

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JERALD HAMMANN,

Plaintiff,

v.

CYTRX CORPORATION, STEVEN A.  
KRIEGSMAN, LOUIS IGNARRO, JOEL K.  
CALDWELL, and EARL W. BRIEN,

Defendants.

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: C.A. No.  
: 2021-0676-PAF  
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Chambers  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, Delaware  
Wednesday, August 11, 2021  
3:15 p.m.

- - -

BEFORE: HON. PAUL A. FIORAVANTI, JR., Vice Chancellor

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ORAL ARGUMENT RE PLAINTIFF'S MOTION TO EXPEDITE AND  
MOTION FOR A TEMPORARY RESTRAINING ORDER AND THE  
COURT'S RULINGS

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CHANCERY COURT REPORTERS  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, Delaware 19801  
(302) 255-0521

1 APPEARANCES: (via telephone)

2 JERALD HAMMANN, PRO SE

3 JAMES M. YOCH, JR., ESQ.  
4 Young Conaway Stargatt & Taylor LLP

5 -and-  
6 ALLAN S. BRADLEY, ESQ.  
7 of the Texas Bar  
8 Vinson & Elkins LLP  
9 for Defendants

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1 THE COURT: Good afternoon. Vice  
2 Chancellor joining.

3 Can we have a roll call starting with  
4 the plaintiff.

5 MR. HAMMANN: Your Honor, this is  
6 Jerald Hammann.

7 THE COURT: For the defendant?

8 MR. YOCH: Good afternoon, Your Honor.  
9 This is James Yoch from Young Conaway Stargatt &  
10 Taylor on behalf of the defendants. And with me today  
11 is my co-counsel, Allan Bradley from Vinson & Elkins,  
12 who has been admitted *pro hac vice*, and with your  
13 permission, will be making remarks on behalf of the  
14 defendants today.

15 THE COURT: Very well. Good  
16 afternoon.

17 Counsel, I have read your papers  
18 Mr. Hammann, you may proceed on your motion for a  
19 temporary restraining order and for expedited  
20 proceedings.

21 MR. HAMMANN: Thank you, Your Honor.  
22 I just have one more thing to add from what I had  
23 already briefed.

24 I've been taking a close look at the

1 Caloz declaration, and I think -- and, specifically,  
2 paragraph 14 of the Caloz declaration -- and I think  
3 if we compare that declaration to the cooperation  
4 agreement provision, we can see that the defendants  
5 have breached the cooperation agreement.

6           There is a specific sentence of that  
7 paragraph 14 of the Caloz declaration, and I'm going  
8 to read it. "Mr. Chizever advised that if there were  
9 no other concrete alternatives, the Board was entitled  
10 to conclude that accepting the offer from Armistice  
11 and increasing the authorized number of shares was in  
12 the best interest of the Company and its  
13 shareholders."

14           If one looks at that advice, the first  
15 important qualification that Mr. Chizever made was  
16 that the company must have no other alternative -- no  
17 other concrete alternatives. I think Mr. Chizever was  
18 basing this qualification on the word "prohibit"  
19 contained in the cooperation agreements because the  
20 escape clause can only be invoked if the lack of such  
21 action would prohibit compliance with fiduciary  
22 duties.

23           On page 14 of my reply brief, I  
24 outline three concrete alternatives, each of which the

1 defendants were aware. Therefore, under  
2 Mr. Chizever's own advice, the escape clause in the  
3 cooperation agreement was not available to defendants  
4 and their actions constitute a breach of the  
5 cooperation agreement.

6           Additionally, if one looks at  
7 Mr. Chizever's advice, there's a second important  
8 qualification that he never makes. Mr. Chizever never  
9 evaluated the best interests of the non-employee  
10 non-board member stockholders. Instead, he only  
11 evaluates the best interests of the company and its  
12 shareholders.

13           As can be seen, the company did not  
14 request that Mr. Chizever evaluate whether its conduct  
15 would be in compliance with the cooperation agreement  
16 but only whether its conduct would be in compliance  
17 with more generalized fiduciary duties. Therefore, it  
18 is clear if you compare paragraph 13 of the  
19 cooperation agreements to the advice that Mr. Chizever  
20 provided, that the defendants have breached the  
21 cooperation agreements.

22           And since I've had the opportunity to  
23 provide a reply in all other respects, I'll stop now  
24 and hold for any questions that you might have or

1 anything to respond to the defendants.

2 THE COURT: Mr. Hammann, what  
3 particular relief are you seeking with respect to your  
4 motion for a TRO?

5 MR. HAMMANN: What I'd like to have  
6 done -- and let me go to my actual last paragraph in  
7 the conclusion. What I'd like to have is a stay,  
8 which would prevent the defendants from holding the  
9 special meeting until this dispute is resolved, and  
10 then I would like to prevent CytRx from enforcing  
11 paragraphs 9(a)(130, 9(a)(6), 7(a), and 4(a) of the  
12 cooperation agreement.

13 THE COURT: All right. I may have  
14 questions for you on reply.

15 Let me hear from counsel for the  
16 defendants. Mr. Bradley.

17 MR. BRADLEY: Thank you, Your Honor.  
18 Allan Bradley for the defendants, and may it please  
19 the Court.

20 Mr. Hammann is a tiny minority  
21 stockholder who is asking this Court to exercise its  
22 equitable power to interfere in a stockholder vote and  
23 disrupt a multimillion-dollar financing of the  
24 purchase agreement that the board decided was

1 necessary to prevent the company from following into  
2 insolvency.

3           The plaintiff brings a breach of  
4 contract claim, which is not colorable on the  
5 pleadings, and three counts of breach of fiduciary  
6 duty, which are also not colorable and, in addition,  
7 are barred by a covenant not to sue.

8           The plaintiff will suffer no  
9 irreparable harm from a denial of his motion because  
10 he has promised to sell all of his shares before any  
11 stockholder vote. And the balance of the equities  
12 strongly favors the company in this dispute. So we're  
13 asking you to deny the motion in its entirety.

14           THE COURT: Mr. Bradley, if I find  
15 that the company is in material breach of the  
16 cooperation agreement, does that not excuse the  
17 plaintiff from having to comply with the requirements  
18 of that agreement?

19           MR. BRADLEY: No, Your Honor, I don't  
20 think it does. I don't think that the plaintiff has  
21 articulated a viable theory for why a breach by the  
22 company should excuse him from performance, especially  
23 under Section 4(a), his commitment to sell his shares  
24 by August 21st, ten days from now.

1           And, Your Honor, part of why I say  
2 that is there are a lot of distinct provisions in this  
3 cooperation agreement. It includes, for example, a  
4 payment of \$250,000 that the company made to  
5 Mr. Hammann imposed by the cooperation agreement.

6           THE COURT: Does that mean that the  
7 company simply has to pay him \$250,000 and does not  
8 have to comply with anything else in the agreement?

9           MR. BRADLEY: No, Your Honor.

10           My point in what I was just saying is  
11 simply that Mr. Hammann is seeking to pick and choose  
12 which provisions to enforce, and he is seeking in this  
13 motion to enforce the cooperation agreement against  
14 the company while also asking the Court to excuse his  
15 own performance. And, Your Honor, I would just submit  
16 that that's not a viable request. To enforce the  
17 cooperation agreement, he should continue to also  
18 abide by the cooperation agreement.

19           The second point in response is simply  
20 that the company -- the defendants have complied with  
21 the cooperation agreement, including Section 3, the  
22 provision preventing an increase to the authorized  
23 number of shares.

24           THE COURT: Well, Counsel --



1 MR. BRADLEY: Go ahead, Your Honor.

2 THE COURT: I've looked at the minutes  
3 from this July 11, 2021, meeting, and it does not  
4 reflect that anybody from the board had a conversation  
5 with counsel.

6 MR. BRADLEY: Well, Your Honor, the  
7 board did receive the advice from counsel via  
8 Mr. Caloz, who has spoken --

9 THE COURT: The CFO -- according to  
10 the minutes, the CFO said he had a telephone call with  
11 the company's outside lawyer at Loeb & Loeb, who was  
12 apprised of the situation. And I don't know what that  
13 means, because it's not fully explained. And says  
14 that if there were no other concrete alternatives, the  
15 board was entitled to conclude that raising capital  
16 and increasing the company's number of authorized  
17 shares was in the best interest of the company and its  
18 shareholders.

19 What I do not see in those minutes,  
20 however, is any conversation between any director and  
21 counsel, but, rather, it's essentially a hearsay  
22 discussion delivered from the CFO to the board.

23 MR. BRADLEY: Your Honor, our position  
24 is that the board did consult with counsel via

1 Mr. Caloz. And there may have been other discussions  
2 in addition to that, but the minutes of the board from  
3 July 11th do reflect that the board had consulted with  
4 counsel about this potential purchase agreement  
5 because Mr. Caloz had done so and reported back to  
6 them.

7 THE COURT: But Mr. Caloz is not a  
8 member of the board, is he?

9 MR. BRADLEY: He is not a member of  
10 the board. That's correct.

11 THE COURT: You may proceed.

12 MR. BRADLEY: So, Your Honor, there  
13 are two independent reasons why Count I is not  
14 colorable and insufficient on its face. The first is  
15 that it does not establish a breach of the plain  
16 language of the cooperation agreement. The second  
17 reason is that it does not allege damages.

18 On the point about the clear language  
19 of the contract, the pleading did not establish a  
20 violation of Section 3 of the cooperation agreement.  
21 So, as discussed in the papers, the board did exactly  
22 what Section 3 requires, and the complaint does not  
23 allege otherwise. The board faced a risk of a going-  
24 concern qualification. It faced this risk for several

1 months, up to several years. And there was a real  
2 turning point in June of this year when the new drug,  
3 Arimoclomol, received a complete response letter from  
4 the FDA. That action by the FDA meant that the board  
5 could no longer expect certain revenue in late 2021,  
6 and so the risk of a going concern which had been  
7 referenced in the public filings was suddenly very  
8 real, and the board expected it would be imposed by  
9 the end of 2021 and that the company would be  
10 insolvent by the end of November 2022.

11           So, Your Honor, this is a situation in  
12 which the board had to act in order to honor its  
13 fiduciary duty to stockholders. The board was in the  
14 market for capital. It was aware of the most  
15 favorable terms at which it could get liquidity. And  
16 so it consulted with counsel via Mr. Caloz and  
17 received advice from Mr. Chizever, and upon  
18 consideration of the advice, concluded in good faith  
19 that the purchase agreement was necessary.

20           Under that agreement, the investor,  
21 Armistice, will invest \$10 million with an investment  
22 option for up to -- for another \$10 million. The  
23 investor will receive some common shares and some  
24 preferred shares which will convert to common shares

1 upon stockholder approval.

2           And, Your Honor, I think an extremely  
3 important point here is that the complaint has no  
4 facts whatsoever, no allegations that this purchase  
5 agreement violates Section 3. And I do think that  
6 there is a pleading requirement here that the  
7 plaintiff show facts demonstrating that the carve-out  
8 of Section 3 does not apply. Nothing in the complaint  
9 suggests bad faith by the board. In fact, in his  
10 reply brief, the plaintiff agrees that the company was  
11 running out of money and something had to be done. So  
12 this is a straightforward failure to state a claim.

13           And, Your Honor, I would submit that  
14 there's a sort of counterfactual point to be made  
15 here. It's not hard to imagine what a sufficient  
16 pleading might look like here. If the company's  
17 quarterly filings showed that it was flush with cash  
18 and in great good health, then the plaintiff could  
19 pull facts from a public filing and allege those  
20 facts, and perhaps then, there would be a colorable  
21 inference to infer that that a purchase agreement like  
22 this was unnecessary. But those facts are not in the  
23 complaint. And they're not in the complaint because  
24 those facts do not exist in the real world either.

1 The board's back was against the wall. The board had  
2 to act to prevent insolvency. So, again, it was  
3 determined in good faith, upon advice from  
4 Mr. Chizever, that failure to act would prohibit them  
5 from complying with their fiduciary duties.

6 THE COURT: Counsel, I was struck by  
7 the defendants' opposition in that it does not address  
8 the allegations of coercion.

9 MR. BRADLEY: Certainly, Your Honor.

10 So as to coercion, the defense  
11 position is that the coercion allegation fails for a  
12 few reasons. First, the defendant -- excuse me -- the  
13 plaintiff has committed to selling his shares within  
14 ten days, August 21st. He will not be a stockholder  
15 on the date of any stockholder meeting and vote, so he  
16 will not suffer any harm. So even if his theory of  
17 coercion carries some weight, it will not cause harm  
18 to him.

19 In the alternative, Your Honor, his  
20 theory of coercion does not carry weight. The choice  
21 facing stockholders at the upcoming board meeting --  
22 at the upcoming stockholder vote is between a  
23 financing on -- so the choice is either disapprove of  
24 the increase in the authorized shares and then the

1 company will be obligated to pay certain dividends and  
2 certain liquidated damages and hold a new stockholder  
3 vote in three months, and in that circumstance, the  
4 company has received -- the company has received the  
5 \$10 million already from Armistice, so that's sort of  
6 a financing arrangement in and of itself; or, on the  
7 other hand, the stockholders could vote to approve the  
8 increase in the authorized number of shares and  
9 receive more favorable terms for the receipt of the  
10 \$10 million.

11                   And, Your Honor, I think the point to  
12 be made here and the reason this is not coercion is  
13 that this is actually a much better situation than a  
14 straight, say, financing by loan on more punitive  
15 terms. And so this choice really is giving  
16 stockholders the better opportunity, a better  
17 opportunity to receive financing. So in that sense,  
18 this is just not a coercive agreement.

19                   THE COURT: Counsel --

20                   MR. BRADLEY: You have also --

21                   THE COURT: Counsel, you had 36 pages  
22 of an opposition brief, and you didn't raise it.

23                   MR. BRADLEY: On the coercion point,  
24 Your Honor?

1 THE COURT: That's correct.

2 MR. BRADLEY: I understand, Your  
3 Honor. I do think that the facts that Mr. Hammann  
4 cannot be a stockholder at the time of the stockholder  
5 vote demonstrates that he will suffer no irreparable  
6 harm under his coercion theory at the stockholder  
7 vote.

8 And just a point to clarify, it's just  
9 a matter of dates, but the complaint alleges that he  
10 must sell by August 31st, that the actual date is  
11 August 21st. That's the deadline. It will certainly  
12 occur before any stockholder vote is held in  
13 September.

14 THE COURT: Remind me --

15 MR. BRADLEY: Your Honor --

16 THE COURT: Remind me of the record  
17 date for the stockholder vote.

18 MR. BRADLEY: The stockholder vote is  
19 tentatively scheduled for September 23rd. The  
20 purchase agreement was made public on July 13th.

21 THE COURT: What's the record date for  
22 the stockholder vote?

23 MR. BRADLEY: I'm not sure, Your  
24 Honor.

1 THE COURT: So if the record date is  
2 before even --

3 MR. BRADLEY: I'm sorry.

4 THE COURT: -- even assuming --

5 MR. BRADLEY: The record --

6 THE COURT: Go ahead.

7 MR. BRADLEY: Your Honor, I do know.  
8 The record date is July 26th.

9 THE COURT: So if the record date is  
10 July 26th, does Mr. Hammann not have the opportunity  
11 to vote?

12 MR. BRADLEY: Even if he has the  
13 opportunity to vote, Your Honor, he will not suffer  
14 any harm under any alleged theory of coercion. His  
15 vote up or down will not affect the value of his  
16 shares.

17 THE COURT: Well, if he's excused from  
18 having to perform under the contract due to the  
19 company's material breach, he could still remain a  
20 stockholder. Right?

21 MR. BRADLEY: Yes, Your Honor, but in  
22 his complaint, he acknowledges that he has an  
23 obligation under the cooperation agreement to sell his  
24 shares. So I understand he is asking to be released



1 from that opportunity, but, Your Honor, I think that's  
2 a little bit circular for him to say I have harm  
3 because I will be a stockholder on that vote, on the  
4 date of that vote, because I'm asking the Court to  
5 permit me to be a stockholder on the date of that  
6 vote. He's asking the Court to give him the harm on  
7 which he justifies his request. So I do not think  
8 that that holds water.

9           And again, I do think that there are  
10 many terms in this cooperation agreement, and I don't  
11 think he has articulated a clear legal analysis for  
12 why this particular remedy, being excused from Section  
13 4(a), should be the remedy, given any material breach.  
14 Again, we refuse the idea that there is a material  
15 breach, but answering your question, he has not  
16 articulated a reason why such a remedy is appropriate;  
17 and we think it is not.

18           If we are going to be parsing through  
19 different provisions elsewhere in the contract,  
20 Mr. Hammann is not, for example, volunteering to give  
21 the \$250,000 back, and I don't think that we will have  
22 a solid arrangement coming out of such an analysis and  
23 sort of bandying about different sections of the  
24 cooperation agreement.

1           And, Your Honor, going back to a point  
2 discussed earlier, it is possible -- it is legal for  
3 the board to deputize an officer to speak with outside  
4 counsel for the benefit of the board. So as to the  
5 point made earlier about how Mr. Caloz spoke with  
6 counsel and then reported back to the board, I know  
7 that the Caloz declaration did not state specifically  
8 that he was deputized to do so, but the board  
9 exercised its duty in hearing a report from the CFO  
10 who was effectively deputized.

11           So that's our position as to that  
12 point, Your Honor.

13           THE COURT: Thank you. Anything  
14 further?

15           MR. BRADLEY: Your Honor, I would also  
16 like to discuss briefly, as to Counts II through IV  
17 and to the balance of equities -- and I will keep it  
18 brief, Your Honor -- first, as to Counts II through  
19 IV, they are barred by a covenant not to sue. So we  
20 would also take the position that they are not  
21 colorable. They allege no harm. They allege no  
22 irreparable harm. But also, a covenant not to sue  
23 dispenses with all of that analysis because there is  
24 this mutual agreement not to bring suit except to

1 enforce the cooperation agreement itself. And that,  
2 on its plain language, applies to the Counts II  
3 through IV.

4           So Hammann -- the plaintiff pleads  
5 those counts as breach of the fiduciary duty, not as  
6 contractual claims under the cooperation agreement.  
7 They are barred. And I would highlight the reasoning  
8 in the case of *Altor Bioscience*, which is a transcript  
9 decision attached as Exhibit 6 to our filings, that  
10 such a covenant not to sue is enforceable in these  
11 circumstances and should be enforced.

12           As to the balance of the equities,  
13 Your Honor, if the motion for this temporary  
14 restraining order is denied, Mr. Hammann suffers not  
15 at all. As I have said, he must sell his remaining  
16 shares in the company by August 21st. And his  
17 pleading is entirely focused on the harms arising out  
18 of the stockholder meeting, which will be in  
19 September.

20           On the other hand, if the temporary  
21 restraining motion is improvidently granted, the  
22 company would then suffer the liquidated damages and  
23 dividend payments from the purchase agreement as well  
24 as the expense of rescheduling and holding a new

1 stockholder vote every three months. The effect would  
2 be that the company would be unable to take full  
3 advantage of a necessary financing agreement, and the  
4 imposition of these costs would be inequitable,  
5 especially compared to Mr. Hammann's lack of harm.

6 I would also raise -- and I think this  
7 is important, Your Honor -- it is possible that if the  
8 company fails to hold a stockholder vote at all, you  
9 know, leaving aside whether the vote is up or down, if  
10 the company fails to hold a stockholder vote at all by  
11 the September 25th deadline, then the investor,  
12 Armistice, might claim breach of contract and bring  
13 suit on its own behalf, imposing further costs and  
14 potentially unpredictable consequences on the company.  
15 So without waiving any defenses that the company might  
16 have in that litigation, I do think that this Court  
17 should consider the potential harms and costs from  
18 such litigation when considering the balance of the  
19 equities.

20 So on that balance, the equities  
21 clearly favor the company and show that a temporary  
22 restraining order would be inappropriate here.

23 And one more point, Your Honor. As  
24 to -- I'm sorry. One more point as to the balance of

1 the equities. There is another interest at stake  
2 here, and that is the interest of third parties, other  
3 stockholders.

4 I know that Mr. Hammann has cast  
5 himself as a representative here repeatedly, but by  
6 seeking this temporary restraining order, he is  
7 effectively attempting to take away the rights of  
8 those stockholders to vote at the upcoming meeting.  
9 Other stockholders would suffer the loss of the  
10 opportunity to vote. They would suffer the loss of  
11 the opportunity to control their company. And, again,  
12 Mr. Hammann is a tiny minority stockholders attempting  
13 to invoke this Court's equitable powers to prevent the  
14 exercise of shareholder democracy on a proposal  
15 related to an important purchase agreement that the  
16 board determined was necessary to the continued  
17 solvency of the company.

18 So the balance of the equities should  
19 include those third party interests. And on all  
20 analyses, I submit that it clearly favors the company  
21 here.

22 And I'd like to go back briefly to the  
23 theory of coercion, Your Honor. The theory of  
24 coercion that the plaintiff alleges was really only in

1 relation to the breach of fiduciary duty claims. And  
2 those claims, as suggested, as I said earlier, are  
3 barred by the covenant not to sue.

4           So, in part, I think that's why the  
5 theory of coercion did not come up in detail in our  
6 pleadings -- excuse me -- in our response, because  
7 that theory is only a matter of the breach of  
8 fiduciary duty claims. It's barred. It's not  
9 colorable. We submit that it's just not at issue  
10 here.

11           And, Your Honor, last, I would point  
12 to the other basis for which Count I is not a  
13 colorable claim. That's because the plaintiff did not  
14 state a valid claim of breach because he did not  
15 allege any damages.

16           And, again, Your Honor, I know I said  
17 it before. He must sell out of the stock by  
18 August 21st. The vote must happen sometime in  
19 September. Whatever happens at the stockholder  
20 meeting and vote, even if he votes his shares, the  
21 outcome will not affect Mr. Hammann at all. And  
22 damages are an element of a contract claim.

23           So, overall, Your Honor, I do think  
24 that the balance of the equities here, in the end,

1 show that the risk -- the certain consequences and the  
2 risk of consequences to the company if the temporary  
3 restraining order motion is improvidently granted are  
4 potentially quite severe. The consequences to the  
5 other stockholders, also quite significant. And the  
6 potential harm to Mr. Hammann is nothing at all, or,  
7 in the alternative, even if we do look at his theories  
8 of dilution and that sort of thing, they're  
9 quintessentially reparable theories of harm.

10 So, Your Honor, this Court should not  
11 enjoin the stockholder meeting and vote. There's  
12 certainly no basis to order Mr. Hammann released from  
13 certain provisions of the cooperation agreement. And  
14 we would ask Your Honor to dismiss this motion in its  
15 entirety.

16 THE COURT: Counsel, what would be the  
17 method of determining a monetary remedy of damages for  
18 unlawful dilution? How would I do that?

19 MR. BRADLEY: Your Honor, at that  
20 point, the Court could calculate a stock drop. If the  
21 plaintiff could make a showing that the stock fell  
22 from one price to another, then the Court could  
23 establish monetary damages on that basis.

24 THE COURT: Isn't that speculative?

1                   MR. BRADLEY: I don't think so, Your  
2 Honor. I think that if the plaintiff seeks to show  
3 harm, then the plaintiff can make that showing and  
4 could try to show causation. But those are the harms  
5 and those are compensable as monetary damages.

6                   THE COURT: Very well. Let me hear  
7 from Mr. Hammann.

8                   MR. HAMMANN: Yeah. I've got a couple  
9 points here.

10                   One of the things that struck me about  
11 some of the more recent comments being made is the  
12 idea that we have a cooperation agreement that lasts  
13 for two years but a requirement to sell my shares  
14 within one year. And they're arguing, well, once he  
15 sells the shares, all of these other provisions of the  
16 cooperation agreement that he has the right to assert  
17 against the defendants, he technically no longer has  
18 that right because he sold his shares.

19                   I don't think that matches the intent  
20 of the cooperation agreement. Some of the reasons the  
21 cooperation agreement includes a specific performance  
22 provision is exactly for that reason. We're not  
23 supposed to be -- under the cooperation agreement, the  
24 objective is not to evaluate the harm. We already



1 agreed in the cooperation agreement that the harm  
2 would be irreparable. And now he's trying to split it  
3 apart and say, well, once he sells his shares, he  
4 can't prove harm anymore, and, therefore, he can't  
5 enforce any of the provisions in the cooperation  
6 agreement. I don't think that was the intent of the  
7 drafters. It certainly wasn't my intent as one of the  
8 drafters in drafting that document.

9           Going earlier in his conversation, he  
10 talked about the allegations in the complaint. One of  
11 the challenges with that argument is that I was  
12 seeking additional information from the defendants for  
13 20 days prior to filing this complaint. And they  
14 basically said, tell us what right you even have to  
15 ask for this information.

16           So if there are deficiencies in the  
17 complaint based on information that was not available  
18 to me at the time I drafted the complaint, it's really  
19 difficult for me to understand why the proper course  
20 of action there would be to permit me to amend the  
21 complaint.

22           The specific provisions that I have --  
23 there was a big discussion around, well, if  
24 Mr. Hammann is asking to be relieved from all of these

1 other provisions, he shouldn't be able to split these  
2 things apart. The specific provisions I'm asking to  
3 be relieved from are ones that automatically are  
4 somewhat implicated in the defendants' specific  
5 conduct that I'm alleging in the complaint. I didn't  
6 ask to be relieved from the entire cooperation  
7 agreement. I took the very specific things that it  
8 would be beneficial for me to be relieved from so that  
9 I can communicate with shareholders, so that I can  
10 help them organize if it comes to be that this is  
11 going to go to a vote.

12                   And while at page 19 of my reply  
13 brief, I gave an analysis indicating why I believe  
14 paragraph 8(a) does not apply to the circumstance, to  
15 the extent that it might apply, I submit that that  
16 should be an additional section of the cooperation  
17 agreement that I should be relieved from during the  
18 pendency of this action, again, tailored specifically  
19 to what we've seen taking place and tailored  
20 specifically to the alleged breach that I'm claiming  
21 here.

22                   And I think that pretty much was it  
23 for my notes. Thank you, Your Honor.

24                   MR. BRADLEY: May I respond, Your

1 Honor?

2 THE COURT: Briefly.

3 MR. BRADLEY: So as to the point that  
4 Mr. Hammann was just making about supposedly not  
5 having rights after selling out of his shares, that's  
6 simply wrong, Your Honor. He may not be able to show  
7 harm in certain circumstances, but the cooperation  
8 agreement still contains, for example, mutual  
9 nondisparagement clauses and other provisions that are  
10 in effect through the duration of the standstill.

11 Separately, as a drafter of the  
12 contract and as a party to the contract, Mr. Hammann  
13 agreed to the sale of the shares. He did not have to  
14 agree to that. And so there's no reason now to give  
15 him a way out of that obligation, which he voluntarily  
16 assumed for consideration which he has received.

17 As to the second point about seeking  
18 information from the company, the cooperation  
19 agreement does not require the company to seek  
20 Mr. Hammann's permission under Section 3, and it does  
21 not obligate the company to provide him with an  
22 explanation. But if you actually do look at the  
23 letter, which Mr. Hammann himself submitted, what you  
24 see is a letter that says, please identify the legal

1 basis for your question, which I think can be read as  
2 a simple, you know, state your claim, state your  
3 request; or, in the alternative, in the very next  
4 paragraph, let's have a phone call.

5           And so the defense did not have an  
6 obligation to explain but did respond in a perfectly  
7 ordinary and acceptable way.

8           And, finally, the -- I guess I would  
9 just like to push back once more on the idea that the  
10 defendant can be excused from certain sections of the  
11 cooperation agreement that he very much wants to be  
12 excused from while seeking to enforce all other  
13 sections of the cooperation agreement.

14           It is basic contract law that seeking  
15 to -- when a party seeks to enforce a contract and  
16 brings a claim for breach, the party must show  
17 performance. And Mr. Hammann is picking and choosing  
18 and selecting only the best provisions to escape for  
19 himself and seeking to enforce the provisions that he  
20 want to against the company. And, Your Honor, this is  
21 just, in a very straightforward way, not equitable.

22           And, separately, he has argued that he  
23 has specifically chosen the sections that will help  
24 him organize other stockholders. These other

1 stockholders can organize on their own if they choose  
2 to. They do not need Mr. Hammann to do so. They can  
3 bring suit. They could bring any of these claims.  
4 They are not affected by a covenant not to sue, for  
5 example. And they are not doing so.

6           And so, Your Honor, in the end, the  
7 best course of action here, the equitable course of  
8 action here, is to allow the stockholders to pursue  
9 their vote, to exercise their vote, and to handle this  
10 purchase agreement and the related proposal according  
11 to the normal principles of shareholder democracy.

12           I believe very strongly, I submit very  
13 strongly to the Court that there is no basis for  
14 giving Mr. Hammann a way out of certain provisions of  
15 the agreement so that he may then suffer some damages  
16 so that he may then bring these claims. I submit that  
17 it is circular and inequitable and does not -- and  
18 would really produce a severe imbalance in the  
19 equities here and severe -- could produce severe  
20 consequences for the company.

21           THE COURT: Thank you.

22           By way of background, the plaintiff  
23 entered into a cooperation agreement with CytRx in  
24 August of 2020 which, among other things, requires him

1 to sell all of his CyTRx stock by late August 2021.  
2 Whether it's the end of the month or the 21st is a  
3 matter of some dispute between the parties. It also  
4 prohibits him from bringing suit against the company  
5 or the board.

6           The agreement provides that during the  
7 standstill period, "the Company shall not take any  
8 action in support of or make any proposal to increase  
9 the number of the Company's authorized outstanding  
10 shares of Common Stock, unless the Board determines in  
11 good faith, after consulting outside counsel, that the  
12 lack of such action would prohibit Board members from  
13 complying with their fiduciary duties as directors of  
14 the Company to the non-employee, non-Board-member  
15 stockholders."

16           On July 11, 2021, the board approved  
17 entering into a securities purchase agreement with  
18 Armistice Capital Master Fund Ltd. to invest up to  
19 \$20 million, of which 10 million would be paid at  
20 closing. The agreement requires an increase in the  
21 number of the company's outstanding common stock  
22 authorized shares, which, in turn, requires  
23 stockholder approval. The company entered into that  
24 agreement on July 13.

1           The company has issued a preliminary  
2 proxy statement for a special meeting of stockholders  
3 to approve the increase in authorized shares under the  
4 securities purchase agreement. The agreement requires  
5 a stockholder vote by September 25. The company has  
6 issued a preliminary proxy statement and has indicated  
7 the meeting will not occur before September 13. I'm  
8 told that the stockholder vote is tentatively planned  
9 for September 23.

10           Under the securities purchase  
11 agreement, if the stockholders do not approve the  
12 proposal to increase the number of authorized shares,  
13 the company must pay Armistice \$164,800 a month up to  
14 a total of \$1,977,600, and must hold a new vote every  
15 three months to obtain stockholder approval to  
16 increase the number of authorized shares.

17           Plaintiff has filed a complaint  
18 alleging the company and the board have violated the  
19 cooperation agreement, breached their fiduciary duties  
20 in connection with the securities purchase agreement  
21 and the proposal to increase the number of authorized  
22 shares, and the plaintiff seeks expedited proceedings  
23 and a temporary restraining order.

24           The temporary restraining order is an

1 extraordinary remedy. It's a specialized remedy of  
2 short duration designed primarily to prevent imminent  
3 irreparable injury. Parties seeking a TRO must  
4 establish a colorable claim, a threat of imminent  
5 irreparable harm, and a balancing of hardships  
6 favoring the moving party. The Court has routinely  
7 refrained from granting interim injunctive relief that  
8 amounts to final relief.

9           Similarly, to obtain expedited  
10 proceedings, the plaintiff must establish a  
11 sufficiently colorable claim and the sufficient  
12 possibility of threatened irreparable injury that  
13 would justify the extra costs of an expedited  
14 injunction proceeding.

15           Plaintiff alleges the stock purchase  
16 agreement is a breach of the cooperation agreement  
17 because the stock purchase agreement, among other  
18 things, coerces stockholders into voting for raising  
19 the authorized share count. According to the  
20 plaintiff, this vote is coercive because the terms of  
21 the agreement require the company to hold meetings  
22 every three months until a majority of stockholders  
23 vote in favor of raising the authorized share count  
24 and it requires the company to pay that monthly



1 penalty up to a maximum of approximately \$2 million if  
2 the stockholders do not approve raising the authorized  
3 share count.

4           A stockholder vote may be nullified by  
5 a showing that the structure or circumstances of the  
6 vote were impermissibly coercive. Wrongful coercion  
7 may exist where the board or some other party takes  
8 actions which have the effect of causing the  
9 stockholders to vote in favor of the proposed  
10 transaction for some reason other than the merits of  
11 the transaction. That's *Williams versus Geier*, 671  
12 A.2d 1368 at pages 1382 to 83 from the Delaware  
13 Supreme Court in 1996.

14           The determination inquiry focuses on  
15 "whether the stockholders have been permitted to  
16 exercise their franchise free of undue external  
17 pressure created by the fiduciary that distracts them  
18 from the merits of the decision under consideration."  
19 That's *In re Saba Software*, 2017 WL 1201108 at \*15,  
20 from this Court on March 31, 2017.

21           This Court has found the stockholder  
22 vote to be coercive where no rational stockholder  
23 could afford not to vote in favor of the board  
24 proposal. That is from the *AC Acquisitions* case, 519

1 A.2d 103 at page 113, from this Court in 1986.

2           Hammann's claim that the vote is  
3 structurally coercive is, on this very, very  
4 preliminary record, in my view, colorable for purposes  
5 of a motion to expedite. Hammann has fairly alleged  
6 the defendants have not abided by the terms of the  
7 cooperation agreement in seeking to increase the  
8 authorized number of shares. While the defendants  
9 contest those allegations, including by claiming they  
10 acted in subjective good faith upon advice of counsel,  
11 there are factual disputes that must await  
12 determination at a later stage.

13           I also believe that he has stated a  
14 colorable claim that he may not be barred under the  
15 cooperation agreement if there has been a material  
16 breach by the company. Again, the claim is colorable  
17 in my view, at least at this stage.

18           It is possible that Hammann's  
19 performance under the contract may be excused because  
20 a party is excused from performance under a contract  
21 if the other party is in material breach thereof.  
22 That's a common law principle of contract. And again,  
23 at this very preliminary stage, I believe that there  
24 is a colorable claim.

1           I'm denying the motion for a temporary  
2 restraining order because I do not believe that there  
3 is an imminent threat of irreparable harm, and some of  
4 the relief that Mr. Hammann seeks would essentially  
5 grant him final relief. I also recognize that in  
6 conducting the balance of harms, the balance of harms  
7 at this stage tips in favor of the company.

8 Therefore, I am not going to enter a temporary  
9 restraining order, but I will set this down for a  
10 hearing on a preliminary injunction before the  
11 stockholder vote.

12           Mr. Hammann needs to recognize,  
13 however, that there may very well be a steep hill to  
14 climb even if he has a reasonable probability of  
15 success and if he demonstrates a threat of irreparable  
16 harm because he must establish a balance of the  
17 equities in favor of an injunction. Based on the  
18 record before me, it appears that this company is  
19 strapped for cash and this may very well be the only  
20 financing opportunity it has.

21           With that, I'm going to deny the  
22 motion for a temporary restraining order and grant the  
23 motion for expedited proceedings. I will schedule  
24 this for a preliminary injunction hearing on either

1 September 14 or September 15. I ask the parties to  
2 confer on a schedule and get back to my assistant on  
3 whether you are available on the 14th or the 15th for  
4 that preliminary injunction hearing.

5 I'm not asking for reargument, but if  
6 there are any questions about my ruling, I'm happy to  
7 entertain them.

8 Let me first turn to Mr. Hammann.

9 MR. HAMMANN: No questions, Your  
10 Honor. Thank you.

11 THE COURT: Mr. Bradley?

12 MR. BRADLEY: I'm sorry, Your Honor.  
13 No questions from the defense.

14 THE COURT: Thank you, Counsel and  
15 Mr. Hammann. I appreciate your arguments. I look  
16 forward to seeing your schedule soon.

17 Court stands in recess.

18 MR. HAMMANN: Thank you, Your Honor.

19 (Proceedings concluded at 3:59 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 36 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 12th day of August, 2021.

/s/ Jeanne Cahill  
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Jeanne Cahill, RDR, CRR  
Official Chancery Court Reporter  
Registered Diplomate Reporter  
Certified Realtime Reporter