

Del. Supreme Court Lets \$3.8B Ligand Note Fix Stand

By **Rose Krebs**

Law360 (January 10, 2020, 8:04 PM EST) -- The Delaware Supreme Court on Friday affirmed a Chancery Court ruling over a botched formula used in a bond indenture from Ligand Pharmaceuticals Inc., rejecting certain traders' contention that the decision disregarded investor protections by allowing Ligand to unilaterally fix its potential \$3.75 billion blunder.

In a brief order, the en banc panel of justices let stand Vice Chancellor J. Travis Laster's May 2019 ruling that tossed the suit, which had sought to enforce a botched formula that would have given bond traders a \$4 billion conversion right for \$250 million in notes. The vice chancellor had ruled that Ligand had a right to correct the formula and annul the billion-dollar golden ticket bond traders had hoped to cash in.

"The [Supreme Court] properly affirmed the dismissal because it agreed with the thorough and well reasoned analysis set forth in the Court of Chancery's decision," Ligand's attorney Blair Connelly of Latham & Watkins LLP told Law360 on Friday. "Hopefully this ruling will deter similar lawsuits against issuers who exercise their contractual rights."

Ligand's troubles were traced to a nonpublic, convertible note offering in August 2014, which involved the release of an initial offering memorandum on a private placement convertible note issuance, followed by an indenture for the buyer transaction.

Although the earlier offering and related U.S. Securities and Exchange documents correctly described the conversion rate and calculation method, the indenture for the notes issued used an incorrect term in part of the conversion formula, potentially setting up the \$4 billion conversion right for \$250 million in notes.

Eight bond trading companies sued Ligand in July 2018, asserting that they believed their \$212 million share of notes would have carried a right to a stock and cash conversion worth about \$3.877 billion, a roughly 18.3-fold increase.

The suit claimed violations of the Trust Indenture Act of 1939, with the investors asserting they "relied on the clear and unambiguous language of the [original] indenture" and accusing Ligand of amending the document without notice.

However, Vice Chancellor Laster ruled that the Trust Indenture Act provision that Ligand was accused of violating does not apply to the indenture because it was not sold in a public offering, and even if it did apply, it only protects a noteholder's right to receive principal and interest payments, not conversion

rights.

In court filings, Ligand asserted that the bond traders were simply trying to squeeze extra value out of the company by threatening protracted litigation, despite the alleged enforceability of agreement terms allowing the correction.

During oral arguments in front of the justices on Wednesday, the traders' attorney Nipun Patel of Holland & Knight LLP told the appellate court that Vice Chancellor J. Travis Laster ruled in favor of Ligand's after-the-fact conversion equation amendment and dismissed the case without taking into account disputed facts, rules and interpretations.

In part, Patel said, the vice chancellor found that the securities document included a statement that would allow the mistaken conversion right to be unilaterally realigned after a note sale to match the formula provided in a separate offering memorandum, which Ligand said contained the originally intended rate.

"The Court of Chancery erroneously concluded that action was permissible because, as a factual matter, the offering memo supplied 'the original deal,'" said Patel, who represents hedge fund AG ONCON LLC and others. "That's a factual question. In order to conclude that the offering memo supplied the original deal, you have to accept Ligand's [claim to a] mistake as true."

Chief Justice Collins J. Seitz Jr., however, referred to a provision for reconciling details on the securities with the offering memo as "the elephant in the room." He pressed Patel on arguments that claimed the New York Uniform Commercial Code and "trumping" provisions of the note indenture barred Ligand from correcting the document without the bondholders' consent.

Connelly countered during oral arguments that there was no such impediment to allowing for the correction.

"There's been a suggestion made in the briefing that somehow it would be bad policy to allow this [amendment] provision to be enforced," he said. "We think it would be exactly the opposite. New York policy is to enforce contracts. This provision exists because in the rough and tumble world of how these deals are done, these things happen. Where there's a glitch, a mechanism is there so it can be quickly addressed."

Counsel for the traders did not immediately respond to a request for comment Friday.

The traders are represented by Elena C. Norman and Daniel Kirshenbaum of Young Conaway Stargatt & Taylor LLP, and Martin G. Durkin, Nipun Patel and Keith N. Sambur of Holland & Knight LLP.

Ligand is represented by David E. Ross and R. Garrett Rice of Ross Aronstam & Moritz LLP, and Blair Connelly and Zachary L. Rowen of Latham & Watkins LLP.

The case is AG ONCON LLC et al. v. Ligand Pharmaceuticals Inc., case number 300-2019, in the Supreme Court of the State of Delaware.

--Additional reporting by Jeff Montgomery and Dean Seal. Editing by Adam LoBelia.