IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, Plaintiff, v. DAVID PYOTT, HERBERT W. BOYER, LOUIS J. LAVINGNE, GAVIN S. HERBERT, STEPHEN J. RYAN, LEONARD D. SCHAEFFER, MICHAEL R. GALLAGHER, ROBERT ALEXANDER INGRAM, TREVOR M. JONES, DAWN E. HUDSON, RUSSELL T. RAY, and DEBORAH DUNSIRE, Defendants, and ALLERGAN, INC., Nominal Defendant.	)	C.A. No. 5795-VCL

U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND'S MOTION FOR INTERVENTION

U.F.C.W. Local 1776 & Participating Employers Pension Fund ("UFCW Fund") respectfully submits this Motion for Intervention for the purpose of allowing UFCW Fund to intervene in *Louisiana Municipal Police Employees' Retirement System v. Pyott, et al.*, C.A. No. 5795-VCL, and subsequently staying the proceedings until UFCW Fund's books and records demand, made on November 3, 2010, is resolved,[1] and for the purpose of moving to appoint its

[1] UFCW Fund has not filed and cannot file a complaint in intervention at this time because it has not yet received the documents in response to its books and records demand. Nevertheless, UFCW Fund requests leave to intervene because, among other things, "[i]n order to have standing to seek a stay of this action, [UFCW Fund] must be [a] part[y] following leave to intervene." *See Sanders v. Wang*, C.A. No. 16640-NC, 1998 Del. Ch. LEXIS 207, at *9 (Del. Ch. Nov. 19, 1998) (Exhibit A hereto).

counsel, Lesley Weaver, Esq., of the law firm of Shepherd, Finkelman, Miller & Shah, LLP, lead counsel. The grounds for this Motion are as follows:

INTRODUCTION

1. *Louisiana Municipal Police Employees' Retirement System v. Pyott, et al.*, C.A. No. 5795-VCL, a derivative action initiated on September 3, 2010, is currently pending before this Court. That action seeks to hold members of the Board of Directors (the "Board") of Allergan, Inc. ("Allergan" or the "Company") (collectively, the "Allergan defendants") liable for their breaches of fiduciary duties in connection with the Company's sales, marketing, and branding of its drug BOTOX for uses not approved by the Food and Drug Administration ("FDA").

2. At this stage of the proceedings, the Allergan defendants have filed motions to dismiss the action, and on November 24, 2010, Louisiana Municipal Police Employees' Retirement System ("LMPERS") filed an answering brief in opposition to the Allergan defendants' motions to dismiss, in lieu of filing an amended complaint. Due to LMPERS's failure to make a demand for inspection of Allergan's books and records pursuant to 8 *Del. C.* § 220, and the likelihood that UFCW Fund would be estopped from filing a complaint against Allergan in the event Allergan's motions to dismiss are granted, UFCW Fund respectfully requests that the Court allow it to intervene in this action.

STATEMENT OF FACTS

3. Allergan is a Delaware corporation that specializes in manufacturing and marketing pharmaceuticals and medical devices. Allergan manufactures a pharmaceutical formulation of botulinum toxin type A, marketed under the name BOTOX. In 1989, the FDA approved BOTOX for the treatment of blepharospasm, which is involuntary contraction and closure of eyelid muscles, as well as for the treatment of strabismus, which is misalignment of the

eyes. In 2000, the FDA approved BOTOX for cervical dystonia, which is abnormal head and neck posture with associated involuntary movements. In 2004, the FDA approved BOTOX for the treatment of severe primary axillary hyperhidrosis, which is severe underarm sweating. BOTOX has also been approved for the treatment of increased muscle stiffness in elbow, wrist, and finger muscles in adult patients with upper limb spasticity.

4. Under the Food, Drug, and Cosmetics Act ("FDCA"), 21 U.S.C. §§ 301-397, and the Public Health Services Act ("PHSA"), 42 U.S.C. § 262 *et seq.*, drug manufacturers may not market or promote a drug for a use that the FDA has not approved. See 21 U.S.C. §§ 331(a), (d); 42 U.S.C. §§ 262(a)(1), (b); 21 C.F.R. § 601.12. Specifically, under the FDCA, a drug manufacturer illegally misbrands a drug if its labeling includes information about any of the drug's unapproved uses.

5. While the FDA has only approved BOTOX for the treatment of the limited number of disorders listed above, Allergan promoted BOTOX for numerous off-label or unapproved uses, including the treatment of, *inter alia*: pain; headaches, including chronic migraine headache, episodic migraine headache, tension type headache, and post-whiplash headache; spasticity; juvenile cerebral palsy; lower back pain; tennis elbow; temporomandibular joint disorder (TMJ); arthritis; enlarged prostate; overactive bladder; and incontinence due to neurogenic bladder.

6. Allergan promoted BOTOX for off-label or unapproved uses, through, among other ways, false and fraudulent statements to physicians regarding BOTOX's efficacy, made through Allergan's salesmen and medical liaisons, Continuing Medical Education programs funded by Allergan, off-label injection training sessions funded by Allergan, articles published in journals and magazines that were written in whole or in part by Allergan employees, and websites funded and controlled by Allergan. Allergan further promoted the off-label or unapproved uses

by training physicians to miscode and alter records on claims forms to ensure payment by Medicare, Medicaid, and other federal health care programs. Furthermore, Allergan provided physicians with "value added support services," including individual patient audits, that would facilitate third party reimbursement payments, maximize payments to doctors, and encourage additional sales of BOTOX. Allergan also made false statements to Medicare and other federal health care program contractors to impact coverage determinations, lobbied healthcare payers to expand coverage for off-label uses, and provided kickbacks to physicians.

7. The Company further promoted BOTOX for off-label or unapproved uses by paying doctors to attend Advisory Boards, promotional dinners, or to tout Botox's efficacy for off-label uses, and by creating and funding organizations to promote off-label uses of BOTOX. Allergan also provided selective discounts to doctors who predominantly treated off-label conditions, and encouraged doctors to diagnose headaches and pain as symptoms of its on-label cervical dystonia indication and other approved indications. Additionally, Allergan promoted BOTOX to medical specialists who did not customarily treat patients with any of the conditions that BOTOX was approved to treat, including headache clinics, anesthesiologists, pain specialists, and pediatricians.

8. On June 5, 2007, Amy M. Lang, M.D. and Charles J. Rushin filed a *qui tam* action in the United States District Court for the Northern District of Georgia to recover damages and civil monetary penalties arising from Allergan's violations of the False Claims Act, 31 U.S.C. §§ 3729-3733. *United States ex rel. Lang v. Allergan, Inc.*, Civ. No. 1:07-cv-1288-WSD (N.D. Ga.). On February 22, 2008, Cher Beilfuss and Kathleen O'Connor-Masse filed a similar *qui tam* action against Allergan in the United States District Court for the District of Massachusetts. On October 26, 2009, Albert Edward Hallivis filed a *qui tam* action against Allergan in the United States District Court for the District of Maryland. The cases filed in 2008 and 2009 were

removed to the Northern District of Georgia. *United States ex rel. Beilfuss v. Allergan, Inc.*, Civ. No. 1:08-cv-1883-WSD (N.D. Ga.); *United States ex rel. Hallivis v. Allergan, Inc.*, Civ. No. 1:09-cv-3434-WSD (N.D. Ga.). The United States chose to intervene in the *Lang* and *Beilfuss* actions.

9. On September 1, 2010, the United States Department of Justice ("DOJ") announced that Allergan had agreed to plead guilty and pay $600 million to resolve criminal and civil allegations arising from Allergan's unlawful promotion of BOTOX. Allergan entered into a settlement agreement with the United States of America, acting through the DOJ and the United States Attorney's Office for the Northern District of Georgia and on behalf of the Office of Inspector General of the United States Department of Health and Human Services ("OIG-HHS"), the TRICARE Management Activity, the United States Office of Personnel Management, the United States Department of Veterans Affairs, and the Office of Workers' Compensation Programs of the United States Department of Labor, and the relators identified in the aforementioned *qui tam* actions ("Settlement Agreement").

10. Pursuant to the Settlement Agreement, the Company agreed to plead guilty to violating the FDCA, 21 U.S.C. §§ 331(a) and 333(a)(1), in connection with the introduction into interstate commerce of a misbranded drug, BOTOX. Allergan also consented to a criminal fine and forfeiture totaling $375 million. The Company further agreed to pay a civil fine of $225 million to the federal government and certain Medicare participating states to settle the three aforementioned *qui tam* actions, as well as separate state actions brought on similar grounds.

11. As a condition precedent to the settlement of the aforementioned matters, Allergan entered into a Corporate Integrity Agreement ("CIA") with the OIG-HHS. The CIA requires, among other things, that: Allergan maintain a Chief Compliance Officer and a U.S. Compliance Committee; the Company's Board review and oversee matters related to compliance with federal health care program requirements, FDA requirements, and the obligations of the

CIA; the Board meet at least quarterly to review and oversee Allergan's Compliance Program; the Board adopt a signed resolution for each Reporting Period summarizing its review and oversight of matters relating to Allergan's compliance with federal health care program requirements, FDA requirements, and the obligations of the CIA; and certain Allergan employees monitor and oversee activities within their areas of authority and annually certify that the applicable Allergan component is compliant with federal health care program requirements, FDA requirements, and the obligations of the CIA.

NATURE AND STAGE OF THE PROCEEDINGS

12. On September 3, 2010, almost immediately after Allergan entered into the CIA and Settlement Agreement, and without first making a demand for inspection of books and records pursuant to 8 *Del. C.* § 220, LMPERS filed its derivative complaint against Allergan and the Board. That complaint alleges "breaches of fiduciary duty of loyalty and commission of waste by the board of directors of . . . Allergan[.]"

13. Soon after, three derivative complaints were filed in the United States District Court for the Central District of California. On September 9, 2010, Willa Rosenbloom filed a derivative complaint against Allergan and the Board. *Rosenbloom v. Pyott, et al.*, Case No. 8:10-cv-01352-DOC. On September 17, 2010, Daniel Himmel filed a derivative complaint against Allergan and the Board. *Himmel v. Pyott, et al.*, Case No. 8:10-01417-DOC. On September 24, 2010, Pompano Beach Police & Firefighters' Retirement System and Western Washington Laborers-Employers Pension Trust filed a derivative complaint against Allergan and the Board. *Pompano Beach Police & Firefighters' Ret. Sys., et al. v. Pyott, et al.*, Case No. 8:10-cv-01449-DOC.

14. On October 5, 2010, United States District Court Judge Orinda D. Evans accepted Allergan's guilty plea and sentence, approving the Settlement Agreement. On October

11, 2010, LMPERS filed an amended complaint.[2] On October 25, 2010, the Allergan defendants filed motions to dismiss LMPERS's derivative complaint. Also on October 25, 2010, the three derivative complaints filed in California were consolidated. *In re Allergan, Inc. S'holder Deriv. Litig.*, Master File No. SACV10-01352-DOC.

15. On November 3, 2010, UFCW Fund made a demand for inspection of Allergan's books and records, pursuant to 8 *Del. C.* § 220. *See* attached Exhibit B. In that request, UFCW Fund demanded that Allergan immediately make available books, records, and documents related to, *inter alia*: (1) All Board materials concerning the Company's sales, marketing, or branding of BOTOX for both FDA approved and off-label uses, conditions, and dosages; (2) All Board Materials concerning, but not limited to, specific studies or documents regarding BOTOX; (3) All Board Materials concerning the investigation and settlement of the *qui tam* actions discussed above; (4) All Board Materials concerning, discussing, or relating in any way to the Settlement Agreement; (5) All Board Materials concerning the Company's compliance, or efforts to comply, with the Settlement Agreement; (6) All documents reflecting or embodying any procedures, protocols, or controls created, designed, or intended to ensure compliance with the FDCA, the Social Security Act, or other federal health care programs; (7) All Board Materials concerning the CIA; and (8) All Board Materials concerning compliance with the CIA. On November 19, 2010,

[2] On October 4, 2010, the United States filed a Government Memorandum in Support of Binding Plea and Sentencing Memorandum in the criminal action against Allergan. *United States v. Allergan*, Crim. No. 1:10-cr-00375-ODE (N.D. Ga.). Furthermore, on October 5, 2010, a Plea Agreement was entered into by the United States Attorney's Office for the Northern District of Georgia and Allergan. While LMPERS failed to mention either document in its amended complaint filed on October 11, 2010, LMPERS relies on both documents throughout its answering brief in opposition to the Allergan defendants' motions to dismiss, further indicating the unnecessary haste with which LMPERS is pursuing this action. UFCW Fund anticipates demanding and receiving documents from Allegan regarding the subject matter of both government documents.

Allergan agreed to provide certain requested documents, and the parties are currently negotiating a form of confidentiality agreement.[3]

16. On November 24, 2010, LMPERS filed an answering brief in opposition to the Allergan defendants' motions to dismiss. The Allergan defendants are to file their reply briefs on December 8, 2010, and oral argument on the motions to dismiss will be held on December 17, 2010.

ARGUMENT

17. Court of Chancery Rule 24 governs intervention in an action:

> (a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
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> (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

"This Court will deny a motion to intervene under Court of Chancery Rule 24 where the movant's claims are identical to the claims already raised and where the movant's interests are adequately protected by the original plaintiff(s)." *S. St. Corp. Recovery Fund I v. Salovaara*, C.A. No. 16579, 1999 Del. Ch. LEXIS 144, at *12-13 (Del. Ch. July 9, 1999) (attached Exhibit C).

[3] The Company's responsive letter was designated "Confidential," and in the absence of a confidentiality agreement, UFCW Fund has not included the responsive letter as an exhibit hereto.

18. The Supreme Court of Delaware has repeatedly emphasized that shareholder "plaintiffs may well have the 'tools at hand' to develop the necessary facts for pleading purposes,' including the inspection of the corporation's books and records under 8 *Del. C.* § 220." *White v. Panic*, 783 A.2d 543, 549 n.15 (Del. 2001) ("The Court of Chancery was certainly justified in chastising the plaintiff for his lackluster pre-suit efforts."); *see also Brehm v. Eisner*, 746 A.2d 244, 266-67 (Del. 2000) ("Plaintiffs may well have the 'tools at hand' to develop the necessary facts for pleading purposes. For example, plaintiffs may seek relevant books and records of the corporation under Section 220 of the Delaware General Corporation Law[.]"). *See generally Freund v. Lucent Techs., Inc.*, C.A. No. 18893, 2003 Del. Ch. LEXIS 3, at *13 (Del. Ch. Jan. 9, 2003) (attached Exhibit D) ("[T]he Delaware Supreme Court has made it clear that the public policy of this State is to encourage stockholders to utilize Section 220 before filing a derivative action . . . to meet the heightened pleading requirements of Court of Chancery Rule 23.1 that are applicable to such actions."). As the Supreme Court of Delaware explained in *Rales v. Blasband*:

> Surprisingly, little use has been made of section 220 as an information-gathering tool in the derivative context. Perhaps the problem arises in some cases out of an unseemly race to the court house, chiefly generated by the "first to file" custom seemingly permitting the winner of the race to be named lead counsel. The result has been a plethora of superficial complaints that could not be sustained. Nothing requires the Court of Chancery, or any other court having appropriate jurisdiction, to countenance this process by penalizing diligent counsel who has employed these methods, including section 220, in a deliberate and thorough manner in preparing a complaint that meets the demand excused test of Aronson.

634 A.2d 927, 934 n.10 (Del. 1993).

19. LMPERS chose not to use the "tools at hand" to develop the necessary facts in its suit against Allergan. Specifically, LMPERS did not seek relevant books and records of Allergan under 8 *Del. C.* § 220. Instead, LMPERS filed its complaint a mere two days after the DOJ's announcement that Allergan had agreed to plead guilty and pay $600 million to resolve its

criminal and civil liability arising from its unlawful promotion of BOTOX. This was more than a full month before District Court Judge Orinda D. Evans accepted Allergan's guilty plea and sentence.

20. To the contrary, UFCW Fund diligently prepared and investigated in anticipation of filing a derivative suit against Allergan. As discussed above, UFCW Fund made a Section 220 demand on Allergan, and Allergan is currently in the process of producing certain requested books and records. Accordingly, UFCW Fund will be able to gather and analyze the necessary information – information that LMPERS failed to obtain in support of its complaint – to be able to effectively represent UFCW Fund's and the other shareholders' interests against the Allergan defendants.

21. However, as this Court and numerous federal courts have held, collateral estoppel will bar relitigation of demand futility where one derivative suit was dismissed with prejudice, and a second shareholder plaintiff subsequently files similar claims against the same set of defendants in another court. *See, e.g., In re Career Educ. Corp. Deriv. Litig.*, Consol. C.A. No. 1398-VCP, 2007 Del. Ch. LEXIS 184 (Del. Ch. Sept. 28, 2007) (attached Exhibit E) (plaintiffs precluded from relitigating issue of demand futility based on dismissal of federal case with substantially similar allegations and claims); *Henik v. LaBranche*, 433 F. Supp. 2d 372 (S.D.N.Y. 2006) (where shareholder derivative suit brought in a state court was dismissed, and an analogous federal action was subsequently brought by a different plaintiff against the same set of defendants, the subsequent plaintiff's claim that demand was excused was barred by res judicata and collateral estoppel doctrines); *In re Sonus Networks, Inc. S'holder Deriv. Litig.*, 422 F. Supp. 2d 281 (D. Mass. 2006) (dismissal of a state court shareholder derivative case precludes different shareholder plaintiff in a parallel federal derivative suit from relitigating the issue of demand futility under the issue preclusion doctrine).

22. Accordingly, if the Allergan defendants succeed on their motions to dismiss, and LMPERS's complaint is subsequently dismissed, UFCW Fund will likely be estopped from filing a derivative suit against Allergan. Although, unlike LMPERS, UFCW Fund made a Section 220 demand on Allergan and is obtaining new facts and information about the Company, this Court held in *In re Career Education Corporation* that the plaintiff was estopped from relitigating demand futility after a parallel federal case was dismissed, despite only the second plaintiff making a Section 220 demand, and the plaintiff in the federal case failing to make such a demand. *See In re Career Educ. Corp*., 2007 Del. Ch. LEXIS 184, at *33-38 ("While the Delaware courts have encouraged prospective plaintiffs to make a *Section 220* demand before filing a derivative suit, there is no risk in this case that the application of issue preclusion will undercut that principle."); *see also In re Sonus Networks, Inc.*, 422 F. Supp. 2d at 294 ("Although these plaintiffs claim that it would be 'unfair' to preclude this litigation 'because another litigant failed to raise' additional factual support later developed, this circumstance does not 'justify affording [the plaintiffs] an opportunity to relitigate the issue.'"). *But see W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 643 n.22 (Del. Ch. 2006):

> Equitable considerations render dubious the majority position on this issue. Preventing subsequent individual plaintiffs from bringing potentially meritorious suits based on additional information gained in a *section 220* demand would undercut the purpose of the statute and the policy concern articulated by the Delaware Supreme Court that plaintiffs should employ *section 220* before filing suit. While a prior suit by another plaintiff with similar allegations of demand futility may bar a second plaintiff from filing the same suit, if the second plaintiff makes substantially different allegations of demand futility based on additional information, issue preclusion, from both a logic and fairness standpoint, would not apply.

23. Accordingly, despite UFCW Fund obtaining new facts pertinent to the litigation, UFCW Fund would likely still be estopped from filing a derivative complaint if LMPERS's action is dismissed. Furthermore, even if UFCW Fund was not estopped from pursuing its own action following dismissal of LMPERS's complaint, the scope of documents available to UFCW

Fund under Section 220 may be limited by the Court. *See, e.g., Norfolk Cnty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, C.A. No. 3443-VCP, 2009 Del. Ch. LEXIS 20, at *18 (Del. Ch. Feb. 12, 2009) (attached Exhibit F) ("The scope of documents available to a stockholder under § 220, however, is limited.").

24. Therefore, because UFCW Fund would likely be estopped from filing a complaint against Allergan in the event the Allergan defendants' motions to dismiss are granted, UFCW Fund requests that the Court allow UFCW Fund to intervene in this action as a matter of right, or, in the alternative, that the Court, in its discretion, permit UFCW Fund to intervene in this matter. *See* Ct. Ch. R. 24(a), (b). As the Second Circuit explained in *Dana v. Morgan*:

> [Plaintiff] knew of the pendency of the other suit and he had an opportunity to be heard in it. . . . At any time before decree he might have been made a party if he had chosen to intervene, and having become a party he might have informed the court of anything he deemed important to bring to its attention and might have had the bill of complaint amended if the court concluded an amendment necessary. . . . He had his opportunity and declined to avail himself of it.

232 F. 85, 91 (2d Cir. 1916); *see also Henik*, 433 F. Supp. 2d at 382 ("Just as Plaintiffs Henik and Lewis have failed to point out on this motion how the plaintiffs in Brown failed to adequately litigate the issue of demand futility, so too did they fail to do so by intervening in the Brown action.").

25. While UFCW Fund's derivative claims are related to those asserted by LMPERS, UFCW Fund is in the process of obtaining new, relevant information from Allergan relating to Allergan's marketing of BOTOX. This information (not available to LMPERS and not presented in LMPERS's complaint) will allow UFCW Fund to vigorously litigate the case. Accordingly, UFCW Fund will not merely restate the claims contained in LMPERS's complaint, but will bring significant new information to the table that will allow UFCW Fund to adequately represent the shareholders' interests. If UFCW Fund is not permitted to intervene in the action against

Allergan, and the action is dismissed, UFCW Fund's and the shareholders' abilities to protect their interests will be permanently impaired.

26. In the alternative, if the Court determines that UFCW Fund may not intervene as a matter of right, UFCW Fund requests that this Court, in its discretion, permit it to intervene in the action. First, UFCW Fund's claims have general questions of law and fact in common with LMPERS's claims, as both generally allege that Allergan breached its fiduciary duties in connection with its marketing of BOTOX for off-label uses. Second, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

CONCLUSION

For the foregoing reasons, UFCW Fund respectfully requests that this Court grant its Motion for Intervention and, subsequently, stay the proceedings until the issue of leadership can be decided and UFCW Fund's books and records demand is resolved.

Dated: November 30, 2010

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