

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HIGH RIVER LIMITED PARTNERSHIP, :
ICAHN PARTNERS LP, ICAHN PARTNERS :
MASTER FUND LP, ICAHN PARTNERS :
MASTER FUND II LP, AND ICHAN PARTNERS: :
MASTER FUND III LP, :
 :
 :
 Plaintiffs, :
 :
 :
 v. : Civil Action :
 : No. 3677-CC :
BIOGEN IDEC, INC., a Delaware :
corporation, :
 :
 :
 Defendant. :

- - -

Chancery Court
34 The Circle
Georgetown, Delaware
Monday, May 19, 2008
10:00 a.m.

- - -

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

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TRIAL TRANSCRIPT

- - -

CHANCERY COURT REPORTERS
34 The Circle
Georgetown, Delaware 19947
(302) 856-5645

COPY

1 APPEARANCES:

2 STEVEN E. JENKINS, ESQ.
3 RICHARD I. G. JONES, JR., ESQ.
4 TIFFANY GEYER LYDON, ESQ.
Ashby & Geddes
for Plaintiffs

5 GREGORY P. WILLIAMS, ESQ.
6 JOHN D. HENDERSHOT, ESQ.
7 Richards, Layton & Finger, P.A.
-and-
8 ALAN S. GOUDISS, ESQ.
of the New York Bar
9 Shearman & Sterling, LLP
for Defendant

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1 is, I think, well within what the purpose of 220 is.

2 220 isn't just a dig for derivative
3 suits tool. 220 is designed to let the owners of
4 a company know something about the operations when
5 management doesn't want to tell them.

6 Thank you, Your Honor.

7 THE COURT: Thank you, Mr. Jenkins.

8 Because this is scheduled for
9 June 19, I think it is appropriate and helpful if I
10 give you a ruling now. I have read your pretrial
11 briefs, I have listened to the testimony of
12 Mr. Denner, and I have considered your closing
13 arguments.

14 220 is, of course, a well known
15 vehicle under Delaware law; the famous tools-at-hand
16 vehicle that shareholders may use to gain access to
17 records of a company in which they are invested,
18 either to investigate a wrongdoing or to explore
19 whether other stockholders should be aware of alleged
20 mismanagement or a purported mismanagement, and as
21 well as a vehicle to obtain predeterminations as to
22 the value of the equity they own in privately held
23 companies, for example, companies that don't have a
24 market that establishes their value.

1 The test, of course, is whether or
2 not you're a stockholder. And here there is no
3 question that it is undisputed that the entities here
4 are stockholders. There is no dispute either with
5 respect to the formality of the demand or the
6 technical requirements of the demand having been
7 satisfied here.

8 There is some argument about whether
9 or not a proper purpose has been stated, but I am not
10 of the mind that there is a real question or problem
11 there. This is a stockholder that has announced its
12 intention to run a slate of potential nominees for
13 the board to Biogen. It has indicated its
14 disagreement with the incumbent board and management
15 with respect to the process which was implemented by
16 that board and management to undertake a potential
17 sale of Biogen.

18 It has -- that is, the plaintiff
19 stockholder -- has an intention of communicating to
20 stockholders its views. Its purpose here it
21 identifies as to obtain information which is known
22 only to the company, of course, with respect to how
23 this process was designed. Given the nature of the
24 process that was actually used and followed, there is

1 some at least suggestion that it was not designed in
2 a way that would maximize the chances for a sale of
3 the company, but instead may have been designed in
4 a way to deter potential bidders or to make it so
5 difficult for potential bidders that a sale would be
6 unlikely or less likely. That's the dispute.

7 There are two different points of
8 view, and a very clear disagreement amongst the
9 parties as to which alternative it is that Mr. Denner
10 has explained in his testimony, but that I think it
11 is not in any way demeaning the process or the
12 purpose, rather, that has been stated and articulated
13 by the shareholder here for why it wants to examine
14 this discrete set of documents and records. So, I am
15 satisfied on this record of evidence before me that
16 the purpose stated here is a proper purpose: To
17 communicate with stockholders in the context of this
18 proxy dispute.

19 This is a far cry, frankly, in my
20 view, from the Motient decision by Vice Chancellor
21 Lamb. There is no indication here that this is a
22 stockholder intending to abuse or to manipulate the
23 220 demand and the 220 hearing before this Court so
24 as to use it as a, quote, rhetorical platform,

1 unquote, in a proxy battle with incumbent management
2 and board of Biogen.

3 There is nothing at all that would
4 suggest or imply that that is what is at work here,
5 nor has there been an abusive demand process to
6 request inspection of dozens of categories of
7 documents and information as there was in the Motient
8 case. So this case, it seems to me, is a far cry
9 from that decision.

10 I think the more difficult decision
11 for me in this case has been whether or not there has
12 truly been a demonstration of a need for this
13 particular information, whether it's essential and
14 necessary for the stockholder to be able to
15 communicate its views to the other stockholders with
16 respect to this process, and with respect to the
17 actions of the management and the board.

18 As to that question, it is closer in
19 my mind, but I think what tips me in favor of the
20 stockholder here, however slightly it may be, is that
21 there have been characterizations by Mr. Mullen, the
22 CEO of Biogen, and statements -- public statements
23 with respect to the nature of this process and how it
24 was designed to be comprehensive and thorough, and

1 was deliberately designed by the board and by
2 management and with the assistance of investment
3 advisors to achieve the maximum opportunities for
4 sale of the company; and then conflicting statements
5 and other points that it was really because of market
6 conditions at the time that suggested this is why the
7 sales process failed, rather than the design of the
8 process itself.

9 Those circumstances and those
10 statements to the market and to the public seem to me
11 to at least give rise to a basis for the stockholder
12 plaintiffs here needing access to the actual
13 documents that would demonstrate unequivocally, it
14 seems to me, whether there was some deliberate effort
15 here to manipulate the process or to create a process
16 that was doomed to fail from the outset. Those
17 documents internal to the company are known only to
18 those internal to the company; and so, therefore,
19 that is what, in the end, pushes me on the side of
20 finding that these particular discrete documents and
21 minutes of meetings that may exist are necessary and
22 essential to the stockholder's demand.

23 For all of those reasons, I will
24 award access and grant the demand. But I am doing it

1 with the stipulations that Mr. Jenkins had readily
2 agreed to, which is that there will be a
3 confidentiality agreement or stipulation between the
4 parties with respect to the use of the information;
5 and that at least initially it will be on an
6 attorneys eyes only basis of Mr. Jenkins' firm and
7 perhaps inside counsel at the Icahn entities so that
8 that review can be undertaken.

9 Then, if there is a dispute -- and I
10 hope there isn't one, but if there is a dispute
11 between counsel about release or the disclosure of
12 these minutes of meetings or documents that came
13 from, I would presume, the investment bankers to
14 management commenting on this process and any risks
15 of this process that were being designed, that if
16 counsel were unable to reach an agreement about what
17 can be disclosed publicly and what can't be, then you
18 know how to find me and reach me; and I will resolve
19 that dispute if you reach that point.

20 I would ask Mr. Jenkins to provide a
21 form of order that implements the Court's ruling.
22 Run it by Mr. Williams and Mr. Goudiss on the other
23 side for their review, and then I will execute it as
24 soon as you alert me that it is ready.

1 Is there anything further? If not,
2 thank you very much, counsel.

3 MR. JENKINS: Thank you, Your Honor.

4 (The trial was adjourned at 12:44 p.m.)

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1 CERTIFICATE

2
3 I, JENNIE L. WASHINGTON, Official Court
4 Reporter of the Chancery Court, State of Delaware,
5 do hereby certify that the foregoing pages numbered
6 3 through 128 contain a true and correct
7 transcription of the proceedings as stenographically
8 reported by me at the hearing in the above cause
9 before the Chancellor of the State of Delaware, on
10 the date therein indicated, except for the ruling at
11 pages 121 through 127 which was revised by the
12 Chancellor.

13 IN WITNESS WHEREOF I have hereunto set my
14 hand at Georgetown, this 23rd day of May, 2008.

15
16 /s/ Jennie L. Washington
17 Official Court Reporter
18 of the Chancery Court
19 State of Delaware

20 Certification Number: 140-PS
21 Expiration: Permanent
22
23
24