

## A Halloween Scare: Ambiguity in Loan Terms

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A recent decision in the Commercial Division of the Supreme Court, New York County, emphasizes the importance of clear and unambiguous contract drafting in all lending situations, including real estate. Acting Supreme Court Justice Anar Rathod Patel denied a motion to dismiss in *BioPharma Credit PLC, et al. v. Biogen Inc., et al.*,<sup>[1]</sup> because certain payoff terms in a loan agreement were subject to “countervailing interpretations.”<sup>[2]</sup>

The suit stems from a \$275 million loan agreement between the plaintiffs, as lender, and defendant Reata Pharmaceuticals, Inc. (Reata), as borrower. Funding of the loan was tied to Reata’s sales of a pharmaceutical, *Skyclarys*, a version of omeveloxolone which was developed for the treatment of Friedrich’s ataxia. The loan was disbursed in tranches, of which Tranches A, B and C were mandatory and Reata was required to withdraw. The funding of Tranches A and B occurred without issue. However, the parties disagreed as to whether Reata was required to draw the Tranche C funds. Pursuant to the loan agreement, the funding of Tranche C was tied to certain commercial revenue thresholds reached by sales of *Skyclarys*. The “Tranche C Net Sales Trigger” was activated, and the money was to be disbursed, when the earlier of the following were met:

(a)(i) if the first commercial sale of omeveloxolone in the U.S. occurs on or before June 30, 2023, TTM Net Revenue having equaled or exceeded \$40 million for the trailing 12-month period ended December 31, 2023, or (ii) if the first commercial sale of omeveloxolone in the U.S. occurs between (and including) July 1, 2023, and September 30, 2023, TTM Net Revenue having equaled or exceeded \$40 million for the trailing 12-month period ended March 31, 2024, or (iii) if the first commercial sale of omeveloxolone in the U.S. occurs on or after October 1, 2023, TTM Net Revenue having equaled or exceeded \$40 million for the trailing 12-month period ended June 30, 2024; and (b) TTM Net Revenue having equaled or exceeded \$55 million for any trailing 12-month period ending on or prior to March 31, 2024; in each case of clauses (a)(i), (a)(ii), (a)(iii) and (b) above, as reasonably determined by a Responsible Officer of Borrower in good faith in accordance with GAAP and supported by Borrower’s financial statements (including with respect to any portion of the applicable trailing 12-month period included in the financial statements filed with the SEC).<sup>[3]</sup>

The first U.S. commercial sale of *Skyclarys* occurred June 23, 2023. A short time later, defendant Biogen Inc. (Biogen) acquired Reata, and the two merged on September 26, 2023, with Reata becoming a wholly owned subsidiary of Biogen. Revenues for *Skyclarys* were \$28,519,000 in July and August 2023, and September revenues were projected to be \$14,199,673. However, on the same day Reata and Biogen merged, Biogen sought to prepay the loan and terminate the loan agreement by paying the plaintiffs the outstanding principal and fees for Tranches A and B. Defendants did not pay anything toward Tranche C, arguing they did not meet the Net Sales Trigger prior to Biogen’s acquisition of Reata, and that Biogen was not a “successor” to the loan agreement and therefore not liable for its repayment. The plaintiffs disagreed, notified the defendants of their default and accelerated the loan, and subsequently filed suit for breach of the loan agreement. The defendants eventually filed a motion to dismiss the plaintiffs’ complaint, resting on three main points: (1) Tranche C was never triggered, and even if it were, funding of Tranche C was not automatic; (2) Assuming the Tranche C trigger was met, Reata was not obligated to close on it prior to merging with Biogen and the subsequent termination of the loan agreement; and (3) a cause of action against Biogen was improper, as Biogen was neither a party to the loan agreement nor a successor to Reata.

The defendants’ primary argument was that Tranche C was never triggered because the language of the Net Sales Trigger required calculation of revenue on a certain date, but that date did not occur prior to the date the loan

agreement was terminated. The defendants compared the language of subsection (a) (excerpted above), which calculated revenues for a 12-month trailing period *ending* December 31, 2023, against that of subsection (b), which calculated the same revenues but for a period *ending on or prior to* March 31, 2024. Because the language of (a) required calculation on a specified date, and that date had not yet occurred, the defendants posited that Tranche C could not have been triggered prior to that date. The defendants also argued that GAAP precluded certain revenue calculations which would have triggered Tranche C. The defendants argued that the last month for which revenue was calculable under GAAP prior to termination of the loan agreement was August 2023. Thus, at the end of August, GAAP-calculated revenues did not meet the \$55 million threshold specified in subsection (b) of the Tranche C Net Sales Trigger, so the defendant was not required to fund Tranche C.

The plaintiffs had a markedly different interpretation of the same Net Sales Trigger provisions. First, Plaintiffs pointed to the loan agreement definition of “TTM Net Revenue,” which provided that it may be determined “as of any date” and “for any period.” Second, the plaintiffs demonstrated that nothing in GAAP forbids revenue calculation prior to the end of a month, and that the defendants made that very calculation in their November 2023 Form 10-Q. The court found merit in both parties’ arguments, opining that the provisions in question “could be reasonably interpreted in either direction.”<sup>[4]</sup> As an example, the court referred to the definition of TTM Net Revenue, which does provide for calculation “as of any date of determination,” however, the definition also requires calculation in accordance with GAAP and the loan agreement defines GAAP in a manner too broad to render the calculation terms unambiguous. Given the ambiguity and clear disagreement between the parties on its interpretation, the court could not grant the defendants’ motion to dismiss on this point.

The defendants also argued that even assuming Tranche C was triggered, the funding of the tranche was not automatic upon meeting the revenue thresholds. Under the loan agreement, the defendants were required to file an “Advance Request Form” in which they specified a funding date at least 45 days in advance. Had the Tranche C trigger been met, the 45-day window would not have closed prior to the defendants’ termination of the loan agreement. The plaintiffs instead viewed this 45-day period as a formality and argued that the obligation to fund was triggered solely upon meeting the applicable revenue threshold. Here, the court found the loan agreement “entirely silent” as to the interplay of the funding obligation and 45-day period, and given the absence of extrinsic evidence to indicate otherwise, the loan agreement was ambiguous in this respect.<sup>[5]</sup>

The defendants’ second main point centered around certain conditions precedent to funding Tranche C which the defendants argued were not met prior to termination and, thus, the defendants were not obligated to draw the funds given their nonoccurrence. The court was not as receptive to this argument, citing precedent which held that “a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of a condition.”<sup>[6]</sup> Here, the court determined that the defendants interfered with the conditions precedent to funding Tranche C by terminating the loan agreement prior to their occurrence, and thus the defendants could not “avail themselves of these conditions and argue that their non-occurrence absolves Defendants of liability.”<sup>[7]</sup>

Lastly, the parties disputed whether Biogen became successor to the loan agreement by its acquisition of Reata. The loan agreement did not define “successor” and as the defendants pointed out, Biogen was not a party to the loan agreement and operates independently of Reata, despite Reata becoming a subsidiary of Biogen. The plaintiffs disagreed, arguing that Biogen’s securities filings show it assumed all of Reata’s liabilities, that Biogen replaced all of Reata’s staff and executives, and that Reata’s previous web address automatically redirects to Biogen’s website. The court first noted that it cannot *sua sponte* implicate Biogen, as the loan agreement was absent a definition for “successor.” However, under relevant precedent, Biogen could be held liable if its merger with Reata was deemed a *de facto* merger. Courts consider a number of factors in determining whether a *de facto* merger occurred, including (1) continuity of ownership, (2) cessation of ordinary business and dissolution of the predecessor, (3) assumption of liabilities by the successors, and (4) continuity of management, personnel, location, assets and general business operation. Given the presence of at least some of these factors, the Court found the question of Biogen’s liability to be a factual issue resolved best through discovery.

Based on the foregoing, the Court denied the defendants’ motion to dismiss in its entirety. While the ultimate result is still to be determined, one thing is unambiguous – the ambiguity of a critical provision has resulted in costly litigation.

<sup>[1]</sup> 2024 NY Slip Op 51335(U), 2024 N.Y. Misc. LEXIS 7437

<sup>[2]</sup> *Id.* at 9.

[3] *Id.* at 2.

[4] *Id.* at 7.

[5] *Id.* at 8.

[6] *Id.* at 9, citing *Kooleraire Serv. & Installation Corp. v. Bd. of Ed. of City of New York*, 28 N.Y.2d 101 (NY 1971).

[7] *Id.* at 9-10.