

ACTIVIST DEFENSE MOVES MAY COME UNDER CLOSER LEGAL SCRUTINY

A ruling from Vice Chancellor Travis Laster helps venBio nix a JV between activist target Immunomedics and Seattle Genetics.

BY DAVID MARCUS

One of the most eventful proxy fights of the 2017 season occurred at Immunomedics Inc., where dissident stockholder venBio Select Advisor LLC won control of the company's board and was able to terminate a development and license agreement Immunomedics (IMMU) had signed with Seattle Genetics Inc. (SGEN). Delaware Vice Chancellor J. Travis Laster enjoined the companies from completing the joint venture in a March 9 bench ruling that came a week after venBio won control of the Immunomedics board.

Because Laster did not issue a written opinion, other judges may place less weight on his ruling than they otherwise might have, but the decision does suggest that Delaware judges will be receptive to arguments that they should closely scrutinize actions that companies take when under pressure from activists.

JV agreements rarely attract judicial scrutiny, since the decision to enter into them is normally governed by the business judgment rule, but the facts in Immunomedics were unusual. Founded in 1982, the company has never successfully brought a drug to market, but breast cancer drug IMMU-132 began to show promising trial results in 2015, and the company began to look for joint venture partners that December. But Immunomedics stock fell by 35% in 2016, and on Nov. 16, venBio, which owns 9.9% of the company, announced it was launching a proxy fight with a slate of four nominees for a five-member board.

Immunomedics postponed its 2017 annual meeting until Feb. 16 and on Jan. 9 brought on four new directors, bringing the board size to seven. On Feb. 9, the board signed the JV agreement with Seattle Genetics, pushed the annual meeting back to March 3, and amended the company bylaws to provide for plurality rather than majority voting and to provide for mandatory advancement of expenses to directors. venBio's dissident slate, led by its portfolio manager Behzad Aghazadeh, won control of the board in the March 3 election.

In the JV, Seattle Genetics agreed to pay Immunomedics \$250 million, money it needed to fund further testing of IMMU-132, and as much as \$1.7 billion contingent upon the achievement of various milestones. Seattle Genetics also bought 3,000,000 shares of Immunomedics common stock, a 2.8% stake, for \$4.90 a share and as part of the deal stood to be issued a three-year warrant to purchase 8,655,804 shares of common stock at the same price. The JV also included a six-day go-shop right.

Laster declined to evaluate the JV agreement in his bench ruling, instead focussing on the circumstances in which Immunomedics agreed to it. The judge reviewed the JV agreement in February, he said on March 9, and believed that the companies wouldn't close the JV while the proxy fight was pending because of a condition in the JV providing that absence of litigation was a condition to closing. But Immunomedics waived the closing condition on Feb. 20, "apparently for no consideration," Laster wrote.

The judge held that venBio had made "a colorable claim" that the terms of the licensing deal should be subject to intermediate scrutiny "because the board entered into the transaction during an active proxy contest with defeat looming, with the goal of taking an issue away from the insurgents by locking down the asset the insurgents were running to control and taking away one of their election planks" Laster said in his bench ruling. He also focussed on Greenhill & Co., the bank Immunomedics hired in September 2016 to consider a licensing transaction and other strategic alternatives. In December, the board expanded the bank's role to include defending against venBio for a contingent fee of \$1.5 million. The judge said he was inclined to "discount" Greenhill's view of the Seattle Genetics deal "because of their dual role and their multimillion-dollar incentives to favor a transaction as part of their two engagements for the company." Laster scheduled a June trial in the matter, though the tone of his ruling suggested he was skeptical of Immunomedics.

The judge's view of the case may have helped push the parties to reach a settlement, which they announced on May 5. The companies terminated their agreement, though Seattle Genetics held on to the 3 million Immunomedics shares it bought when it signed the deal as well the warrants for the purchase of 8.7 million shares at \$4.90, though the expiration date on them was moved up to Dec. 31, 2017. Immunomedics also announced a \$125 million private placement of preferred stock convertible into common at \$5.41 a share, the common's May 4 closing price. Cynthia Sullivan stepped down as CEO, and the board is now chaired by venBio's Behzad Aghazadeh. Immunomedics stock was trading at \$8.84 a share

on June 30.

Eleazer Klein, Michael Swartz and Kristie Blase of Schulte Roth & Zabel LLP in New York and David Teklits, Kevin Coen and Alexandra Cummings of Morris, Nichols, Arsht & Tunnell LLP advised venBio. John Reed, Ethan Townsend, Harrison Carpenter and Derrick Farrell of DLA Piper LLP (US) in Wilmington represented immunomedics and its directors. Brian Frawley and Elizabeth Rose of Sullivan & Cromwell in New York and Raymond DiCamillo and Anthony Calvano of Richards, Layton & Finger PA in Wilmington counseled Seattle Genetics Inc.

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