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 REPLY MEMORANDUM OF LAW TO PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND'S MOTION FOR INTERVENTION AND DEFENDANTS' OPPOSITION TO U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND'S MOTION FOR INTERVENTION

Dated: December 30, 2010

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U.F.C.W. Local 1776 & Participating Employers Pension Fund ("UFCW Fund") respectfully submits this Reply Memorandum of Law to Plaintiff's Memorandum of Law In Opposition to U.F.C.W. Local 1776 & Participating Employers Pension Fund's Motion for Intervention and Defendants' Opposition to U.F.C.W. Local 1776 & Participating Employers Pension Fund's Motion for Intervention,[1] 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,[2] and for the purpose of moving to appoint its counsel, Lesley Weaver, Esq., of the law firm of Shepherd, Finkelman, Miller & Shah, LLP, lead counsel.

ARGUMENT

A. ***Plaintiff's Opposition***

Louisiana Municipal Police Employees' Retirement System ("Plaintiff") claims the MFI is "belated" and the "action was progressing smoothly and swiftly" until UFCW Fund sought to intervene. Plaintiff's Memorandum of Law in Opposition to U.F.C.W. Local 1776 & Participating Employers Pension Fund's Motion for Intervention, Dec. 17, 2010, at 1 (hereinafter "Plaintiff's MOL"). It maintains the results of UFCW Fund's books and records demand are "speculative at best," and asserts UFCW Fund "has not shown that its interests are not being adequately represented by the Plaintiff, or that it could assert claims or causes of action that

[1] UFCW Fund's Motion for Intervention is hereinafter referred to as the "MFI."

[2] UFCW Fund has yet to receive documents in response to its books and records demand. As stated in its MFI filed on November 30, 2010, "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)." MFI 1, n.1. Counsel for UFCW Fund and Defendants are now concluding negotiations on a form of a proposed confidentiality agreement under which documents responsive to UFCW Fund's books and records demand will be produced. Defendants' Opposition to U.F.C.W. Local 1776 & Participating Employers Pension Fund's Motion for Intervention, Dec. 17, 2010, at ¶ 10.

would do anything but mirror those alleged in the Complaint." *Id*. Moreover, Plaintiff posits that "granting the [MFI] would only serve to unduly delay the adjudication of the rights of the original parties, while providing absolutely no benefit to Allergan, Inc. ('Allergan' or the 'Company'), the entity on whose behalf Plaintiff brought this action." *Id*. at 2.

B. *Defendants' Opposition*

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 (collectively, "Individual Defendants"), and Nominal Defendant Allergan, Inc. ("Allergan" or the "Company") (collectively, "Defendants"), are also opposed to the MFI. Parroting Plaintiff's MOL, they argue that the MFI is "untimely and inappropriate" because UFCW Fund made its books and records request "two months *after* plaintiff . . . instituted this action and now seeks to intervene nearly three months later."[3] Defendants' Opposition to U.F.C.W. Local 1776 & Participating Employers Pension Fund's Motion for Intervention, Dec. 17, 2010, at ¶ 1 (hereinafter "Defendants' MOL"). They claim that because briefing was completed on their motions to dismiss on the issues of demand futility and failure to state a claim, "[t]o the extent UFCW Fund's intervention would delay the litigation and require Defendants to re-brief these issues, Defendants are opposed, particularly because Plaintiff's argument that demand is excused is based on information that is readily available from public documents and UFCW Fund's application is premised on the mere *possibility* that it *may* uncover additional facts relevant to the pending claims." *Id.* (emphasis in original).

Defendants suggest that the Court first decide their motions to dismiss before turning its attention to UFCW Fund's MFI. The rationale behind this argument is that "[i]f the motions to

[3] UFCW Fund's demand was made less than one month after Plaintiff filed its verified amended derivative complaint, and it sought to intervene less than two months after the amended complaint was filed. This does not constitute a material delay, especially because Plaintiff is not seeking injunctive relief or expedited discovery.

dismiss are granted and UFCW Fund subsequently obtains new facts relevant to the claims asserted in this action . . . [it], or Plaintiff, may file a motion pursuant to Court of Chancery Rule 60(b) at that time." *Id.* at ¶ 2.

C. ***The Rights of Allergan Can Be Protected Only If the Court Grants the MFI***

1. **Background**

The Court's decision in *King v. VeriFone Holdings, Inc.*, 994 A.2d 354 (Del. Ch. 2010), which discussed at length the relationship between hastily-filed derivative actions and those filed after a books and records demand, effectively debunks the arguments advanced by Plaintiff and Defendants. The facts in *King* were slightly different in that the plaintiff in that case filed an action pursuant to 8 *Del C.* § 220 after his federal derivative action was dismissed without prejudice. This Court held that "[o]nce a plaintiff has chosen to file a derivative suit, it has chosen its course and may not reverse course and burden the corporation (and its other stockholders) with yet another lawsuit to obtain information it cannot get in discovery in the derivative suit." *Id.* at 357. However, the Court's opinion contained language that is highly applicable to the dispute at hand. The Court stated:

> For years, our Supreme Court has made clear that derivative plaintiffs should seek books and records and otherwise conduct an adequate investigation into demand excusal *before* rushing off to file a derivative complaint. Likewise, our Supreme Court has made clear that diligent plaintiffs who do so should not be penalized, and thus courts should be careful not to reward counsel who rapidly fire off complaints in order to secure first-filed status. Representative litigation plays an important role in protecting the interests of stockholders, but it will not optimally serve investors unless suits are actually filed on the basis of a real concern that wrongdoing has occurred and after a proper investigation.

Id. at 356 (emphasis in original) (citations omitted). That is precisely what happened in the present case -- Plaintiff filed its initial complaint ***two days*** after the settlement with the government was announced, and its amended complaint ***six days*** after the settlement was approved by a federal judge. MFI at ¶¶ 12, 14.

In *King*, as in the present case, "[t]here was no basis for exigency and no expedited treatment was sought." 994 A.2d at 355. The Court explained:

> [H]aste was the order of the day because the plaintiff's lawyers wanted to win the filing Olympics. And they did. The court handling the derivative suit rewarded the plaintiff and his counsel with lead plaintiff status. But in the lawyers' haste, they did not conduct an adequate pre-suit investigation. And when their complaint was confronted with a motion to dismiss for failure to plead demand excusal, it could not survive that motion.

Id.

Furthermore, the Court recognized that:

> [T]here was a rational reason for the haste, albeit one that has nothing to do with the best interests of [the company], its stockholders, or its prior stockholders who had bought and sold during the relevant time frame. ***That reason is related to the self-interest of the lawyers jockeying for position as lead counsel.*** In King's case, his counsel admits that she rapidly filed the complaint on his behalf, and eschewed seeking books and records at that time, in order to have the first derivative complaint on file and therefore to be the winner in the lead counsel Olympics race.
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> But winning that race came at an eventual price. Perhaps in large measure because King and his counsel did not undertake any responsible pre-suit investigation, the complaint was soon challenged on demand excusal grounds. . . .
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> King also forewent the chance to say to the Federal Court and to the defendants: "My bad, I filed prematurely. I am going to dismiss the case without prejudice, ask you to vacate the organizational order, and give me a chance to do what I should have done first, which is to file a books and records action, actually read the records obtained, and then make a decision whether to file. I regret the error but want to do the right thing." Instead, King pressed ahead with his amended complaint and joined issue with the defendants about whether it pled grounds for demand excusal.
>
> King then lost that contest and the Federal Court dismissed his complaint, but the Federal Court did not dismiss King's complaint with prejudice, even as to him only. Rather, the Federal Court granted King leave to amend his complaint yet again, and even suggested filing an action under *§ 220[.]* . . . ***Thus, the order rewarded a plaintiff and his counsel for winning the filing Olympics and engaging in behavior contrary to the interests of [the company], and***

> ***discouraged the entry of other possible plaintiffs who might have wished to proceed in the expected and investor-beneficial fashion, by investigating first and suing second.*** For their part, [the company] and its stockholders got to pay the costs of having the corporation and its directors and officers face litigation in two separate forums.

Id. at 357-59 (emphasis added).

The Court took a dim view of the plaintiff's tactics, stating:

> [P]erhaps most importantly, to allow King to use *§ 220* in an after-the-fact manner to bolster his derivative complaint exacerbates the perverse incentives motivating too many representative plaintiffs' unseemly and inefficient race to the courthouse. The only reason King rushed to file his complaint in the derivative action and has since sought supplementary discovery through the *§ 220* process is so that he and his counsel could win the race to become lead plaintiff and lead counsel. But, the intended end of the derivative lawsuit is not furthering the interests of fast-filing plaintiffs or their lawyers; rather, the derivative suit is one of several tools that stockholders may use to further the corporation's best interests. Because that tool can be misused if it is not wielded properly, courts must be mindful to create incentives that encourage the kind of litigation conduct that is more likely to benefit investors as a class. The derivative suit's central purpose is compromised when counsel prematurely file thinly-substantiated complaints that cannot meet the heightened *Rule 23.1* particularized pleading standard only in order to beat their competitors in the plaintiffs' bar, and then attempt to compensate for those inadequate pleadings through an after-the-fact process that needlessly saps corporate funds through drawn-out dismissal motion practice and simultaneous lawsuits in separate forums. ***Perhaps most critically, perpetuating this inefficient system can only demoralize plaintiffs' counsel who desire to diligently investigate the facts before filing a complaint in order to present a pleading that adequately pleads demand excusal and viable claims.***

Id. at 362-63 (emphasis added) (citations omitted). The Court emphasized:

> What does serve the interests of the public and the corporation's shareholders in this and similar derivative suit situations, however, is a process where plaintiffs conduct a thorough investigation in order to fashion adequate pleadings -- using *§ 220* if necessary -- *before* filing their initial complaint. That is why the Delaware courts have consistently admonished plaintiffs to use *§ 220 before* filing a derivative action.

Id. at 363 (emphasis in original) (citations omitted).[4] *See also Baca v. Insight Enters., Inc.*, C.A. No. 5105-VCL, 2010 Del. Ch. LEXIS 130, at *11-12 (Del. Ch. June 3, 2010) ("For reasons

[4] The Court in *King* also noted:

explained thoroughly in *King* . . . permitting a post-plenary-action Section 220 demand rewards entrepreneurial plaintiffs' lawyers who file quickly to gain control of a derivative case without conducting a meaningful pre-suit investigation.") (citation omitted).

2. Plaintiff's Arguments

Plaintiff was prepared for the "fast-filer Olympics," filing its initial complaint two days after Allergan's settlement with the government was announced, and its amended complaint six days after the settlement was approved by the federal court. It won a gold medal because it filed its complaint before: three other shareholder derivative actions were filed in the U.S. District Court for the Central District of California (which have since been consolidated); another action was filed in California State Superior Court; and UFCW Fund made its books and records demand. MFI at ¶¶ 13-15; Defendants' MOL at ¶¶ 4-5, 8. Plaintiff now opposes UCFW Fund's

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> ***Perhaps it is time for the reversal of the traditional presumption in favor of first filers in the derivative suit context.*** When a derivative plaintiff files a damages action hastily in the wake of a public announcement, there is no basis for expediting the case to further the interests of the corporation and its stockholders, and, when the derivative plaintiff forewent a books and records investigation and a period of deep reflection on the publicly available documents and the law, ***should not the presumption be that the plaintiff is not fit to serve as the lead fiduciary for the corporation and its stockholders?*** What rational argument is there that it advances the legitimate interests of investors to give a leg up to the first to get to court in a situation when being first to court is likely to compromise the ability of the filing plaintiff to sustain his derivative complaint? Admittedly, there are no easy answers to the question of how to select lead counsel in representative actions, but ***what is certain is that rewarding plaintiffs and their counsel who sue first, and investigate and think second is likely to maximize the costs to investors of representative suits and minimize the benefits.*** Put simply, the speed racer approach might benefit certain interests, but those interests do not include the investors of corporations or the other societal constituencies dependent on the effective and efficient governance of corporations.

994 A.2d at 364 n.34 (emphasis added).

efforts to strip it of its fast-filing gold medal, even though Allergan will be better served if the Court does so.

Plaintiff asserts that Count I of the Criminal Information filed by the United States Attorney for the Northern District of Georgia ("USA-NDG") demonstrates that Allergan's Board—the Individual Defendants in its derivative complaint—"affirmatively directed and approved Strategic Plans to increase the Company's off-label BOTOX® sales through an illegal promotion and market[ing] scheme." Plaintiff's MOL at 3, and Ex. 3 thereto. Plaintiff also maintains that other publicly available sources of information, such as the *qui tam* complaints that led to the Company's settlement with the government, the Company's annual reports to investors, and the charters for two of the Allergan Board's subcommittees, provide ample support for its allegations as to the Board's wrongdoing. Plaintiff's MOL at 4-6. Plaintiff then attempts to shoehorn its arguments into the confines of Rule 24(a) (Intervention of right) and (b) (Permissive intervention).[5]

a. Intervention of right

"Delaware courts embrace a liberal policy of allowing intervention." *Franklin Balance Sheet Inv. Fund v. Crowley*, C.A. No. 888-N, 2006 Del. Ch. LEXIS 188, at *11 (Del. Ch. Oct. 19, 2006). Rule 24(a) states:

[5] Plaintiff argues that UFCW Fund's motion should be denied pursuant to Rule 24(c) because its motion to intervene was not "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Plaintiff's MOL at 17. However, the failure to file a pleading is not a procedural defect upon which to deny a motion to intervene. *Schiff v. RKO Pictures Corp.*, 136 A.2d 193 (Del. Ch. 1954). *See also Caras v. Am. Original*, No. 1258, 1987 Del. Ch. LEXIS 531 (Del. Ch. Nov. 23, 1987) (cited by Plaintiff) (proposed intervenor need not file pleading with a motion to intervene where a similar claim has been asserted by the existing plaintiff). The Court has the inherent power to stay this action, as requested by UFCW Fund, until Defendants respond to its books and records demand, and UFCW Fund determines whether the documents produced justify continuing its efforts to intervene. *See Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009) ("This Court possesses the inherent power to manage its own docket, including the power to stay litigation on the basis of comity, efficiency, or simple common sense.") (citations omitted). UFCW Fund can file its complaint, if the facts so warrant, at that time.

> 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.

Plaintiff argues that UFCW Fund and the Company do not have an "interest at risk" under Rule 24(a). *Cf. Harris v. RHH Partners, LP*, C.A. No. 1198-VCN, 2009 Del. Ch. LEXIS 65, at *3 (Del. Ch. Apr. 23, 2009) ("A motion to intervene [under Rule 24(a)] seeks to evaluate whether, in its absence, the interests of a non-party will be impaired."). It claims they cannot "be adversely affected if the Motion to intervene is denied." Plaintiff's MOL at 18. Plaintiff maintains, on the one hand, "if the Complaint is upheld, *as it should be*," then it will "be entitled to conduct full discovery of the Company and the Individual Defendants." *Id.* (emphasis added).[6] On the other, if its complaint is dismissed, "there will be no impediment to the Movant in moving forward with its books and records demand." *Id.* at 19. Plaintiff suggests that "if its books and records demand were to somehow produce significant new facts that the Movant could use to craft a new complaint with substantially different allegations, denial of the Motion to intervene would cause it no harm," even if Defendants' motion to dismiss on the basis of demand futility is granted. *Id.*

The flimsiness of Plaintiff's argument cannot be overstated. Plaintiff assumes that its complaint should be "upheld," *i.e.*, Defendants' motions to dismiss should be denied. While such confidence is admirable, it may not be realistic. Without analyzing Plaintiff's demand futility or failure to state a claim arguments in detail,[7] it is fair to say that: (1) establishing demand futility

[6] Defendants agree, arguing that UFCW Fund's motion will be moot if the Court denies their motions to dismiss. Defendants' MOL at ¶ 21.

[7] UFCW Fund needs to tread lightly on this subject. It is loath to dissect the merits of Plaintiff's demand futility arguments or those as to whether it stated a claim upon which relief can be

is a relatively "onerous" burden for any plaintiff, *see Bakerman v. Sidney Frank Importing Co.*, C.A. No. 1844-N, 2006 Del. Ch. LEXIS 180, at *19 (Del. Ch. Oct. 10, 2006); and (2) all of the documents relied upon by Plaintiff—including the Criminal Information—provide a large amount of detail as to the *Company's* wrongdoing but less so when it comes to that of the *Board*; there do not appear to be any particularized "smoking guns" establishing the Board's culpability. *See, e.g.*, Criminal Information at ¶ 14 ("Allergan was aware of the prohibitions on promoting and marketing a drug or biologic in interstate commerce for off-label uses."); ¶ 17 ("Allergan made it a top corporate priority to maximize sales of BOTOX for spasticity, migraine headache and pain, none of which were approved by the FDA."); ¶ 21 ("In an email, an Allergan executive states: 'It's too bad that there is no easy way to obtain "headache" in our label . . .'").[8] Not surprisingly, Defendants argue that "Plaintiff has not alleged facts demonstrating a wrongful action by the Directors." Instead, the complaint generally alleges that the Board "approved strategic plans that sought to promote and take advantage of the off-label marketing scheme. . . . But Plaintiff provides no detail as to which Board members approved the plans, when any plans were approved, what the content of those plans was, or any other particularized facts concerning the alleged strategic plans." Individual Defendants' Opening Brief in Support of Their Motion to Dismiss the Complaint, Oct. 25, 2010, at 15.

This is why UFCW Fund's books and records demand is of critical importance. It tailored its demand to request only "Board Materials" concerning the corporate wrongdoing alleged by the government and the *qui tam* plaintiffs, and regarding the settlement of those

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granted in full view of the Defendants. On the other hand, UFCW Fund needs to demonstrate to the Court why the Company's interests are not being represented in the best possible manner by the Plaintiff.

[8] "Allergan" was defined as "Allergan, Inc. . . . a global corporation formed under the laws of the state of Delaware . . ." Criminal Information at ¶ 2.

actions.[9] The Company's response to the books and records demand may be of invaluable assistance in establishing the Board's culpability or lack thereof, the futility of demand, and the outcome of Defendants' motions to dismiss. Put another way, staying this action until the books and records demand has been complied with, then permitting UFCW Fund to intervene with a fresh complaint incorporating the results of its investigation to fashion adequate pleadings (should such a complaint be justified), will inure to Allergan's best interests because it may be the only way for the Company to survive a motion to dismiss. It will also deny rewarding Plaintiff with a gold medal for fast filing without conducting an adequate investigation.[10] There is no down side to proceeding as such other than creating a minor delay in a case without any time exigencies. *See King*, 994 A.2d at 364 n.34 ("When a derivative plaintiff files a damages action hastily in the wake of a public announcement, there is no basis for expediting the case to further the interests of the corporation and its stockholders[.] . . .").

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[9] The demand letter defined "Board Materials" to mean "all documents concerning, related to, provided at, considered at, discussed at, or prepared or disseminated in connection with any meeting of the Company's Board of Directors or any regular or specially created committee thereof (including, without limitation, the Audit and Finance, Corporate Governance, Organization and Compensation, and Science & Technology Committees), including all presentations, board packages, recordings, agendas, summaries, memoranda, transcripts, notes, minutes of meetings, drafts of minutes of meetings, exhibits distributed at meetings, summaries of meetings, or resolutions."

[10] In Plaintiff's rush to file, it failed to mention in its amended complaint the Government Memorandum in Support of Binding Plea and Sentencing Memorandum in the criminal action against Allergan, as well as the Plea Agreement entered into by the USA-NDG and Allergan. UFCW Fund, in contrast, expects to receive Board Materials concerning these documents. MFI at ¶ 14 n.2. Plaintiff shrugged off this lapse by claiming that "the allegations in the Complaint are clearly sufficient to demonstrate both demand futility and the viability of the claims asserted in the Complaint. Further . . . the Sentencing Memorandum . . . essentially iterates logical and reasonable *inferences* that are otherwise permissible to draw in Plaintiff's favor from the facts alleged in the Complaint[.] . . ." Plaintiff's MOL at 21 n.10 (emphasis added). Therein lies the difference between Plaintiff and UFCW Fund: Plaintiff is willing to risk the Company's chances on its fast-filed complaint and inferences to be drawn therefrom, whereas UFCW Fund prefers to represent Allergan after conducting a thorough investigation, including obtaining Board Materials through a books and records demand that may eliminate the need to draw inferences as to what the Board knew and when it knew it.

Plaintiff's suggestion that UFCW Fund will not be harmed if Plaintiff loses the pending motions to dismiss because it may proceed with its books and records demand and file a new complaint if the results of its demand produce significant new facts with substantially different allegations is of no help to UFCW Fund or the Company. The fact is that a dismissal of the Plaintiff's complaint may well preclude UFCW Fund from initiating a new derivative action, even one that has been thoroughly investigated and documented. *See Norfolk Cnty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, C.A. No. 3443-VCP, 2009 Del. Ch. LEXIS 20 (Del. Ch. Feb. 12, 2009), *aff'd*, 977 A.2d 899 (Del. 2009); *In re Career Educ. Corp. Deriv. Litig.*, Consol. C.A. No. 1398-VCP, 2007 Del. Ch. LEXIS 184 (Del. Ch. Sept. 28, 2007).

This Court has said that "[w]hile 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." *West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 643 n.22 (Del. Ch. 2006). However, in *Norfolk County*, the Court found that the "extension of collateral estoppel" as articulated in *West Coast Management* "was based on the unique position in a derivative suit of the corporation, which is the true party in interest." 2009 Del Ch. LEXIS 20, at *28 (citing *In re Career Educ. Corp.*, 2007 Del. Ch. LEXIS 184). It noted that "[t]o some extent, therefore, the applicability of collateral estoppel depends upon the adequacy of representation in the prior proceeding. If a subsequent plaintiff makes credible allegations that the interests of the corporation were not suitably represented in the prior proceeding, collateral estoppel may not apply." *Id.* at *28-29. ***The Court went on to reject the plaintiff's contention that the plaintiff in the prior dismissed***

derivative action did not adequately represent the corporation because it failed to make a books and records demand before filing suit. *Id.* at *29.[11]

Plaintiff should not draw comfort from the Court's finding in *Norfolk County* that the failure to make a books and records demand before filing a derivative complaint did not constitute inadequate representation under the circumstances.[12] In *Norfolk County*, the initial derivative plaintiff waited more than two months after the alleged wrongdoing was disclosed before filing his derivative complaint and was not challenged by an intervenor who made a books and records demand. Instead, the books and records demand was made by a second plaintiff after the original derivative action was dismissed on the basis of demand futility.

In contrast, the question presented here is not whether Plaintiff will adequately represent the Company but who will ***best*** represent the Company. *See King*, 994 A.2d at 356 ("Representative litigation plays an important role in protecting the interests of stockholders, but ***it will not optimally serve investors unless suits are actually filed on the basis of a real concern that wrongdoing has occurred and after a proper investigation.***") (emphasis added). The facts in the present case present the question of whether a plaintiff in a derivative action who did not make a books and records demand in order to rush into litigation should be allowed to stave off a challenge from an intervenor in the same action who, without undue delay, heeded the repeated admonishments of the courts of this state to utilize the "tools at hand" before filing a derivative action (assuming UFCW Fund finds there is a reasonable basis to do so after reviewing the results of its books and records demand).

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[11] While UFCW Fund does not concede it will be collaterally estopped from bringing a second derivative action if Plaintiff's complaint is dismissed, there is no question that Defendants will argue collateral estoppel under such circumstances and that a favorable outcome for UFCW Fund is open to question. There is no good reason why the interests of Allergan should be jeopardized in this manner.

[12] "Representation" means "the quality of the case which plaintiff may be in a position to present in contrast to the caliber of his attorney." *Young v. Janas*, 136 A.2d 189, 190 (Del. Ch. 1954).

It is difficult, if not impossible, to see how Plaintiff is best able to represent the Company given: (1) its failure to make a books and records demand; and (2) the haste with which it assembled its complaint and amended complaint. As this Court has stated, "[p]erhaps it is time for the reversal of the traditional presumption in favor of first filers in the derivative suit context." *King*, 994 A.2d at 364 n.34. The Court should grant UFCW Fund's motion to intervene in this matter in order to give it standing to seek a further stay of the proceedings, continue to stay the matter until its books and records demand is resolved, and appoint its counsel, Lesley Weaver, Esq., of the law firm of Shepherd, Finkelman, Miller & Shah, LLP, lead counsel. MFI at 1 & n.1; *Sanders v. Wang*, C.A. No. 16640-NC, 1998 Del. Ch. LEXIS 207, at *9 (Del. Ch. Nov. 19, 1998).

b. Permissive intervention

Rule 24(b) states:

> 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.

It is not necessary for the Court to consider whether UFCW Fund meets the standards for permissive intervention in light of the discussion above that it meets the criteria for intervention of right. Nevertheless, Plaintiff's MOL contains a number of statements that need to be addressed.

Plaintiff states that "[i]t is well established that a motion for discretionary intervention under Rule 24(b) should be denied if it 'restates claims pled by the original plaintiff or if the original plaintiff adequately can represent the intervenor's interest.' *S[outh] St. Corp. Recovery Fund I v. Salovaara*, 1999 WL 504778, at *2 (Del. Ch. July 9, 1999); *see also Wier v. Howard Hughes Med. Inst.*, 404 A.2d 140, 145 (Del. Ch. 1979) ('where the petition for leave to intervene adds nothing to the claim asserted in the original complaint, leave to intervene may appropriately

be denied')."[13] It goes on to claim that UFCW Fund "has utterly failed to show that any complaint it might file would contain new facts or allegations or set forth new legal arguments, or that Plaintiff and its counsel cannot adequately represent [its] interests in this action" and that "granting the pending Motion to intervene would only serve to unduly delay these proceedings and prejudice the original parties to this action." Plaintiff's MOL at 21.

Plaintiff's analysis is fundamentally flawed. The primary question under Rule 24(b) is whether "applicant's claim . . . and the main action have a question of law or fact in common." Clearly they do—in fact, Plaintiff argues that "it ***appears*** that any . . . complaint" filed by UFCW Fund "would (a) merely re-plead what is contained in Plaintiff's Complaint and/or plead logical inferences that the Court should already draw in Plaintiff's favor from the Complaint's allegations, and (b) assert claims and legal arguments that are identical to the claims and arguments already made by the Plaintiff." *Id.* at 21-22 (emphasis added).

Plaintiff's argument that "any" subsequent complaint filed by UFCW Fund after receiving documents from its books and records demand would "merely" replead the allegations in its complaint and/or the "logical inferences" the Court should draw therefrom has been discredited above. At the risk of redundancy, the documents to be produced by the Company may: (a) lead to new or more specific allegations; and (b) eliminate the need for "logical inferences" that could be Plaintiff's downfall in Defendants' motions to dismiss. There is no reasonable basis to put the Company's rights at risk merely to satisfy Plaintiff's hypothesis as to the apparent strength (apparent to Plaintiff, that is) of its hastily-filed complaint.

[13] *South Street* did not state whether its decision was based on Rule 24(a) or (b), or both. However, use of the word "restates" and the reference to adequate representation appear to mean the Court was referring to Rule 24(a). In contrast, the quotation from *Weir* was clearly referring to Rule 24(b). 404 A.2d at 145.

Plaintiff maintains "the acts that might be reflected in the documents sought in the books and records demand are already alleged, with specificity, to be within the knowledge of the Allergan Board and/or approved by it." Plaintiff's MOL at 22. It goes on to say:

> [W]hile the Movant has demanded books and records concerning "the Company's sales, marketing, or branding of BOTOX," *see* Mot. at ¶15, the Complaint is replete with allegations concerning these issues, including that the Individual Defendants were provided with monthly Customer Surveys that tracked specifically sales of BOTOX® for off-label uses compared to FDA-authorized uses. *See*, *e.g.*, ¶¶ 27-58, 59, 61, 63, 64, 67, 68, 69, 73, 78-94. While the Movant demanded books and records concerning "specific studies or documents" regarding BOTOX®, *see* Mot. at ¶15, the Complaint already contains numerous allegations regarding such BOTOX® studies. *See, e.g.*, ¶¶55, 57, 61, 63, 64, 85, 90, 92; *see also* Adams Decl., Exs. 5-7. As a further example, the Movant demanded books and records reflecting "procedures, protocols, or controls created, designed, or intended to ensure compliance with" the FDAC [sic] or other federal health care programs, *see* Mot. at ¶15. However, the Complaint already contains detailed allegations regarding, among other things, the Company's Code of Business Conduct and Ethics, which relates to compliance with applicable laws and regulations and worldwide clinical and regulatory standards, including any waiver thereof, and the Charters of the Board's various committees, which concern compliance-related duties affecting Allergan and require general compliance oversight of the Company, among other duties. *See*, *e.g.*, ¶¶74-75, 115-17; *see also* Adams Decl., Exs. 11(a), 11(b) & 12.11 Thus, there is virtually nothing in the books and records demand that hasn't already been alleged with specificity in the Complaint, and the Movant has completely failed to present any evidence that it has received or will receive any new, material information.

Id. at 22-23.

Again, without being unnecessarily critical of Plaintiff's response to Defendants' motions to dismiss, the problems with this argument are two-fold. First, Plaintiff's amended complaint is long on claims of wrongdoing by the Company but short as to the particularized allegations of improper conduct or inaction by the Individual Defendants necessary to meet its burden of establishing demand futility. Second, Plaintiff ignores the fact that UFCW Fund's books and records demand is exclusively for "Board Materials" that may provide the particulars about the Individual Defendants' actions or lack thereof that are currently missing from Plaintiff's amended complaint. Thus, Plaintiff's assertion that UFCW Fund will "merely re-plead what is contained

in Plaintiff's Complaint and/or plead logical inferences that the Court should already draw in Plaintiff's favor from the Complaint's allegations, and . . . assert claims and legal arguments that are identical to the claims and arguments already made by the Plaintiff" is patently incorrect. UFCW Fund's books and records demand may be the key to establishing demand futility and the Individual Defendants' liability (or showing that a cause of action cannot be established).

Plaintiff frets that "[a]llowing [UFCW Fund] to intervene would merely delay the progress of the case with no apparent benefit to the injured parties." Plaintiff's MOL at 28. It expresses concern that, "if the Court were to delay these proceedings in order to allow the books and records process to move forward, it is ***likely*** that the California court[s] would take hold of the case." *Id.* at 28 n.13 (emphasis added).

As discussed above, UFCW Fund's intervention may yield substantial benefits to the Company without unduly delaying the litigation. As for the California actions, there is little chance they will bypass this action, because California law follows the "first-filed rule." *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231 (Cal. 2002). In addition, this Court can manage its docket so that this action retains primacy in time.

3. Defendants' Arguments

Defendants, predictably, are satisfied dealing with Plaintiff rather than UFCW Fund. They argue that "UFCW Fund's untimely Motion fails to show how Plaintiff is unable to represent [the Company's] interests or how it could better prosecute this action." Defendants' MOL at ¶ 16. They give short shrift to years of Delaware jurisprudence about derivative plaintiffs utilizing the tools at hand by suggesting "there is no information that UFCW Fund would obtain in response to its Section 220 Demand that would somehow make it a better representative in this action." *Id*. at ¶ 17. Defendants agree with Plaintiff's suggestion that "[m]ost of the facts at issue . . . come from publicly filed documents, including the Information

and the publicly announced terms of the Government Settlement." *Id.* They even proffer that none of the "Board materials UFCW Fund obtains in response to its Section 220 Demand [will] reveal any new facts or information that would suggest" that Allergan's "Board approved strategic plans that sought to take advantage of off-label marketing or that the Board approved or implemented such plans. . . . In fact, as UFCW Fund will soon find, the Board materials reflect there were never any approvals of alleged off-label marketing or promotion." *Id.* Defendants offer that UFCW Fund could seek relief under Court of Chancery Rule 60(b) if it "were to obtain ***any*** information relevant to the claims." *Id.* at ¶ 18 (emphasis added).

Defendants should not be allowed to choose who will represent Allergan. UFCW Fund discussed above why a derivative complaint made after utilizing the tools at hand, in particular its books and records demand, likely will be superior to Plaintiff's entry in the fast-filer Olympics. In addition, the lack of undue delay resulting from UFCW Fund's intervention has been previously noted.

Defendant's claim that nothing significant will come of UFCW Fund's Section 220 demand is new and disturbing. First, it suggests they are carefully scrutinizing the documents to be disclosed to ensure nothing damaging is released instead of providing books and records as required by law. Second, with all due respect, it is for UFCW Fund, not Defendants, to decide the legal significance of the released books and records. Third, ***Defendants' carefully worded statement does not eliminate or even mention the possibility that Allergan's Board knew about off-label marketing or promotion of Botox but did nothing to stop it.***

Plaintiff's complaint, based as it is on publicly available documentation, likely would not reach this latter type of wrongdoing. UFCW Fund's books and records demand, however, concentrating on "Board Materials concerning the Company's sales, marketing, or branding of BOTOX for both . . . approved and 'off-label' uses, conditions, and dosages, including, but not

limited to, the establishment, modification, implementation, and/or oversight of any sales, marketing, or branding programs, campaigns, strategies, or the like," would extend to what the Board knew about "off-label marketing or promotion" of Botox and when it knew about it. Small wonder, then, that Defendants would rather deal with Plaintiff and relegate UFCW Fund to filing a motion under Rule 60(b) for relief if it "were to obtain ***any*** information relevant to the claims." *See* discussion above.

All of which leads to UFCW Fund's fourth point, which is that Defendants' recommendation that UFCW Fund seek relief under Rule 60(b) if it obtains "any" relevant information under its books and records demand is as dubious as Plaintiff's suggestion that UFCW Fund would not be barred by collateral estoppel from bringing a second action based on that information if the instant case is dismissed. Of course UFCW can seek relief under Rule 60(b); however, Defendants neglect to mention that such relief is unlikely to be forthcoming.

Rule 60(b) provides:

> Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. – On motion and upon such terms as are just, the Court may relieve ***a party or a party's legal representative*** from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence[.] . . . A motion under this subdivision does not affect the finality of a judgment or suspend its operation. . . .

As a threshold question, it is debatable whether UFCW Fund has standing to obtain relief under Rule 60(b) if it is not permitted to intervene. Rule 60(b) limits relief to "a party or a party's legal representative." Federal courts have interpreted Fed. R. Civ. P. 60, which is substantially similar to Rule 60, to bar relief to non-parties. *See, e.g.*, *Ericsson, Inc. v. InterDigital Commc'ns Corp.*, 418 F.3d 1217, 1224 (Fed. Cir. 2005) (collecting cases); *Smith v. Mo. Pac. R.R. Co.*, 615 F.2d 683 (5th Cir. 1980) (claimants who failed to intervene had no right to relief under Fed. R. Civ. P. 60(b)). UFCW Fund would be forced to maintain it is entitled to relief because it is in privity with Plaintiff in that both represent the interests of Allergan. *See In re Childress*, 851 F.2d

926 (7th Cir. 1988). The results of such an argument are debatable. *See, e.g., Henik v. LaBranche*, 433 F. Supp. 2d 372 (S.D.N.Y. 2006); *In re Sonus Networks, Inc. S'holder Deriv. Litig.*, 422 F. Supp. 2d 281 (D. Mass. 2006), *aff'd*, 499 F.3d 47 (1st Cir. 2007) (finding privity between different derivative plaintiffs because the corporation is the true party in interest in a derivative action).[14]

Moreover, assuming UFCW has standing, in order to obtain relief under the "newly discovered evidence" provision of Rule 60(b), an applicant must establish:

> the newly discovered evidence has come to his knowledge since the trial; ***that it could not, in the exercise of reasonable diligence, have been discovered for use at the trial***; that it is so material and relevant that it will probably change the result if a new trial is granted; that it is not merely cumulative or impeaching in character; and that it is reasonably possible that the evidence will be produced at the trial.

Levine v. Smith, 591 A.2d 194, 202 (Del. 1991) (quotation omitted) (emphasis added), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Relief under Rule 60(b)(2), which is left to the discretion of the Court based upon the facts and circumstances, "is not favored." *The 99-Year Lease Tenants of Lynn Lee Vill. & Other Tenants Listed on Exh. A v. Key Box "5" Operatives, Inc.*, C.A. No. 12771, 2005 Del. Ch. LEXIS 114, at *10 (Del. Ch. Aug. 4, 2005) (citations omitted), *aff'd*, 906 A.2d 806 (Del. 2006). The reason why such relief is disfavored is "because Rule 60(b) implicates two important values: the integrity of the judicial process and the finality of judgments." *Id.* (quotation omitted).

Thus, UFCW Fund will be faced with an uphill fight if it is not permitted to intervene, Plaintiff's action is dismissed, and it discovers new evidence through its books and records

[14] While a privity argument might establish standing for a Rule 60(b) motion, it could also result in the application of collateral estoppel in a derivative case subsequently filed by UFCW Fund if its Rule 60(b) motion is denied. *See Norfolk Cnty.*, 2009 Del Ch. LEXIS 20, at *28; *Henik*, *supra*; *Sonus*, *supra*.

demand.[15] Defendants undoubtedly will oppose any Rule 60(b)(2) motion by UFCW Fund, no matter how meritorious. In fact, it is possible, if not probable, they will argue such a motion should be denied because *Plaintiff* could have discovered the new evidence if it had made its own Section 220 demand. The Court should not permit Defendants to parlay Plaintiff's rush to the courthouse into trapping UFCW Fund's potentially meritorious claim, uncovered with the aid of a books and records demand, behind a solid wall of collateral estoppel and an untenable Rule 60(b) motion.

Defendants echo Plaintiff's arguments that it is premature for UFCW Fund to intervene because, lacking the results of its books and records demand, it does not have a claim that would survive a motion to dismiss on the basis of Rules 23.1 or 12(b)(6). Defendants' MOL at ¶¶ 19-20. They also claim that "[p]ermitting UFCW Fund to intervene prior to deciding the motions to dismiss would unreasonably delay this litigation and deny Defendants speedy resolution of what ***they contend*** is an unmeritorious case." *Id.* at ¶ 21 (emphasis added).

UFCW Fund understands Defendants' desire to escape potential liability based on Plaintiff's complaint before details of their involvement in the Company's illegal activities regarding off-label BOTOX sales become known through UFCW Fund's books and records demand. However, a quick dismissal based on a complaint filed in contravention to the long-standing admonishments of the Delaware courts about using the tools at hand before filing derivative actions would not serve the interests of justice.

It is indisputable that the Company agreed to pay the U.S. Government (and certain state governments) $600 million to resolve criminal and civil allegations regarding off-label sales of

[15] UFCW Fund is not conceding there is no possibility it would prevail on a Rule 60(b)(2) motion, particularly if the newly discovered evidence is especially compelling; rather, it is merely pointing out that it would be exceedingly difficult to do so. There is no valid reason why the representation of Allergan's interests potentially should hang on the outcome of a Rule 60(b)(2) motion when the situation can be avoided by allowing UFCW Fund to intervene and staying the action until its books and records demand is satisfied.

BOTOX, a very large sum by any reasonable standard. The Company has expended and will continue to expend as yet unknown millions of dollars for legal fees, investigation expenses, costs of complying with the Corporate Integrity Agreement it signed with the government, and other expenses associated with its wrongdoing. The Company's potential right to recover against its Board of Directors for those expenses should not hang on a hastily filed complaint prepared without the benefit of a books and records demand. The Company and its shareholders deserve better.

CONCLUSION

For the reasons stated above and in UFCW Fund's Motion for Intervention, the Court should permit UFCW Fund to intervene in this action; stay the action until its books and records demand is resolved in full; and appoint its counsel, Lesley Weaver, Esq., of the law firm of Shepherd, Finkelman, Miller & Shah, LLP, lead counsel.

Dated: December 30, 2010

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