IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAN ANTONIO FIRE & POLICE PENSION FUND, on behalf of itself and all others similarly situated,	:	
Plaintiff,	:	
v.	:	**C.A. No. 4446-VCN**
DANIEL M. BRADBURY, JOSEPH C. COOK, Jr., ADRIAN ADAMS, STEVEN R. ALTMAN, TERESA BECK, KARIN EASTHAM, JAMES R. GAVIN, GINGER L. GRAHAM, HOWARD E. GREENE, Jr., JAY S. SKYLER, JOSEPH P. SULLIVAN, JAMES N. WILSON, and AMYLIN PHARMACEUTICALS, INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: July 1, 2010
Date Decided: October 28, 2010

Andre G. Bouchard, Esquire and Joel Friedlander, Esquire of Bouchard, Margules & Friedlander, P.A., Wilmington, Delaware; Mark Lebovitch, Esquire, Samuel J. Lieberman, Esquire, and Amy Miller, Esquire of Bernstein Litowitz Berger & Grossman LLP, New York, New York; and Frank Burney, Esquire of Martin & Drought, P.C., San Antonio, Texas, Attorneys for Plaintiff.

Raymond J. DiCamillo, Esquire and Margot F. Alicks, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, and Robert A. Sacks, Esquire, Diane L. McGimsey, Esquire, Orly Z. Elson, Esquire, and Damion D.D. Robinson, Esquire of Sullivan & Cromwell LLP, Los Angeles, California, Attorneys for Defendants Amylin Pharmaceuticals, Inc., Daniel M. Bradbury, Joseph C. Cook, Jr., Adrian Adams, Steven R. Altman, Teresa Beck, Karin Eastham, James R. Gavin, Ginger L. Graham, Howard E. Green, Jr., Jay S. Skyler, Joseph P. Sullivan, and James N. Wilson.

NOBLE, Vice Chancellor

I. INTRODUCTION

This memorandum opinion addresses Plaintiff San Antonio Fire & Police Pension Fund's (the "Pension Fund") application for an award of attorneys' fees and expenses (the "Application"). The Pension Fund seeks $5.6 million in fees and $262,750.87 in expenses to compensate its attorneys for their role in disabling continuing director provisions in two separate debt instruments of Defendant Amylin Pharmaceuticals, Inc. ("Amylin" or the "Company").

The Pension Fund asserts that its efforts in rendering the continuing director provisions ineffective empowered and enabled Amylin's shareholders to elect freely new directors, a major improvement in the Company's corporate governance. Additionally, the Pension Fund argues that because of its efforts, the specter of immediate repayment of more than $900 million of corporate debt no longer influences Amylin's stockholders when casting votes for directors. In response, the Defendants contend that the Pension Fund's lawsuit created no substantial corporate benefit, and instead, imposed significant costs on Amylin. As a result, the Defendants assert that the Court should award nothing on the Application or, at most, attorneys' fees of $250,000 plus expenses of $125,000.

For the reasons set forth below, the Court finds that the Plaintiff is entitled to an award of attorneys' fees and expenses. The Court, however, grants the Application but only in the amount of $2,900,000, inclusive of expenses.

II. BACKGROUND

A. *The Parties*

The Pension Fund has been at all relevant times a beneficial owner of Amylin common stock. It brought this action on behalf of itself and all other similarly situated stockholders of Amylin through its counsel, Bouchard Margules & Friedlander, P.A., Bernstein Litowitz Berger & Grossman LLP, and Martin & Drought, P.C. (collectively, the "Plaintiff's Counsel").

Amylin is a publicly traded Delaware corporation engaged in the discovery, development, and commercialization of medicines with its principal place of business in San Diego, California. The individual defendants were all members of Amylin's board of directors (collectively, the "Incumbent Board") when the Pension Fund filed this action.

The remaining defendants are Bank of America, N.A. ("BANA") and The Bank of New York Mellon Trust Company, N.A. ("BNYM"), formerly The Bank of New York Trust Company, N.A. BANA is the administrative agent for Amylin's senior secured credit agreement, dated December 21, 2007 (the "Credit Agreement"). BNYM is the trustee under the trust indenture, dated June 8, 2007 (the "Indenture"), for Amylin's 3.00% convertible senior notes due 2014 (the "2007 Notes").

B. *Factual Background and Procedural History*

The factual background of this lawsuit is described in detail in this Court's earlier post-trial memorandum opinion.[1] Accordingly, only facts relevant to the Application are recited below. These facts are taken from the Court's post-trial memorandum opinion, unless cited otherwise.

The Credit Agreement, executed by Amylin and BANA on December 21, 2007, provides for a $125 million term credit facility with an additional $15 million revolving credit facility. The Finance Committee of Amylin's board of directors authorized the Company's officers to enter into the Credit Agreement on terms and conditions deemed to be proper and necessary by those authorized officers.

The face value of the 2007 Notes, publicly issued by Amylin in June 2007, is $575 million.[2] Amylin's board delegated authority to the Finance Committee to serve as the Pricing Committee for the 2007 Notes, charging it with negotiating and issuing the 2007 Notes. Additionally, the board authorized some of Amylin's senior management to negotiate the terms and conditions of the 2007 Notes.

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[1] *San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc.*, 983 A.2d 304 (Del. Ch. 2009), *aff'd en banc*, 981 A.2d 1173 (Del. 2009) (TABLE).

[2] *See* Joint Decl. of Joel Friedlander, Esq. and Mark Lebovitch, Esq. in Supp. of Pl.'s Application for an Award of Attorneys' Fees and Expenses ("Joint Decl."), Ex. D (Amylin Form 10-K) at 39.

This action resulted from parallel continuing director provisions contained in both the Credit Agreement and the Indenture.[3]

Under the Credit Agreement, a change of control constitutes an event of default.[4] Such a default would result in the immediate acceleration of outstanding debt due under the Agreement, absent a waiver by BANA.[5] The Credit Agreement defines a "change of control" to include:

> an event or series of events by which . . . (b) during any period of 24 consecutive months, a majority of the members of the board of directors . . . of the Company cease to be composed of individuals (i) who were members of that board . . . on the first day of such period, (ii) whose election or nomination to that board . . . was approved by individuals referred to in clause (i) above constituting at the time of such election or nomination at least a majority of that board . . . or (iii) whose election or nomination to that board . . . was approved by individuals referred to in clauses (i) and (ii) above constituting at the time of such election or nomination at least a majority of that board . . . (excluding, in the case of both clause (ii) and clause (iii), any individual whose initial nomination for, or assumption of office as, a member of that board . . . occurs as a result of an actual or threatened solicitation of proxies or consents for the election or removal of one or more directors by any person or group other than a solicitation for the election of one or more directors by or on behalf of the board of directors).[6]

While Amylin and BANA negotiated over the definition of "change of control," BANA's model clause ultimately remained in the executed Credit Agreement.

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[3] Provisions of this nature are sometimes referred to as "proxy puts" or "poison puts."
[4] Fourth Verified Am. Compl., Ex. B (Credit Agreement) § 8.01(k).
[5] *Id.* § 8.02(b).
[6] *Id.* § 1.01.

The Indenture provides that "[i]f a Fundamental Change occurs at any time, then each [registered note holder] shall have the right . . . to require the Company to repurchase all of such [registered note holder's] Notes or any portion thereof . . . for cash . . . at a repurchase price equal to 100% of the principal amount thereof, together with accrued and unpaid interest . . . ."[7] The Indenture further provides that a "Fundamental Change will be deemed to have occurred if . . . at any time the Continuing Directors do not constitute a majority of the Company's Board of Directors."[8] Under the Indenture, "Continuing Directors" include:

> (i) individuals who on the Issue Date constituted the Board of Directors and (ii) any new directors whose election to the Board of Directors or whose nomination for election by the stockholders of the Company was approved by at least a majority of the directors then still in office (or a duly constituted committee thereof) either who were directors on the Issue Date or whose election or nomination for election was previously so approved.[9]

The continuing director provision appearing in the Indenture had remained unchanged from the initial draft of the Indenture circulated by counsel for lead underwriters Goldman Sachs and Morgan Stanley. The Pricing Committee, in discussions with its external advisors, inquired as to whether the 2007 Notes contained any unusual or non-customary terms before authorizing the issuance and sale of the 2007 Notes. The continuing director provision in the Indenture was

[7] Fourth Verified Am. Compl., Ex. A (Indenture) § 11.01(a).
[8] *Id.* § 1.01.
[9] *Id.*

neither discussed by nor brought to the attention of the Pricing Committee or Amylin's board.

Although the continuing director provisions in the Credit Agreement and the Indenture are phrased differently, both impact Amylin's stockholders the same. They deter the stockholders from nominating and electing directors of their choosing to Amylin's board. The only material, functional difference is that the board can approve a nominee under the Indenture to avoid triggering that continuing director provision. The Credit Agreement lacks any comparable approval mechanism.

Amylin received notice in the beginning of 2009 that two of the Company's stockholders—Eastbourne Capital Management, L.L.C. ("Eastbourne") and Icahn Partners LP and affiliates ("Icahn")—intended to nominate candidates for election to Amylin's board of directors. Both Eastbourne and Icahn initially intended to nominate separate five-person slates—collectively, sufficient to replace a majority of the twelve-member Incumbent Board. As disclosed in Amylin's annual report filed on February 27, 2009, a proxy contest resulting in the election of a majority of new directors to Amylin's board would trigger the continuing director provisions of both the Credit Agreement and the Indenture. As a result, the Company could have faced financial catastrophe.

Amylin's default under the Credit Agreement, unless waived by BANA, would have caused $125 million to become immediately due, in addition to any outstanding balance on the $15 million revolving credit facility. Additionally, holders of the 2007 Notes could have demanded that Amylin repay the $575 million face value balance of those notes, plus interest. Because of a cross-default provision in Amylin's 2004 Notes,[10] repayment of the foregoing debts would almost certainly have forced Amylin to repay the $200 million debt owed by the Company under the 2004 Notes.[11] Thus, the Company was at risk of immediate repayment of up to $915 million. With only $817 million in cash, cash equivalents, and short term investments as of December 31, 2008, Amylin would likely have been insolvent had it triggered the continuing director provisions in the Credit Agreement and the Indenture and if it had cross-defaulted on the 2004 Notes.

To avoid these adverse consequences, Eastbourne urged the Incumbent Board to approve the dissident slates to avoid triggering the continuing director

[10] The 2004 Notes are 2.50% convertible senior notes due 2011. A separate trust indenture, dated April 6, 2004, between Amylin and J.P. Morgan Trust Company, acting as trustee, governs the terms of the 2004 Notes. *See* Credit Agreement § 1.01 (defining the terms "senior 2004 notes" and "senior 2004 notes documents" for purposes of the Indenture).

[11] Before trial in May 2009, both the 2007 Notes and the 2004 Notes traded at a significant discount—the 2007 Notes traded at approximately 55 cents on the dollar and the 2004 Notes traded at approximately 83 cents on the dollar. *See* Joint Decl., Ex. A (Joint Pretrial Stip.) ¶¶ 44-45. Accordingly, had Amylin triggered the covenant in the Indenture or cross-defaulted on the 2004 Notes, the Company faced a high probability of having to immediately repurchase both the 2007 Notes and the 2004 Notes for face value.

provision of the Indenture and to seek a waiver from BANA for any event of default resulting from a change in control under the Credit Agreement.

On March 17, 2009, the Incumbent Board designated May 27, 2009 for Amylin's annual shareholder meeting (the "2009 Meeting"). On March 24, 2009, the Pension Fund filed its Verified Complaint against Amylin and the Incumbent Board, alleging various breaches of fiduciary duty and seeking declaratory and injunctive relief. It later filed its Verified Amended Complaint, further alleging that Amylin's directors had violated 8 *Del. C.* § 141(a) by adopting the continuing director provision in the Credit Agreement.[12] The Court ordered expedited proceedings.

Amylin filed its preliminary proxy statement on March 30, 2009 (the "Preliminary Proxy Statement"), declaring that "[t]he Company believes that its current Board of Directors has the ability to approve any nominees proposed for election by Icahn or Eastbourne . . . and avoid the occurrence of a 'fundamental change' under the [I]ndenture . . . ."[13] Amylin further advised its stockholders that, in contrast to its powers under the Indenture, the Incumbent Board "cannot avoid the occurrence of a 'change of control' under the [C]redit [A]greement in the event

[12] *See* Verified Am. Compl. ¶¶ 74-76.

[13] Letter of Joel Friedlander, Esq., dated Mar. 30, 2009, Ex. B (Preliminary Proxy Statement) at 18. Amylin sought confirmation from BNYM of the Company's interpretation of the approval powers authorized by the Indenture. Counsel for BNYM declined to confirm the interpretation set forth in Amylin's Preliminary Proxy Statement.

six or more of [the stockholder-nominees] are elected," even with board approval.[14]

The Pension Fund filed a set of amended complaints on April 3, 2009 and April 6, 2009. In its Second Verified Amended Complaint, the Pension Fund named BANA as defendant[15] and sought "an order declaring that the Proxy Put in the Credit Agreement is invalid and unenforceable under Delaware law and severable from the remainder of the Credit Agreement."[16] In its Third Verified Amended Complaint, the Pension Fund named BNYM as defendant[17] and added a new count seeking "an order declaring that the Board of Directors of Amylin possesses the sole right and power under the terms of the 2007 Indenture to approve any nominees proposed by Icahn or Eastbourne in order to nullify the Proxy Put."[18] Amylin and the Incumbent Board members subsequently filed their answer and cross-claimed against BNYM. The cross-claim sought a declaration that the Incumbent Board, under the rights reserved to it by the Indenture, could approve any or all of the stockholder-nominees up to the time of the 2009 Meeting.

On April 13, 2009, Amylin and the Pension Fund entered into a partial settlement. As part of the settlement, the Pension Fund agreed not to seek money

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[14] *Id.*
[15] Second Verified Am. Compl. ¶ 22.
[16] *Id.* ¶ 80.
[17] Third Verified Am. Compl. ¶ 23.
[18] *Id.* ¶ 91.

damages against Amylin and agreed to dismiss its claim alleging that the Incumbent Board had breached its fiduciary duties by not approving the stockholder-nominees. The Pension Fund also agreed not to seek injunctive relief related to the dismissed claim. In return, Amylin agreed to approve the Eastbourne and Icahn nominees for purposes of the continuing director provision in the Indenture, conditioned on "the entry of a final, non-appealable order prior to May 27, 2009 declaring that the Board possesses the contractual right to do so . . . ."[19]

The Pension Fund then filed its Fourth Verified Amended Complaint reflecting the terms of the partial settlement entered into with Amylin. It continued to allege that the Incumbent Board members had violated their fiduciary duty of care by agreeing to the continuing director provisions in the Credit Agreement and the Indenture,[20] that the continuing director provision in the Credit Agreement was invalid and unenforceable under Delaware law,[21] and that either the Incumbent Board had the power under the Indenture to approve the proposed stockholder-nominees in order to nullify the continuing director provision or that the provision was altogether invalid and unenforceable under Delaware law.[22] Thus, the validity

[19] Aff. of Raymond J. DiCamillo, Esq. ("DiCamillo Aff."), Ex. 14 (Amylin Form 8-K) at 2.
[20] Fourth Verified Am. Compl. ¶ 66.
[21] *Id.* ¶ 75.
[22] *Id.* ¶¶ 80-81.

of the continuing director provisions in both the Credit Agreement and the Indenture remained at issue before trial.

On May 1, 2009, Amylin informed the Court that it had executed an amendment to the Credit Agreement with BANA providing for a limited waiver (the "Limited Waiver").[23] BANA later advised the Court—which had held all claims related to the Credit Agreement in abeyance for purposes of trial[24]—that the requisite number of lenders had consented to the Limited Waiver.[25] As a result, the Court deemed Count II of the Fourth Verified Amended Complaint—seeking a declaration that the continuing director provision of the Credit Agreement was invalid and unenforceable—moot.[26] Under the Limited Waiver, if the director elections of the 2009 Meeting resulted in an event of default because of the continuing director provision in the Credit Agreement, that default would be waived by the lenders.[27] In return, Amylin agreed to pay a specified fee based on the outstanding balance of the credit facility in the event the Credit Agreement's continuing director provision was triggered by the director elections of the 2009 Meeting.[28]

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[23] Aff. of Joel Friedlander, Esq., Ex. N (Letter of Margot F. Alicks, Esq.).
[24] *San Antonio Fire & Police Pension Fund*, 983 A.2d at 312.
[25] Letter of Richard H. Morse, Esq., dated May 7, 2009.
[26] *San Antonio Fire & Police Pension Fund*, 983 A.2d at 312 n.14.
[27] Aff. of Robert A. Sacks, Esq. ("Sacks Aff."), Ex. 4 (Second Amendment, Consent and Waiver) § 1.01(a).
[28] *Id.* § 1.07.

Trial was held on May 4, 2009, and, on May 12, 2009, the Court issued its post-trial memorandum opinion on the remaining counts of the Plaintiff's Fourth Verified Amended Complaint—Count I alleging that the Incumbent Board breached its fiduciary duty of care and Count III seeking declaratory relief as to the continuing director provision in the Indenture. In that brief interim, Eastbourne and Icahn had filed their definitive proxy statements. Eastbourne reduced its number of nominees to three and Icahn reduced its number of nominees to two. Accordingly, at most five stockholder-nominees could have been elected to Amylin's twelve-person board at the 2009 Meeting. There was no longer any risk of triggering the continuing director provisions as a result of the 2009 director election. There remained, however, the risk of triggering the provisions in future director elections.

In its post-trial memorandum opinion, the Court rejected the Plaintiff's fiduciary duty of care claim against the Incumbent Board, entering judgment for the Defendants on Count I. As to Count III, the Court granted in part the Plaintiff's request for declaratory relief along with Amylin's related cross-claim against BNYM. In doing so, the Court determined that, in the abstract, "the board may approve a slate of nominees for the purposes of the Indenture . . . without endorsing them, and may simultaneously recommend and endorse its own slate

instead."[29] Otherwise, the Court stated, "[a] provision in an indenture with such an eviscerating effect on the stockholder franchise would raise grave concerns."[30] In applying that analysis to the facts presented, the Court determined that "the board may approve the stockholder nominees if the board determines in good faith that the election of one or more of the [stockholder] nominees would not be materially adverse to the interests of the corporation or its stockholders."[31] Because the record was not sufficiently developed on that issue, and in light of the reduced size of the stockholder slates, the remainder of Count III and Amylin's related cross-claim were deemed unripe for adjudication and dismissed without prejudice.

The Pension Fund filed a notice of appeal on May 13, 2009.[32] Thereafter, the parties exchanged correspondence regarding whether this Court's decision required Amylin's board of directors to approve the stockholder-nominees, as contemplated by the partial settlement, for purposes of the Indenture.[33] Reaching an impasse and with the 2009 Meeting concluded, the Pension Fund pursued its appeal to the Supreme Court. At the 2009 Meeting, Amylin stockholders elected two of the five combined Eastbourne and Icahn nominees.[34]

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[29] *San Antonio Fire & Police Pension Fund*, 983 A.2d at 314.
[30] *Id.* at 315.
[31] *Id.* at 316.
[32] DiCamillo Aff., Ex. 25 (Pl.'s Notice of Appeal).
[33] *See* Sacks Aff., Ex. 6 (Letter of Mark Lebovitch, Esq.); *id.* Ex. 7 (Letter of Robert A. Sacks, Esq.); *id.* Ex. 8 (Letter of Mark Lebovitch, Esq.).
[34] *See id.* Ex. 9 (Letter of Robert A. Sacks, Esq.).

In advance of *en banc* oral argument before the Supreme Court, Amylin, BANA, and the requisite number of lenders executed a Required Lender Consent (the "Consent"), the effect of which was to waive any event of default arising from the continuing director provision in the Credit Agreement for the duration of that agreement at no cost to the Company.[35] As a result, the Pension Fund's appeal as to Count II was mooted since the Consent permanently disabled the continuing director provision in the Credit Agreement.[36] The Plaintiff maintained its appeal as to Counts I and III—specifically, the Pension Fund sought declaratory relief as to the continuing director provision of the Indenture. The Supreme Court, on October 5, 2009, affirmed this Court's decision as to Counts I and III, Count II having been mooted by the Consent.[37]

Post-appeal, the parties continued to correspond regarding the board's ability, and potential obligation under the partial settlement, to approve the two elected stockholder-nominees.[38] The board ultimately approved those two directors at a November 17, 2009 meeting.[39] Accordingly, all directors then seated on Amylin's board were considered "continuing directors" under the terms of the Indenture.

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[35] *See* Joint Decl., Ex. Y (Letter of Joel Friedlander, Esq.).
[36] *See id.*
[37] *San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc.*, 981 A.2d 1173 (Del. 2009) (en banc) (TABLE).
[38] *See* Joint Decl., Ex. AA (Letter of Joel Friedlander, Esq.); *id.* Ex. BB (Electronic message of Joel Friedlander, Esq.); Sacks Aff., Ex. 9 (Letter of Robert A. Sacks, Esq.).
[39] Joint Decl., Ex. CC (Press Release, dated Jan. 20, 2010).

C. *The Parties' Contentions*

In support of the Application, the Pension Fund contends that it achieved this litigation's primary objective of disabling the continuing director provisions in the Credit Agreement and the Indenture. It argues that, as a result, it vindicated the rights of the stockholder franchise, and no longer can Amylin's board invoke the possibility of debt acceleration as a shield against stockholder-nominees. By pursuing alternative theories, the Pension Fund contends, it produced a substantial corporate benefit through its vigorous litigation efforts for which its attorneys deserve compensation. The continuing director provisions "no longer stand as an impediment to the replacement of a majority of Amylin's directors."[40] Thus, the Pension Fund requests an award for attorneys' fees of $5.6 million and expenses of $262,750.87.

In response, Amylin contends that the Pension Fund's lawsuit "was an outright disservice to Amylin's stockholders."[41] Instead of creating any substantial corporate benefit, the Company argues, the Pension Fund merely imposed substantial litigation costs on the Company. Amylin asserts that the record demonstrates that any victory on behalf of Amylin and its stockholders belongs to

[40] Pl.'s Corrected Application for an Award of Attorneys' Fees and Expenses ("Pl.'s Application") at 5.
[41] Def.'s Opp'n to Pl.'s Application for an Award of Attorneys' Fees and Expenses ("Def.'s Opp'n") at 1.

the Company alone. The Pension Fund deserves no credit, according to Amylin, and as a result, the Company urges the Court to deny the Application entirely. In the alternative, Amylin requests that any award be limited to no more than $250,000 in attorneys' fees and $125,000 in expenses.

III. DISCUSSION

A. *Is an Award of Attorneys' Fees and Expenses Appropriate?*

The American Rule provides that litigants generally bear the burden of paying their own attorneys' fees and expenses.[42] Nevertheless, Delaware courts recognize certain well-established exceptions to the American Rule.[43] Among them is the corporate benefit doctrine by which "the Court may order the payment of counsel fees and related expenses to a plaintiff whose efforts result in . . . the conferring of a corporate benefit."[44] Such results need not be pecuniary, so long as the litigation produces a substantial benefit to the corporation or its stockholders.[45]

Where a defendant corporation or board settles or moots some or all of the plaintiff's claims, attorneys' fees may still be awarded;[46] an award may be granted

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[42] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043-44 (Del. 1996).
[43] *See, e.g.*, *id.* at 1044; *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990).
[44] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).
[45] *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006); *see also Dunkin' Donuts*, 1990 WL 189120, at *4 ("In a corporate benefit case, there is no creation of a fund, yet a . . . 'therapeutic' benefit, worthy of compensation, has been conferred.").
[46] *Off v. Ross*, 2009 WL 4725978, at *4 (Del. Ch. Dec. 10, 2009).

if (1) the suit was meritorious when filed, (2) the action producing the corporate benefit was taken by the defendant corporation prior to a judicial resolution, and (3) the resulting corporate benefit was causally related to the lawsuit.[47] Under such circumstances, the defendant corporation bears the burden of demonstrating that no causal link exists between the benefit produced and the filing of the lawsuit.[48] Awarding fees is a matter for the Court's sound discretion.[49]

1. Corporate Benefits to Amylin's Stockholders

Under the corporate benefit doctrine, only "a litigant who confers significant and substantial benefit to a class . . . is entitled to an allowance of fees and expenses."[50] Accordingly, the Court must first determine whether a significant and substantial benefit resulted from the Pension Fund's efforts. A corporate benefit "need not be measurable in economic terms," and as a result, "[c]hanges in corporate policy or . . . a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees."[51]

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[47] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (citing *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980)).
[48] *Id.* at 1080.
[49] *Dunkin' Donuts*, 1990 WL 189120, at *3.
[50] *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *6 (Del. Ch. Aug. 30, 2007).
[51] *Tandycrafts, Inc.*, 562 A.2d at 1165 (citing *Chrysler Corp.*, 223 A.2d at 386; *Allied Artists*, 413 A.2d at 878).

Amylin contends that the Pension Fund conferred no benefit on the Company or its stockholders. Instead, Amylin argues, the Pension Fund harmed the Company's stockholders by imposing substantial litigation costs. In the alternative, Amylin asserts that the Pension Fund, at most, conferred only a modest benefit that resulted primarily from Amylin's own efforts.

Stockholders exercise their authority over corporate affairs by way of ballots. Accordingly, the right to vote on certain matters—most importantly the election of directors—is a fundamental power reserved to the stockholders.[52] When incumbent directors fail to satisfy stockholder expectations, director elections empower the stockholders to remove and replace those incumbent directors. The allocation of power between the stockholders and the board of directors "depend[s] upon the stockholders' unimpeded right to vote effectively in an election of directors."[53] To hold otherwise would threaten the effectiveness of the stockholder franchise and the legitimacy of director power.[54]

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[52] *See MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126-27 (Del. 2003) ("The stockholders' power is the right to vote on specific matters, in particular, in an election of directors."); *In re MONY Group, Inc. S'holder Litig.*, 853 A.2d 661, 673 (Del. Ch. 2004) (noting that because "[t]he shareholder franchise occupies a special place in Delaware corporation law," Delaware courts are particularly concerned with "misconduct that has the effect of impeding or interfering with the effectiveness of a stockholder vote," particularly with director elections).

[53] *MM Companies, Inc.*, 813 A.2d at 1127.

[54] *See id.* at 1126 ("[T]he stockholder franchise has been characterized as the 'ideological underpinning' upon which the legitimacy of the directors managerial power rests.") (citing *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988)); *see also State of Wisconsin Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *7 (Del. Ch. Dec. 4, 2000) ("The right to vote one's shares is a fundamental aspect of stock ownership governed and protected by 8 *Del. C.* § 151(a).").

Because of the fundamental importance to the shareholder franchise of having a choice of candidates for election to the board, significant and substantial benefits unquestionably accrued to Amylin's stockholders from this litigation. Regardless of the outcome of Amylin's director elections—either the 2009 election or future elections—influences on the voting calculus of Amylin's stockholders resulting from the continuing director provisions of the Credit Agreement and the Indenture have been removed or, at least, limited.

First, the Limited Waiver of the Credit Agreement's continuing director provision—executed before the 2009 Meeting—guaranteed that Amylin stockholders could freely elect directors at the 2009 Meeting without triggering an event of default under that agreement.

Second, the subsequent complete waiver of the Credit Agreement's continuing director provision produced by the Consent ensures the same for all future director elections for the duration of the Credit Agreement.

Third, the contractual interpretation supplied by this Court as to the terms of the Indenture provides certainty for future proxy contests. That interpretation teaches that Amylin's board of directors may, in accordance with its fiduciary duties, approve stockholder-nominees for purposes of the continuing director

provision of the Indenture without simultaneously endorsing those nominees for election.[55]

Finally, the approval of the two elected stockholder-nominees by the Incumbent Board makes them "continuing directors" for purposes of the Indenture. Thus, Amylin stockholders can now elect up to five new directors without triggering the continuing director provision in the Indenture. As a result, if the two elected stockholder-nominees are included in determining a new majority of Amylin's twelve-person board, Amylin stockholders are now able to replace a majority of the Incumbent Board without invoking the Indenture's continuing director provision.

Based on the foregoing, potential burdens on the stockholder franchise imposed by provisions in Amylin's debt instruments have been removed or limited. Thus, specific and substantial benefits accrued to the Company's stockholders.

2. Pension Fund's Lawsuit Meritorious when Filed

The applicable standard for determining whether a lawsuit is meritorious when filed is whether "it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out

[55] *San Antonio Fire & Police Pension Fund*, 983 A.2d at 316 & n.37.

some reasonable likelihood of ultimate success."[56] This standard, however, does not require that "there be absolute assurance of ultimate success, but only that there be some reasonable hope."[57] Whether a lawsuit is meritorious "is properly determined as of the commencement of the lawsuit and not by developments thereafter . . . ."[58]

Amylin offers a number of arguments supporting its conclusion that the Pension Fund "had no reasonable likelihood of success when it filed suit."[59] Among them, Amylin contends that all of the Pension Fund's claims—based on the Incumbent Board's fiduciary duties and conduct in entering into third party contracts—were derivative in nature. Accordingly, Amylin argues that Court of Chancery Rule 23.1[60] controls and required the Pension Fund to make demand on the Incumbent Board or, alternatively, to plead demand futility. Having done neither, the Company asserts that the Pension Fund lacked standing to pursue these claims and, therefore, that this lawsuit was not meritorious when filed.[61]

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[56] *Chrysler Corp.*, 223 A.2d at 387.
[57] *Id.*
[58] *Allied Artists*, 413 A.2d at 879.
[59] Def.'s Opp'n at 23.
[60] Court of Chancery Rule 23.1 allows a stockholder to maintain a derivative suit only where a demand has been made on the board to institute such an action and that demand is refused, or where the stockholder adequately pleads demand futility. *Stepak v. Dean*, 434 A.2d 388, 390 (Del. Ch. 1981). If the stockholder fails to satisfy these requirements in a derivative action, the stockholder's complaint is subject to dismissal. *See id.* at 391 (dismissing plaintiff's complaint in toto for failure to satisfy Rule 23.1 requirements).
[61] The Court notes that the Pension Fund doubts Amylin's entitlement to raise standing and demand futility at this juncture. *See* Pl.'s Reply Br. in Supp. of Application for an Award of Attorneys' Fees and Expenses ("Pl.'s Reply") at 19. As part of the April 13, 2009, partial

Amylin correctly directs the Court to the potential for abuse when a plaintiff bringing a derivative suit cannot satisfy the burdens of Court of Chancery Rule 23.1, yet later applies for an award of attorneys' fees under the corporate benefit doctrine. It would be improper to award fees to a plaintiff circumventing Rule 23.1, even if a substantial and significant benefit followed its efforts. For that reason, the Court "has broad discretion to deny fees to an individual plaintiff whose suit would not have been meritorious had demand on the corporation been practical or effective."[62]

Although the Pension Fund did not make a demand on the Incumbent Board and although it did not plead demand futility, this question turns on the nature of the injuries alleged in the Pension Fund's complaint. If those allegations demonstrate a colorable, direct, individual stockholder claim, Court of Chancery Rule 23.1 would not be controlling. An individual stockholder suit is distinguished from a derivative suit based on the type of injury alleged, the party suffering that alleged injury, and the party receiving recovery or relief.[63] In making such a

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settlement, Amylin agreed not to raise standing arguments of this sort so long as the Pension Fund did not seek damages against Amylin or the Incumbent Board. The Court, however, need not decide this dispute since the Court, as set forth below, is not persuaded by Amylin's Rule 23.1 argument.

[62] *Tandycrafts, Inc.*, 562 A.2d at 1167.

[63] *See, e.g.*, Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.02[a] at 9-6 (2010). ("[W]here the complaint describes a distinct injury inflicted directly on rights of individual stockholders traditionally regarded as a personal incident of their stock ownership, the action is individual (or class) in nature, and any ensuing recovery or other relief runs directly to the stockholders.").

determination, the Court asks "[w]ho suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?"[64] Within the confusion surrounding efforts to distinguish between direct and derivative claims, the Supreme Court identified, in *Tooley*, the proposition "that an action cannot be direct if all stockholders are equally affected or unless the stockholder's injury is separate and distinct from that suffered by other stockholders."[65] Indeed, to clarify the distinction between direct and derivative claims, the Supreme Court stated that "[t]he proper analysis has been and should remain that . . . a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation."[66]

The Pension Fund alleged that the continuing director provisions in the Credit Agreement and the Indenture marginalized the stockholder franchise—Amylin's stockholders allegedly could not freely elect directors because of the burdens imposed by these provisions.[67] Thus, the alleged harm, while impacting all stockholders equally, was to Amylin's stockholders directly. Additionally, by requesting declaratory relief as to the validity and legality of the continuing

[64] *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004).
[65] *Id.* at 1038-39.
[66] *Id.* at 1039.
[67] *See* Fourth Verified Am. Compl. ¶¶ 1, 67, 74.

director provisions, the Pension Fund sought to remove constraints hindering the effectiveness of the stockholder vote. Thus, the requested relief, if granted, would directly benefit Amylin's stockholders by freeing the stockholder vote of any such constraints.

Although the Pension Fund's allegations could have given rise to a derivative action—specifically, an action based on the Incumbent Board's fiduciary duties—nevertheless, the foregoing allegations made by the Pension Fund describe the alleged burdens placed on the stockholder vote by the continuing director provisions.[68] Additionally, because "the Supreme Court noted that the Court is 'more prepared to permit the plaintiff to characterize the action as direct when the plaintiff is seeking only injunctive or prospective relief'" under the *Tooley* analysis,[69] it is worth noting that here the Pension Fund sought only declaratory relief.[70] Accordingly, the Pension Fund's allegations may also support a plausible, direct stockholder action.[71] As a result, the Court need not further

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[68] The same facts may support both direct and derivative claims. *See Gentile v. Rossette*, 906 A.2d 91, 99-100 (Del. 2006).

[69] *See Grayson v. Imagination Station, Inc.*, 2010 WL 3221951, at *6 (Del. Ch. Aug. 16, 2010) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996), *overruled on other grounds by*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

[70] The terms of the partial settlement preclude the Pension Fund from seeking money damages. While none of the Pension Fund's complaints explicitly sought monetary relief other than an award of costs, the partial settlement seemingly foreclosed it from doing so.

[71] Because derivative and direct claims sometimes arise from the same facts, the plaintiff is not barred from litigating a direct claim simply because a derivate claim also exists. *See Loral Space & Commc'ns Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 868 (Del. 2009) (holding that where facts give rise to one action including both derivative and direct claims, "[b]oth types of claims may be litigated at the same time" by the plaintiff). As a result, the

consider Court of Chancery Rule 23.1 in determining whether the Pension Fund's lawsuit was meritorious when filed.[72]

Having considered Amylin's other arguments,[73] the Court is satisfied that at the time this action was commenced, the Pension Fund's stockholder action[74] offered a reasonable hope of ultimate success and that this lawsuit was meritorious when filed.[75]

Pension Fund could have likely litigated its alleged direct claim even though the facts here may have generated an overlapping companion derivative claim.

[72] The Court need not determine whether the Pension Fund's claims are only derivative in nature. It suffices that the arguments for the presence of direct claims is more than colorable; they are substantial arguments, even if they might not ultimately prevail.

[73] In addition to its derivate claim argument under Court of Chancery Rule 23.1, Amylin also asserts that the lawsuit was not meritorious when filed because: (1) the Pension Fund's breach of fiduciary duty claim lacked merit; (2) the Pension Fund was not entitled to reformation of contracts between Amylin and third parties, including BANA and BNYM; (3) the Pension Fund lacked standing to challenge the continuing director provisions in the Credit Agreement and the Indenture because it was not a party to or a third-party beneficiary of those agreements; and (4) the Court adopted Amylin's interpretation of the Indenture and, therefore, the Pension Fund cannot claim responsibility for that ruling. Def.'s Opp'n at 23-25. The Pension Fund's duty of care claim may not have been meritorious, but the other claims appear to have had a sufficient basis in law and fact to survive the test.

[74] It should be noted that this standard does not demand that all iterations of the Pension Fund's complaint or claims satisfy the meritorious when filed standard, only that some do. *See In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 362 (Del. Ch. 1999) (holding that meritorious when filed standard satisfied when "at least some of the claims" survived a motion to dismiss).

[75] This action proceeded to trial on an expedited basis. *San Antonio Fire & Police Pension Fund*, 983 A.2d at 310. Implicit in allowing expedition is a determination by the Court that "the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury . . . ." *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994). Although not conclusive, the decision to proceed on an expedited basis tends to support the Court's determination that the Pension Fund's claim was meritorious when filed.

3. Action by Amylin Producing Benefits before a Judicial Resolution

There is no dispute that some of the benefits resulted from action "taken by the defendants before a judicial resolution was achieved."[76] Specifically, Amylin, BANA, and the requisite number of lenders executed the Limited Waiver of the continuing director provision in the Credit Agreement during the course of this litigation.[77] Similarly, the subsequent complete waiver of the continuing director provision of the Credit Agreement was accomplished by Amylin, BANA, and the requisite number of lenders in advance of *en banc* oral argument before the Supreme Court. Because the Supreme Court had yet to make its final determination, those actions—both producing a corporate benefit—occurred before a judicial resolution.

Amylin contends, however, that under Delaware law, the Pension Fund cannot be awarded fees as a result of the board's decision to approve, for purposes of the Indenture, the two elected stockholder-nominees. The Company argues that this mooting action did not occur before a judicial resolution because the board's

[76] *United Vanguard Fund, Inc.*, 693 A.2d at 1079.

[77] Amylin and BANA executed the Limited Waiver on May 1, 2009. The lenders consented to the waiver, as required by the Credit Agreement, on May 6, 2009. Thus, the Limited Waiver produced benefits to Amylin stockholders before this Court issued its post-trial memorandum opinion and the Pension Fund's subsequent appeal.

approval came six weeks after the Supreme Court's decision to affirm this Court's ruling and five months after the 2009 Meeting.[78]

Amylin's argument ignores that a plaintiff's assertions ordinarily remain capable of accomplishing the lawsuit's intended outcome so long as the controversy continues to be "subject to further judicial scrutiny which could . . . change[] the result."[79] For that reason, mooting action undertaken by the defendant corporation or the board during such period of available judicial scrutiny is deemed to occur before a judicial resolution. Although *res judicata* barred the Pension Fund from litigating issues already decided by this Court,[80] the Pension Fund nevertheless retained the ability to litigate further a limited range of issues related to the Indenture when the Incumbent Board approved the elected stockholder-nominees. More importantly, that created a possibility that the Pension Fund could secure additional judicial relief related to the intended purpose of its lawsuit—the disabling of the continuing director provisions.[81]

Had the board continued to delay approval of the elected stockholder-nominees for purposes of the Indenture, the Pension Fund could have sought

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[78] Def.'s Opp'n at 31.
[79] *Allied Artists*, 413 A.2d at 878-79.
[80] *See, e.g.*, *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999) ("*Res judicata* bars a suit involving the same parties based on the same cause of action.").
[81] Fourth Verified Am. Compl. ¶¶ 1, 8.

judicial intervention either to enforce[82] or to construe[83] the terms of the partial settlement entered into by Amylin and the Pension Fund on April 13, 2009. Additionally, because the Court dismissed in part Count III of the Plaintiff's Fourth Verified Amended Complaint without prejudice, the Pension Fund could have repleaded the continuing director approval issue of the Indenture since the 2009 meeting resulted in the election of two stockholder-nominees.[84]

When the board approved the elected stockholder-nominees, Amylin mooted any outstanding claims the Pension Fund retained regarding the partial settlement and the continuing director provision of the Indenture—claims precisely related to the Pension Fund's purpose for filing this action. This mooting resulted in a benefit to Amylin's stockholders and occurred while the issue of approval was still subject to further judicial scrutiny. Accordingly, the approval of the elected stockholder-nominees may be considered as a benefit conferred by the Pension Fund.[85]

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[82] *See In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 599 (Del. Ch. 2007) ("[T]here is no Delaware authority barring the enforcement of a settlement agreement through an action for breach of contract."); *see also Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1285 (Del. Ch. 2004) ("[A] settlement agreement is enforceable as a contract.") (alteration in original) (quoting *Heiman Aber & Goldlust v. Ingram,* 1998 WL 442691, at *2 (Del. Super. May 14, 1998)).

[83] *See Fox v. Paine*, 2009 WL 147813, at *5 (Del. Ch. Jan. 22, 2009) (applying contract interpretation principles in construing a settlement agreement).

[84] *San Antonio Fire & Police Pension Fund*, 983 A.2d at 317-18.

[85] The circumstances surrounding the Amylin board's approval of the two elected stockholder-nominees are unique. If Amylin's Counsel's description is accurate, the significant delay in the approval process was because of the combined impact of Amylin's board waiting for the

4. Causal Connection between the Lawsuit and Corporate Benefits

With the conclusion that certain actions taken by the Company after the filing of the Plaintiff's suit produced substantial benefits for Amylin's stockholders, the burden of persuasion as to causation shifts to Amylin. The Company must "show that no causal connection existed between the initiation of the suit and any later benefit to the shareholders."[86] This rebuttable presumption of causation burdens Amylin because "the defendant . . . is in a position to know the reasons, events and decisions leading up to the defendant's [mooting] action."[87] In order to rebut this presumption, Amylin "ha[s] the burden of demonstrating that the lawsuit did not in any way cause [its] action."[88]

Amylin contends that the Pension Fund cannot claim credit for corporate benefits where it had no involvement or where its lawsuit had no role in achieving the benefit. Specifically, Amylin asserts that only through its own efforts were the Credit Agreement waivers executed with BANA. As evidence, Amylin directs the Court to the Pension Fund's admission that it had no role in negotiating the

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Supreme Court's decision and not having a scheduled board meeting post-appeal until November 17, 2009. *See* Sacks Aff., Ex. 9 (Letter of Robert A. Sacks, Esq.).

[86] *United Vanguard Fund, Inc.*, 693 A.2d at 1080; *see also Tandycrafts, Inc.*, 562 A.2d at 1165 (describing how the burden shifts to the corporation to demonstrate no causal connection between action creating a benefit and the filing of the lawsuit).

[87] *Allied Artists*, 413 A.2d at 880.

[88] *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015 (Del. 2007) (internal quotation omitted) (quoting *Allied Artists*, 413 A.2d at 880).

waivers.[89] Moreover, Amylin argues that the approval of the elected stockholder-nominees was the product of the board's exercise of its fiduciary duties—an action the board had stated it intended to undertake since the inception of this action.[90]

Ultimately, "[t]he presumption of causation is a heavy one and it is to be expected that [the] defendant will not often be able to satisfy it."[91] Throughout this lawsuit, the Pension Fund sought to disable the continuing director provisions of the Credit Agreement and the Indenture. The important issue here is not the Pension Fund's involvement in the mooting actions creating the corporate benefits—these actions were necessarily taken by the defendant corporation only—instead, the Court must consider whether the Pension Fund's lawsuit caused Amylin and its board to undertake mooting actions that subsequently created corporate benefits related to the Pension Fund's purpose in bringing this action.

Clearly, Amylin itself directly negotiated the Credit Agreement waivers, and the Incumbent Board approved the elected stockholder-nominees. Nevertheless, Amylin offers little evidence to demonstrate that it would have negotiated the Credit Agreement waivers and approved of the elected stockholder-nominees in the absence of the Pension Fund's lawsuit. Even if the Court were to infer that these benefits were partly the result of independent activity by Amylin and the

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[89] Def.'s Opp'n at 29 (citing DiCamillo Aff., Ex. 19 (Dep. of Joel Friedlander, Esq.) at 20-21).
[90] *Id.* at 31-32.
[91] *First Interstate*, 756 A.2d at 363 (internal quotation omitted) (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 852 (Del. Ch. 1998)).

Incumbent Board and partly the result of the Pension Fund's lawsuit, that would still be insufficient for the Company to satisfy its burden of demonstrating that the lawsuit in no way caused the benefits.[92] Thus, Amylin failed to rebut the presumption of causation.[93]

B. *What is a Reasonable Award of Attorneys' Fees and Expenses?*

Having concluded that the Pension Fund is entitled to an award of attorneys' fees and expenses, the Court must now determine a fair and reasonable award. The amount of the award is left to the discretion of the Court.[94] The Court is mindful that, in making its determination, the amount of the award should incentivize stockholders (and their attorneys) to file meritorious lawsuits and prosecute such lawsuits efficiently without generating any unnecessary windfall.[95]

The Pension Fund seeks $5.6 million in attorneys' fees and $262,750.87 in expenses based upon a total of 3,338.55 attorney hours dedicated to this matter on a fully contingent basis. The Pension Fund asserts that this fee request is reasonable in light of the results achieved for Amylin's stockholders, which "required a complex, protracted battle involving three different sets of

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[92] *See, e.g.*, *Dunkin' Donuts*, 1990 WL 189120, at *7 (finding that some causal connection exists even where the defendant corporation shows that the corporate benefit is attributable in part to causes other than the plaintiff's lawsuit).

[93] Indeed, the Pension Fund has demonstrated the critical role of Plaintiff's Counsel in achieving all of the benefits associated with the continuing directors provisions.

[94] *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1273 (Del. 2005).

[95] *Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000).

defendants . . . and their combined seven law firms."[96] Moreover, the Pension Fund contends that the benefits achieved here resulted from its pursuit of novel claims on an expedited basis at trial, followed by an appeal to the Supreme Court and additional post-appeal demands.[97]

Amylin counters that the Application's request "far exceeds what courts have determined to be proper in comparable cases, and bears no connection to the realities of this case."[98] Amylin argues that any award to the Plaintiff should be discounted; among the Company's arguments: the Pension Fund (1) should not be rewarded for time spent pursuing failed claims or for its appeal to the Supreme Court, (2) only served a minimal role in securing the benefits, (3) had no written contingent fee agreement with its counsel, (4) did not prevail on any novel or complex claims, and (5) imposed significant costs on Amylin which should be

[96] Pl.'s Application at 5.

[97] There is a lingering question as to whether an evidentiary hearing is necessary to resolve a few factual disputes that arguably would inform the Court's decision on the extent of a fee award. The focus would be on conversations between counsel regarding the need for (or appropriateness of) the appeal to the Delaware Supreme Court. Perhaps as much as one-third of the time devoted by Plaintiff's Counsel to this matter was invested following this Court's decision. The Court concludes that an evidentiary hearing is not necessary. At issue are conversations between counsel under pressure and in difficult and time-sensitive circumstances. It is not so much a matter of what happened as it is of what did the participants understand the other to say or to mean. The written record is of little assistance in determining what was said and, perhaps, with the benefit of retrospection, one would suggest that the communications should have been in writing. That, of course, is not how it happened. A factual hearing that is not likely to be conclusive and that will likely do no more than confirm that there was uncertainty, confusion, and a lack of clarity would not assist the Court in resolving the Application.

[98] Def.'s Opp'n at 33.

reflected in the award amount. Amylin asserts that, at most, the Court should award $375,000, inclusive of expenses.

Where, as here, the benefit achieved is unquantifiable, a *quantum meruit* standard "gives the Court a more equitable means of determining a reasonable fee."[99] Applying such a standard, and considering *Sugarland*[100] and its progeny, the Court "consider[s] the work the attorneys performed to achieve the benefit, and the amount and value of attorney time required for that purpose, taking into account the experience of counsel and the contingent nature of the case."[101] In applying its discretion to determine a fee award, the Court recognizes the central importance of considering the benefits created by the litigation.[102]

Plaintiff's Counsel dedicated 3,338.55 hours to litigating this matter,[103] all of which the Pension Fund asserts produced benefits for Amylin stockholders.[104]

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[99] *Dunkin' Donuts*, 1990 WL 189120, at *8.

[100] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). In accordance with *Sugarland*, the Court considers "the results achieved in the litigation, the contingent nature of the fee arrangement, the amount of time and effort applied, the complexities of the engagement, the quality of the work performed, and the standing and ability of the lawyers involved." *In re Prodigy Commc'ns Corp. S'holders Litig.*, 2002 WL 1767543, at *6 (Del. Ch. July 26, 2002) (citing *Sugarland*, 420 A.2d at 149).

[101] *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *4 (Del. Ch. Sept. 14, 1988).

[102] *See In re Anderson Clayton S'holders' Litig.*, 1988 WL 97480, at *1 (Del. Ch. Sept. 19, 1988) ("Delaware courts have traditionally considered as most important the benefits that the litigation has produced.").

[103] Although not at all material to the Court's determination, it is worth observing that the Pension Fund states in supporting documents to the Application that its counsel dedicated 3,338.55 hours to this action, yet the Application itself states that Plaintiff's Counsel dedicated 3,388.55 hours. *Compare* Joint Decl. ¶ 43, *with* Pl.'s Application at 5, 20.

[104] Based on discovery taken of Plaintiff's Counsel, Amylin estimates a total lodestar of $1,499,373, which represents all hours dedicated by Plaintiff's Counsel to this action—

Amylin argues, however, that some of these hours resulted in no benefit at all. As a result, Amylin contends that any unnecessary hours should not factor into the Court's award. Specifically, the Company asserts that the hours dedicated to the Pension Fund's failed fiduciary duty claims and the appeal—which produced no additional relief for the Plaintiff—should be ignored. The Court concludes that the hours dedicated to the appeal—specifically, hours dedicated after the Consent was executed between the Company and BANA—played a less significant role in producing any benefit.[105] The Court disagrees with Amylin that it should entirely exclude the hours devoted by Plaintiff's Counsel to the fiduciary duty claims. The pursuit of those claims by the Pension Fund contributed, to some extent, to the benefits achieved. Accordingly, the Court will not wholly disregard that effort in determining a reasonable award.

Plaintiff's Counsel litigated this matter on an expedited basis, against defendants represented by sophisticated counsel. Plaintiff's Counsel undertook

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excluding, however, the 140 hours submitted by Martin & Drought, P.C. for which Amylin did not receive time entries or hourly rates. Def.'s Opp'n at 33-34. The Court cites this figure only as a reference point since the Court does not utilize lodestar analysis in determining a reasonable fee award, although it does refer to it as something of a check. In any event, the Pension Fund does not contest Amylin's lodestar analysis—even though the number generated may be on the low end of the range—other than to argue that all of Plaintiff's Counsel's hours are compensable. Pl.'s Reply at 26-27. The Court notes that Plaintiff's Counsel's time records reflect that counsel collectively dedicated 26.3 hours to this matter from the date of the Supreme Court's decision on October 5, 2009. DiCamillo Aff., Ex. 28 (Plaintiff's Counsel's Billing Records).

[105] In addition, although it is not as clear that the appeal to the Supreme Court was essential, Plaintiff's Counsel acted reasonably in pursuing that effort and assuring the ultimate benefit for the stockholders.

this representation on a fully contingent basis,[106] litigating the validity of contractual provisions that, while increasingly common in corporate debt instruments, have received little judicial scrutiny. This was a complex engagement. The quality of the work was excellent. The standing and ability of Plaintiff's Counsel cannot be questioned.

Although the Court cannot calculate the benefit achieved as a precise number, that does not detract from the significance of the non-monetary relief produced by the Pension Fund's efforts. Most importantly, the Credit Agreement and the Indenture no longer frustrate the stockholders' ability to elect a new majority of directors to the Company's board—a fundamental stockholder right without which the legitimacy of board power comes into question. Vindication of the shareholder franchise is a major public policy objective; as a core value in corporate governance, steps undertaken to protect the stockholder franchise may be recognized as having a very real, even if unquantifiable, benefit.

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[106] The Court recognizes the parties' disagreement as to whether the contingent nature of Plaintiff's Counsel's representation is a proper factor to consider here since no written contingent fee agreement existed between the Pension Fund and Plaintiff's Counsel. While such an oral contingent fee agreement is not consistent with Rule 1.5(c) of the Delaware Lawyers' Rules of Professional Conduct, this Court is not vested with authority to discipline members of the bar. Such authority is exclusively vested in the Supreme Court. *See In re Maguire*, 725 A.2d 417, 423 (Del. 1999) ("The inherent and exclusive authority for disciplining members of the Delaware Bar is vested in [the Supreme Court].") (citing *In re Green*, 464 A.2d 881, 885 (Del. 1983)). The lack of a written contingent fee agreement had no impact on the judicial process here and should not preclude the Court from awarding a fee. Moreover, in accordance with public policy, it is proper for the Court to consider the risk undertaken by Plaintiff's Counsel in litigating this matter on a contingent basis. *See First Interstate*, 756 A.2d at 365 (asserting that Delaware public policy warrants rewarding contingent risk undertaken by attorneys in determining a fee award). Accordingly, the Court includes this factor here in ascertaining a reasonable fee award.

Contrary to Amylin's argument that this litigation was a disservice to the Company's stockholders,[107] the record here demonstrates that the benefits produced would not exist but for the Pension Fund's lawsuit. To argue that Amylin or the Incumbent Board would have freed the stockholder franchise of the burdens imposed by the continuing director provisions absent the Pension Fund's action is purely speculative. Indeed, achieving all of the benefits produced required Plaintiff's Counsel to litigate this matter vigorously and completely, a somewhat unusual occurrence in a therapeutic benefit case.

Taking into consideration all of the relevant factors, the Court awards $2,900,000, inclusive of expenses. This award is fair and reasonable in light of all the circumstances and adequately compensates Plaintiff's Counsel for their efforts.

[107] Amylin's angst about paying Plaintiff's Counsel's fees can be understood. The challenged provisions in its debt documents are fairly common. Why it was singled out to bear the burden of litigating about such concerns probably was as much a matter of bad luck as anything else. That, one supposes, is something that happens when a litigant is confronted with a novel issue.

In some ways, Amylin assisted with achieving the result. At times, it joined with the Pension Fund in seeking relief from the impairing provisions. Yet, its course was not steady and usually appeared to carry an element of tentativeness or, perhaps, reluctance. Although Amylin may be entitled to some credit for the outcome here, Plaintiff's Counsel were the primary cause.

IV. CONCLUSION

For the foregoing reasons, the Pension Fund's application for an award of attorneys' fees and expenses is granted in the amount of $2,900,000, inclusive of expenses. Counsel are requested to confer and to submit an implementing form of order.