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Case No. 2017-0309-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SARISSA CAPITAL DOMESTIC FUND LP, SARISSA OFFSHORE MASTER FUND LP, SARISSA CAPITAL FUND GP LLC, SARISSA CAPITAL FUND GP LP, SARISSA CAPITAL OFFSHORE FUND LP LLC, SARISSA CAPITAL MANAGEMENT GP LLC, SARISSA CAPITAL MANAGEMENT LP,	)	C.A. No. _____
Plaintiffs,	)	
v.	)	
INNOVIVA, INC.,	)	
Defendant.	)	

VERIFIED COMPLAINT PURSUANT TO 8 *DEL. C.* § 225 AND FOR SPECIFIC PERFORMANCE

Plaintiffs Sarissa Capital Domestic Fund LP, Sarissa Capital Offshore Master Fund LP, Sarrisa Capital Fund GP LLC, Sarissa Capital Fund GP LP, Saarussa Capital Offshore Fund LP LLC, Sarissa Capital Management GP LLC, Sarissa Capital Management LP (the foregoing entities are hereafter collectively referred to as "Sarissa"), upon knowledge as to themselves and upon information and belief as to all other matters, alleges for their Verified Complaint pursuant to 8 Del C. § 225 and for specific performance, against Innoviva, Inc. ("Innoviva" or the "Company"), as follows:

I. Introduction.

1. American business relies on trust. As J.P. Morgan, Sr. said in his famous testimony to Congress in 1912: "A man I do not trust could not get money from me on all the bonds in Christendom." Parties thus routinely rely on trust to make agreements, and both principles of business integrity and long-settled Delaware contract law require business people to honor their oral—and written—agreements.

2. Some agreements are so fundamental in character and so clear that no principled business person would conceive of reneging on them in because of the huge reputational risk such an action could cause. That is particularly true of transactions between principals and agents, and between fiduciaries and stockholders.

3. This action involves such a contract. The contract involved settling a proxy contest between the board and management, on the one hand, and a substantial stockholder of the Company on the other. The parties agreed to all of the substantial terms of the contract, had papered it up, and one party had signed it when the Company pulled the plug in favor of what it thought was a better deal. It had no right to do so, the agreement was already binding, and the CEO's and board's decision to do so can only have a harmful effect on the Company's business and its stockholders. Announcing to the world that your company cannot

be trusted to keep its agreements, especially with its owners, is no more effective as a business strategy today than it was in J.P. Morgan's time.

4. There is no question that the agreement at issue here was binding. All of the terms of the contract had been agreed upon by both parties and nothing in the agreement made it contingent upon some other non-ministerial act. Indeed, Sarissa had already signed and transmitted its signature pages to the Company hours before the company reneged on the agreement. Under the parties' simple agreement, two of Sarissa's nominees were to be added to the present seven directors of Innoviva and both sides would vote their proxies in favor of those nominees after adjourning the annual meeting of stockholders set for the following day.

5. In addition, Sarissa would withdraw its §220 action currently pending this Court. But the CEO, who was hostile to the idea of talking with Sarissa from the start inasmuch as Sarissa had been pointedly questioning his excessive compensation and supporting nominees who would do the same, was dissatisfied with the deal. Apparently the only reason the CEO agreed to the talks was because it looked like the management slate was going to lose the election, in which case the Sarissa nominees might replace three of the seven board seats, instead of just adding two new seats.

6. After the Company had not only a final, but papered, deal with Sarissa, the CEO looked for alternatives (indeed Sarissa believes that it was probable that he had been looking for alternatives throughout the negotiations between Sarissa and the Company by continuing to solicit proxies), and soon found out that a key stockholder would vote for the management slate. A board meeting was hurriedly convened and the board was persuaded to repudiate the deal with Sarissa since it could now win the contest outright.

7. In so doing, the CEO and those members of the board voting in favor of the repudiation (the plaintiffs do not know whether all the directors participated in that act), let the world clearly see their own notion of business integrity, namely that something is acceptable if you can get away with it. But in fact this was not the type of act with which one can get away. Our law is very clear on this point. Once all substantial terms of a deal are agreed upon the deal is binding upon the parties, unless it is specifically made contingent on some other act. And here not only were all substantial terms agreed upon, Sarissa and its nominees had—at the request of Innoviva—sent their signature pages to Innoviva.

8. This action seeks (1) an expedited proceeding to enforce specifically the parties' agreement and determine the proper size and composition of the Company's board of directors and (2) the entry, *pendente lite,* of an appropriate status quo order to ensure that no irreparable harm befalls the Company before an

order enforcing the agreement and requiring Innoviva to place the two Sarissa nominees on its board can be entered.

II. The Parties.

9. Sarissa collectively owns 1000 shares of record and beneficially owns approximately 3.425 million shares of Innoviva's common stock in the aggregate. That stock has a current market value of approximately $44 million at the time of this complaint. (It was higher on April 19th, but the stock price tumbled over 10% on heavy volume after management announced that it had won the proxy fight). Odysseas Kostas, M.D. and George Bickerstaff, III are the two Sarissa nominees whom the parties agreed would be placed on Innoviva's board under the terms of the parties' agreement.

10. Innoviva is a Delaware corporation with headquarters in Brisbane, California. It does not have any existing operations and its sole business is collecting royalties on certain drugs from GlaxoSmithKline ("GSK"). It employs only 14 people but pays its five senior officers and its seven directors a total of approximately $13.5 million per years. Innoviva's CEO, Michael Aguiar, was paid just shy of $12 million from 2014–2016, or close to $4 million per year. Given that Innoviva presently has no operating business, the current proxy contest has focused on the extraordinary sums paid to Mr. Aguiar, other senior management, and the directors for doing little more than cashing GSK's royalty checks.

III. Background.

11. Plaintiffs and Innoviva's board (and particularly Mr. Aguiar) have been engaged in a proxy contest for over a month. The Company's annual meeting of stockholders was scheduled for Thursday, April 20, 2017 and by Tuesday, April 18th, the results were looking close. Sarissa, which entered the proxy contest reluctantly, had been asking the Company to discuss settlement from the start, but until April 18th talks had not progressed far. Over the course of the next two days, the parties engaged in productive negotiations. Sarissa had nominated three directors to serve on Innoviva's board of seven, but agreed to accept two nominees on an expanded nine-person board. It also agreed to drop the § 220 litigation pending before this Court.

12. For an extended period, Innoviva also insisted on a "standstill" agreement with Sarissa, which Sarissa rejected. At 11:29 p.m. on April 18th, the board's lead lawyer for the proxy contest, Richard Grossman, Esq. of the New York office of Skadden, Arps, Slate, Meagher & Flom sent Sarissa a draft settlement agreement. Mr. Grossman is an experienced corporate mergers-and-acquisitions lawyer and throughout the negotiations he was careful to let Sarissa know the authority he had.

13. In this email, Mr. Grossman noted that "[a]s a reminder the Board has not reviewed the draft or approved the Company's entering into a settlement

agreement at this time. . . As I mentioned on our call, our Board is convening early tomorrow morning and will review the status of the agreement then."

14. At 3:32 a.m., Sarissa's General Counsel, Mark DiPaolo, who also has decades of merger and acquisition experience, responded that "We are not philosophically opposed to having a very simple agreement without a standstill. Unfortunately, I don't think that there is time to get this done via agreement . . . . If the board adds two of our nominees to the board, then this will be over tomorrow morning. Please convey this to your client." The point that any agreement had to be simple and put two Sarissa nominees on the board provided the framework for all the following negotiations. Four minutes later, Mr. Grossman replied, "I will convey your view to my client."

15. Innoviva held a very long board meeting on the morning of April 19th and—faced with the prospect of losing the contest—agreed to enter a simple agreement with no standstill. This was communicated to Sarissa shortly before 2:00 pm in the afternoon of Wednesday, April 19th, when Innoviva's Vice Chairman James Tyree called Sarissa's founding partner, Dr. Alexander Denner. In that discussion the Vice Chairman and Dr. Denner agreed to a settlement in which two Sarissa nominees would be placed on the board.

16. Mr. Grossman thereafter tried reaching Mr. DiPaolo, and before Mr. DiPaolo could call him back, sent Mr. DiPaolo the draft of an agreement and press

release “reflecting what I understand the discussions were between Alex [Dr. Denner] and one of our directors.” That draft was of a simple agreement (attached hereto Exhibit A), but made the agreement contingent “upon the issuance of the attached press release.” Messrs. Grossman and DiPaolo subsequently spoke, and Mr. Grossman told Mr. DiPaolo that the board had “cried uncle”—*ie*, conceded—to the deal proffered by Sarissa and would add two Sarissa nominees to the board with nothing more than a simple agreement setting forth the mechanics to get it done.

17. Sarissa concluded from the calls and the draft agreement provided by Innoviva that it could put all its efforts into appering the settlement and stop soliciting stockholders. Upon information and belief, Mr. Aguiar and/or others at Innoviva used the settlement as an option and continued soliciting proxies.

18. At 2:55 pm, after further talks between the Vice Chairman and Dr. Denner, Mr. DiPaolo sent Mr. Grossman a modified agreement, which, among other things, listed one different Sarissa nominee than had been provided in the Company’s draft. In sending these comments, Mr. DiPaolo noted that the Vice Chairman and Dr. Denner had spoken and that his comments were attached.

19. The two then had a further call at approximately 3:30 p.m., in which Mr. DiPaolo and Mr. Grossman discussed Mr. DiPaolo’s comments to the agreement. Mr. Grossman said all of the comments were acceptable and that Mr.

Grossman would only need to run the language by his co-counsel—not the board. Mr. Grossman and Mr. DiPaolo also agreed that the agreement should not be contingent upon the prior issuance of the press release and that the press release should just be issued after the agreement was signed. Mr. Grossman asked for Mr. DiPaolo's comments to the press release. Mr. DiPaolo indicated they would be coming shortly and that the changes would consist of reordering, adding Odysseas Kostas and Dr. Denner providing a quote. Mr. Grossman said he hoped Dr. Denner would be "nice" in his quote. Mr. DiPaolo responded that "he always is" and the two chuckled over this.

20. At 4:19 p.m., Mr. Grossman's associate (the "associate") sent the following email, along with accompanying clean and redlined drafts (Exhs. B and C), to Sarissa (with a copy to Mr. Grossman as well as to Innoviva's California counsel:

> "Please find attached our comments to the letter agreement, clean and marked against your draft.
>
> Let us know if you would like to discuss. We assume you are in the process of collecting your signature pages and will send your comments to the press release when available."

21. The changes in the agreement were very minor and consisted primarily of the elimination of the press release contingency. Now, the press release was merely to be released "as soon as practicable following the execution of this letter."

22. Sarissa responded at 4:24 p.m. with one small change to the revised settlement agreement (which suggested changing the "as soon as practicable language to "immediately") and at 4:29 p.m.—only ten minutes after the draft agreement had been sent to Sarissa, the associate sent an email stating that: "That change is OK with us." Again copies of that email were sent to Mr. Grossman as well as Innoviva's California counsel.

23. At that point in time (if not sooner), all material points were resolved and the parties' agreement became binding under the law. All that was left was agreeing to the precise language of the press release, which as the attorneys had previously noted was a ministerial thing.

24. Sarissa immediately began tying up those loose ends. At 4:41 p.m., Mr. DiPaolo sent an email to Innoviva's legal team with some suggestions on the press release language, all of which were previously orally provided to Mr. Grossman as indicated above (making clear that Sarissa thought some of its proposals were "just our advice"), and at 4:51p.m. and 4:57 pm, Sarissa sent its signature pages to Innoviva and asked for Innoviva's signature pages in return.

25. Innoviva went radio silent. At 5:32 p.m., Mr. DiPaolo sent an email to the associate saying "call me to discuss logistics when you have a chance." Not hearing anything from the associate, at 6:26 p.m., Mr. DiPaolo tried calling Mr.

Grossman and then sent him an email saying "Just called you. Want to wrap up logistics. Call me at the office or on cell."

26. But silence continued as Innoviva's board decided whether to proceed with honor and integrity or with trickery and momentary advantage, in breach of its contractually binding obligations. It chose the latter. Upon information and belief, Innoviva's CEO, Michael Aguiar was substantially responsible for this decision. As set forth in greater detail in the § 220 action that Sarissa filed in this Court, Mr. Aguiar is hugely compensated for a job that essentially amounts to cashing royalty checks and occasionally meeting with GSK, the corporation paying the royalties. Mr. Aguiar has shown no sign of being willing, much less eager, to have his compensation reduced to anywhere close to market levels.

27. Upon information and belief, this is why Mr. Aguiar had been hostile to the idea of talking with Sarissa from the start. Indeed, it appears that it was only the prospect of losing the proxy fight (and his seat on the board) that got him to agree to talk about settlement at all (having two of nine directors thinking you are hugely overpaid is bad—but not as bad as having three of seven and not having a seat yourself). However, it also appears that Mr. Aguiar quietly kept soliciting proxies when the parties had already agreed to settle the contest.

28. And sometime shortly after the parties entered the agreement, and Sarissa had suspended its proxy solicitation efforts, Mr. Aguiar seems to have

struck gold. A large stockholder whose vote would decide the proxy contest agreed to vote in favor of the management slate at the last minute. Mr. Aguiar now had no need of the deal his company had just struck and his board had approved. So Mr. Aguiar caused the board to hold another meeting—a very different meeting than the one that morning—and at this meeting the board decided that it would not honor its agreements.

29. Sarissa does not know if any directors objected to repudiating a deal to which they had so recently agreed, but at around 7 p.m. on April 19th Mr. Grossman informed Mr. DiPaolo that the board would not proceed with the agreement. He did not deal with Sarissa's immediate protests that the agreement was already in force and binding, while the radio silence had bought management the time it needed to prevent Sarissa from effectively soliciting proxies since the large stockholders had already gone home and would not be able to change their vote before the 8:30 a.m. meeting time the following morning.

30. To date, Innoviva has not explained to Sarissa, or as far as the plaintiffs know, anyone else, why it contends that the agreement is not binding. The plaintiffs assume that failure to explain or even respond is because the Innoviva spin machine has not figured out how to spin its behavior in a way that is credible under well-established law.

31. The agreement entered into by the parties here was binding and Sarissa respectfully requests this court to award it specific performance of the agreement's terms. The harm here is serious and, by definition, irreparable. According to the simple agreement, upon which Sarissa insisted and the board agreed, Dr. Kostas and Mr. Bickerstaff were to have been put on the board on the evening of April 19th and then voted on by the stockholders at the annual meeting, which was to be adjourned until no later than May 19, 2017.

32. The annual meeting is now complete and the Innoviva board is now making decisions in which, by contract, Dr. Kostas and Mr. Bickerstaff should be participating. They would only be two of nine and thus could not force the board to do anything, but the board would be obligated to hear their voices and listen to their thoughts and opinions on how the Company should move forward. Just having one independent voice—much less two—on a board where most of the directors blindly follow the CEO can have an enormously liberating effect on the others.

33. Every day on which Dr. Kostas and Mr. Bickerstaff are unable to participate in board deliberations is a day on which the agreement is violated and the Company's wrongdoing is rewarded.

34. The plaintiffs have no adequate remedy at law.

Count I

(pursuant to 8 *Del. C.* § 225)

35. Pursuant to the parties' agreement, Innoviva's Board of Directors was required to expand the board to nine directors, place Dr. Kostas and Mr. Bickerstaff on the board and then support their election to the Board by the stockholders (including voting their proxies in favor of that election) at the 2017 annual meeting of stockholders.

36. Innoviva, Mr. Aguiar and the other directors have provided no explanation for why they will not comply with the terms of the agreement. Instead, it appears they are searching for reasons to see what excuse is most plausible. But Delaware law on the point is clear. An agreement is binding when all substantial terms are agreed upon and all were agreed here.

37. This agreement did not give Aguiar and Innoviva a free option. Innoviva had everything it needed from Sarissa—including signature pages—to give the agreement binding effect, but it had no right to ask for signature pages to make it easy for it to enforce the agreement if that turned out to be the best course for its directors, and withhold its own signatures in order to create a purported option.

38. Nor could such a strategy work. Under Delaware law, an agreement becomes legally binding when all substantial terms are agreed upon unless the parties specifically agree that it will become binding at some other time. Here

earlier drafts of the agreement called on it to become binding only upon the issuance of a press release, but as has been seen that provision was removed. Nothing in the agreement provides that it would only become binding when Innoviva decided to send its own signature pages.

39. The agreement is enforceable and binding, and under § 225 the present board of Innoviva has no authority or right to act without the presence of Dr. Kostas and Mr. Bickerstaff, who are properly members of the board.

Count II

(Breach of Contract)

40. In addition, the plaintiffs request this Court to enforce specifically their agreement with Innoviva.

41. By failing to abide by the terms of the agreement Innoviva has breached its contract with Sarissa and its nominees.

42. Damages for breach of contract would be an inadequate remedy here because they would not provide the plaintiffs with the benefit of their bargain with Innoviva. Instead, specific performance is necessary to repair the harm caused by the unlawful action of Innoviva, Mr. Aguiar and the Board of Directors.

WHEREFORE, the plaintiffs respectfully request that the Court (1) issue an appropriate status quo order *pendent lite*; (2) specifically enforce the terms of the parties' agreement and order Innoviva and its directors and management to expand

the size of the Board of Directors to nine and appoint Dr. Kostas and Mr. Bickerstaff to the board; (3) award them their attorneys' fees for the costs of bringing and prosecuting this action; and (4) award them such other relief as might be just.

ASHBY & GEDDES

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