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Case No. 5795-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM and U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5795-VCL
DAVID PYOTT, HERBERT W. BOYER, LOUIS J. LAVIGNE, 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.	)	

PLAINTIFFS' ANSWERING BRIEF TO DEFENDANTS' MEMORANDUM REGARDING THE PRECLUSIVE EFFECT OF THE CALIFORNIA DISTRICT COURT'S DISMISSAL OF THE FEDERAL DERIVATIVE ACTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

PRELIMINARY STATEMENT 2

ARGUMENT 6

A. Delaware's Interests In Regulating The Conduct Of Delaware Corporations Militates Against The Reflexive Application Of Collateral Estoppel 6

B. Plaintiffs Should Not Be Collaterally Estopped From Presenting Their Case To This Court 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Brandin v. Deason,
941 A.2d 1020 (Del. Ch. 2007)..... 13

CTS Corp. v. Dynamics Corp. of Am.,
481 U.S. 69 (1987)..... 6

Cavalier Oil Corp. v. Harnett,
564 A.2d 1137 (Del. 1989) 7, 8

Chrysler Corp. v. New Castle County,
464 A.2d 75 (Del. Supr. 1983)..... 14

Columbia Casualty Co. v. Playtex FP, Inc.,
584 A.2d 1214 (Del. 1991) 8, 10, 11

Hydranautics v. FilmTec Corp.,
204 F.3d 880 (9th Cir. 2000) 5

In re Caremark Int'l Inc. Deriv. Litig.,
698 A.2d 959 (Del. Ch. 1996)..... 3

In re Chambers Development Co., Inc. S'holders Litig.,
No. Civ. A. 12508, 1993 WL 179335 (Del. Ch. May 20, 1993) 10, 12

In re FirstEnergy Shareholder Deriv. Litig.,
320 F.Supp.2d 621 (N.D. Ohio 2004) 14

In re USACafes, L.P. Litig.,
600 A.2d 43 (Del. Ch. 1991)..... 6

King v. VeriFone Holdings, Inc.,
12 A.3d 1140 (Del. 2011) 7, 14

Kona Enterprises, Inc. v. Estate of Bishop ex rel. Peters,
243 Fed. Appx. 274 (9th Cir. 2007)..... 5

LeBoyer v. Greenspan
No. CV 03-5603-GHK (JTLx), 2007 WL 4287646 (C.D. Cal. June 13, 2007) 13-14

Levine v. Milton,
219 A.2d 145 (Del. Ch.1966)..... 7, 12

McDermott Inc. v. Lewis,
531 A.2d 206 (Del. 1987) 11

Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.,
394 A.2d 1160 (Del. 1978) 8

Olson v. Motiva Enterprises, L.L.C.,
No. Civ. A. 02C-04-263JRS, 2003 WL 21733137 (Del. Supr. July 22, 2003) 15

People v. Ochoa,
191 Cal.App.4th 664, 119 Cal.Rptr.3d 648 (2011)..... 15

Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.,
564 A.2d 681 (Del. Supr. 1989)..... 8

Raytech Corp. v. White,
54 F.3d 187 (3d Cir.), *cert. denied*, 516 U.S. 914 (1995)..... 15

Ryan v. Gifford,
918 A.2d 341 (Del. Ch. 2007)..... 6-7, 9-10, 12

Sinnott v. Thompson,
32 A.2d 351 (Del. 2011) 9

State Farm Mut. Auto. Ins. Co. v. Superior Court,
114 Cal.App.4th 434, 8 Cal.Rptr.3d 56 (2003)..... 12

Sternberg v. O'Neil,
550 A.2d 1105 (Del. 1988) 7, 9

Travelers Indemnity Co. v. Lake,
594 A.2d 38 (Del. 1991) 8, 9

West Coast Mgmt & Capital, LLC v. Carrier Access Corp.,
914 A.2d 636 (Del. Ch. 2006)..... 12-14

Ji v. Van Heyningen, No.
CA 05-273 ML, 2006 WL 2521440, at *5 (D.R.I. Aug. 29, 2006) 13

Rules

Ct. Ch. R. 15 13

Plaintiffs, Louisiana Municipal Police Employees' Retirement System ("LAMPERS") and U.F.C.W. Local 1776 & Participating Employers Pension Fund ("Local 1776") (together, "Plaintiffs"), respectfully submit this memorandum of law responding to Defendants' February 2, 2012 memorandum ("Defendants' Mem.") regarding the preclusive effect, if any, of the dismissal by the U.S. District Court for the Central District of California (the "California Court") of the federal derivative action. As demonstrated more fully below, Defendants' attempt to prevent this Court's consideration of Plaintiffs' allegations is contrary to Delaware law and should be rejected.

INTRODUCTION

On January 17, 2012, the California Court issued an Order (the "Dismissal Order") in *In re Allergan, Inc. Shareholder Derivative Litig.*, No. SACV 10-1352 DOC (MLGx) (the "California Federal Action"), dismissing, with prejudice, the second amended derivative complaint filed in that action. The Dismissal Order was principally based on demand futility grounds. *See generally* Dismissal Order (attached as Exhibit A to Defendants' Mem.), at 3-5. In reaching its decision, the California Court stated it was applying "Delaware law to determine whether Plaintiffs have adequately pled demand futility." *Id.* at 3.

Defendants now seek to use the Dismissal Order in this Court, even though Plaintiffs were never involved in the California Federal Action, as a means to short-circuit resolution of the pending (and fully briefed) motions to dismiss Plaintiffs' Verified Second Amended Derivative Complaint (the "Second Amended Complaint"). However,

if Plaintiffs are collaterally estopped from even arguing that demand on the Board of Directors of Allergan, Inc. ("Allergan" or the "Company")[1] should be excused as a futile exercise, they would be deprived of fundamental rights afforded to them by Delaware as shareholders of a Delaware corporation.

This Court is not barred from ruling on the pending motions to dismiss. Rather, this Court, in which the first case challenging the alleged corporate wrongdoing was commenced and which presided over the related Section 220 demand action, should be the forum to determine whether Plaintiffs have established a proper basis for demand futility under Delaware law and have stated viable claims.

PRELIMINARY STATEMENT

LAMPERS commenced this action on September 3, 2010, almost a week before the filing of several actions in the California Court (which were subsequently consolidated into the California Federal Action). The motions to dismiss LAMPERS' first amended complaint were fully briefed and set for argument when Local 1776 commenced its Section 220 demand action, and was granted permission to intervene in this Action. At a hearing before this Court on January 21, 2011 regarding Local 1776's motion to intervene, LAMPERS stated that it was committed to prosecuting this action in Delaware, rather than seeking to proceed in another jurisdiction, and the Court suggested that it would consider allowing Plaintiffs to continue the case on a cooperative basis.

[1] In addition to the Company, which is nominally named as a Defendant, Plaintiffs assert claims against: David E.I. Pyott, Herbert W. Boyer, Ph.D., Deborah Dunsire, M.D., Michael H. Gallagher, Gavin S. Herbert, Dawn Hudson, Robert A. Ingram, Trevor M. Jones, Ph.D., Louis J. Lavigne, Russell T. Ray, Stephen J. Ryan, M.D., and Leonard D. Schaeffer (collectively, the "Director Defendants" or the "Board" and, with Allergan, the

Pursuing its 220 demand action, Local 1776 obtained various documents from Allergan, the nominal Defendant, which Plaintiffs then utilized in the Second Amended Complaint they filed jointly on July 8, 2011. As noted, the parties have now fully briefed the motions to dismiss the Second Amended Complaint, and the hearing on the motions is set for March 12, 2012.

In the interim, the parties to the California Federal Action proceeded with briefing and argument on motions to dismiss the California Federal Action plaintiffs' first complaint, which was dismissed without prejudice. Defendants then agreed to provide the California Federal Action plaintiffs with the same documents obtained by Local 1776 through its Section 220 demand. Thereafter, the California Federal Action plaintiffs filed an amended pleading, which dropped certain claims, and motions to dismiss were then briefed.

Without oral argument, and stating its application of Delaware law, the California Court granted the dismissal motions and issued the Dismissal Order. Neither LAMPERS nor Local 1776 had any involvement with the California Federal Action, including with any of the complaints filed there or the briefing in connection with the motions to dismiss. Notwithstanding that lack of involvement, Defendants seek to use the Dismissal Order offensively here, in an attempt to stave off this Court's review of Plaintiffs' well-pled Second Amended Complaint.

Here, the Second Amended Complaint not only asserts a sufficient basis for a finding of demand futility, but asserts viable claims not being alleged in the California

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"Defendants").

Federal Action. For instance, the Dismissal Order states that the plaintiffs there "no longer advance a claim under *Caremark*."[2] In contrast, Plaintiffs here have not abandoned or withdrawn their claim for director oversight liability, but continue to assert, as an alternative theory, that the Allergan Board failed to exercise proper oversight, thus establishing a *Caremark* claim. *See* Plaintiffs' Omnibus Memorandum of Law In Opposition To Defendants' Motions to Dismiss the Second Amended Derivative Complaint, at 39-42.

Further, the Dismissal Order utterly fails to reference numerous allegations that form the basis of Plaintiffs' claims in the Second Amended Complaint. For instance, the Dismissal Order does not reference Allergan's surreptitious funding of organizations such as WE MOVE, The Neurotoxin Institute, or Alliance for Patient Access, whose primary purposes were to promote off-label uses of BOTOX®. *Compare* Dismissal Order at 3-5 *with* Second Amended Complaint, ¶¶ 76-78. Nor does the Dismissal Order reference any of Plaintiffs' allegations regarding large expenditures made to implement various Company programs tied directly to increasing sales of BOTOX® for off-label uses, to expand Allergan's sales personnel and reimbursement claims far beyond levels justified by the BOTOX®'s approved indications, and to lobby Medicare and Medicaid. *Compare* Dismissal Order at 3-5 *with* Second Amended Complaint, ¶¶ 10, 14, 69, 72, 85, 145, 188.

Moreover, while the Dismissal Order briefly mentions, at pages 4-5, the incident involving Dr. Schim, it fails to address or discuss the substantial allegations of

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[2] The California Court's reference to *Caremark* refers to a claim that the Board engaged in a "sustained or systematic failure ... to exercise oversight." *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

wrongdoing pertaining to the continuation of the scheme even after the Schim incident. Notably, the California Court failed to address the Company's Board-approved 2007-2011 Strategic Plan, which expressly tied increased sales force personnel levels with increased sales of BOTOX® for unapproved uses, as well as the Customer Surveys, pled in the Second Amended Complaint here, that detailed, among other things, the Company's off-label BOTOX® sales. *Compare* Dismissal Order at 3-5 *with* Second Amended Complaint, ¶¶ 11, 14, 52, 176, 179. These documents provide direct evidence of the off-label marketing scheme at issue, and further show that the Board allowed it to take place even after the FDA letter criticizing Dr. Schim's blatant misconduct was brought to the Board's attention. The Dismissal Order similarly does not reference any of Plaintiffs' allegations based on various internal research reports documenting serious adverse events arising from off-label uses of BOTOX®, or the Second Amended Complaint's specific allegations based on testimony that Plaintiffs obtained from various personal injury lawsuits. *Compare* Dismissal Order at 3-5 *with* Second Amended Complaint, ¶¶ 99-114. Finally, the Dismissal Order fails to address a number of allegations based on the related *qui tam* complaints, including allegations relating to the payment of kickbacks to doctors by, for example, paying speakers at Company-sponsored events to promote the use of BOTOX® and implement training courses geared to maximizing reimbursement to physicians for BOTOX® use. *Compare* Dismissal Order at 3-5 *with* Second Amended Complaint, ¶¶ 62, 66, 73-75, 87, 89, 90, 92, 96-98.

Based on the foregoing, the Court is not precluded, because of the existence of the Dismissal Order, from ruling on the pending motions to dismiss the Second Amended

Complaint. As a threshold matter, Defendants have failed to show that Plaintiffs would be bound by the Dismissal Order. Even under the test for collateral estoppel advanced by Defendants,[3] assuming *arguendo* that the issues presented in the California Federal Action and in this Court are identical, Plaintiffs were not parties to the California Federal Action. Whether Plaintiffs are in privity with the plaintiffs before the California Court depends on the law of the state of incorporation, and Delaware law clearly would not bind Plaintiffs here with the outcome of the California Federal Action. Moreover, the more fundamental concern is that the Company's Board – the Defendants here – seeks to have a Delaware court decide that, notwithstanding Plaintiffs' resort to Section 220, which is Delaware's preferred method of investigating possible corporate wrongdoing, all of the Delaware-based claims advanced in the Second Amended Complaint are forever lost through application of California's law of collateral estoppel. Such a result would be contrary to Delaware law.

ARGUMENT

A. Delaware's Interests In Regulating The Conduct Of Delaware Corporations Militates Against The Reflexive Application Of Collateral Estoppel.

[3] Defendants seek to invoke the collateral estoppel rule used by the U.S. Court of Appeals for the Ninth Circuit in *Kona Enterprises, Inc. v. Estate of Bishop ex rel. Peters*, 243 Fed. Appx. 274 (9th Cir. 2007), a non-precedential decision, and *Hydranautics v. FilmTec Corp.*, 204 F.3d 880 (9th Cir. 2000). The *Kona* decision, which involved a third-party action to enforce a fee award, relied on the collateral estoppel rule employed in *Hydranautics*. *See Kona*, 243 Fed. Appx. at 278. The collateral estoppel doctrine in *Hydranautics* was based on California law. *See* 204 F.3d at 885. As announced in both decisions, application of collateral estoppel required, in addition to an "identical" issue and that the first proceeding was "a final judgment on the merits," that "the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Hydranautics*, 204 F.3d at 885; *Kona*, 243 Fed. Appx. at 278.

This Court unquestionably has an interest in the regulation of the internal affairs of corporations organized in this State. *See, e.g., In re USACafes, L.P. Litig.*, 600 A.2d 43, 51 (Del. Ch. 1991) (Delaware "has a strong interest in the effective administration of the law governing corporations and limited partnerships organized under its laws") (citations omitted); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) ("A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs"). Furthermore, "Delaware courts have a significant and substantial interest in overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporation." *Ryan v. Gifford*, 918 A.2d 341, 349 (Del. Ch. 2007) (citation and internal quotations omitted). This interest extends to derivative suits brought by shareholders of Delaware corporations. *See Sternberg v. O'Neil*, 550 A.2d 1105, 1125 (Del. 1988) ("Delaware has more than an interest in providing a sure forum for shareholder derivative litigation involving the internal affairs of its domestic corporations. ... Delaware has an obligation to provide such a forum") (citation and footnote omitted); *see also Levine v. Milton*, 219 A.2d 145, 147 (Del. Ch.1966) (observing "that the right of a stockholder to bring a derivative action is a question of substantive law to be determined by the law of the state or country of incorporation").

Allergan is a Delaware corporation. Plaintiffs, as Company shareholders, instituted a derivative action challenging the practices of Allergan's Board and, because it was the first such action filed anywhere, afforded primacy to this Court. Thereafter, Local 1776 instituted an action pursuant to Section 220 of the Delaware Code to inspect

the Company's books and records to further their investigation of corporate mismanagement. Courts in this State have lauded such an approach. *See, e.g.*, *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011) ("Delaware courts have strongly encouraged stockholder-plaintiffs to utilize Section 220 before filing a derivative action, in order to satisfy the heightened demand futility pleading requirements of Court of Chancery Rule 23.1") (footnote omitted). Armed with documents and information gleaned from such inspection, as well as their own investigations, Plaintiffs jointly prepared and filed the Second Amended Complaint. Defendants' challenges to the Second Amended Complaint have been fully briefed and await resolution by this Court.

As Defendants implicitly concede, determination of the preclusive effect of the Dismissal Order initially presents a choice of law issue. *See* Defendants' Mem. at 3; *see also Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141 (Del. 1989) ("The resolution of the *res judicata* claim presents, preliminarily, a choice of law issue"); *Columbia Casualty Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991) (question regarding "the collateral estoppel effect to be given a judgment rendered by a federal district court in Kansas whose jurisdiction was based on diversity of citizenship ... is essentially a choice of laws determination").[4]

[4] *See Cavalier Oil*, 564 A.2d at 1141 ("The effect of a valid judgment as a conclusive adjudication between the parties and persons in privity with them on facts which were or might have been put in issue in the proceedings is determined by the law of the state where the judgment was rendered") (citing Restatement (First), *Conflict of Laws* § 450(2) (1934)); *Columbia Casualty*, 584 A.2d at 1217 ("[T]he doctrines of *res judicata* and collateral estoppel require that the same effect be given a [foreign] judgment rendered upon adequate jurisdiction as [the foreign court] itself would accord such a judgment") (citation and internal quotations omitted).

However, resolution of this choice of law issue must be viewed through the prism of Delaware's adoption of the "most significant relationship" test as set forth in the Restatement (Second), *Conflict of Laws* (1971). *See Travelers Indemnity Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (adopting § 145 of Restatement (Second) to replace the *lex loci delicti* doctrine for tort actions); *Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1166 (Del. 1978) (ruling that, because Delaware "has such a close relationship to the transaction and the parties," its law would be applied to a contract that was silent as to choice of law) (citing Restatement (Second), Conflict of Law § 188); *see also Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 688 (Del. Supr. 1989) ("The courts of Delaware have adopted the choice of law approach of the Second Restatement") (citation and footnote omitted).

Under the Restatement (Second) approach, the following seven factors are fundamental considerations in determining which jurisdiction has the "most significant relationship":

(a) the needs of the interstate and international systems;

(b) the relevant policies of the forum;

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

(d) the protection of justified expectations;

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

Sinnott v. Thompson, 32 A.2d 351, 354 (Del. 2011) (citing Restatement (Second), *Conflict of Laws* § 6(2)); *see Lake*, 594 A.2d at 47 (same).

Consideration of these factors supports the conclusion that, because Delaware has the "most significant relationship" to the issue, the Dismissal Order should not preclude the ability of this Court to independently evaluate the sufficiency of Plaintiffs' demand futility allegations. As noted, Delaware not only has an interest in applying its laws to corporations organized pursuant to its laws, but an "obligation" to provide a "forum for shareholder derivative litigation involving the internal affairs of its domestic corporations." *Sternberg*, 550 A.2d at 1125. Indeed, since the California Court purported to apply Delaware law to the demand futility allegations in the complaint filed in that Court, *see* Dismissal Order at 3, the interests of this State in applying its laws will best be served if the Dismissal Order is *not* given a preclusive effect. Furthermore, since Plaintiffs commenced their action here, "the interest of the forum state in applying its law and policies to those who seek relief in its courts is paramount." *Sinnott*, 32 A.2d at 357 (footnote and internal quotations omitted). As this Court stated in *Ryan v. Gifford*, Delaware courts "have a 'significant and substantial interest in overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations.' This interest increases greatly in actions addressing novel issues." 918 A.2d at 349-50 (quoting *In re Chambers Development Co., Inc. S'holders Litig.*, No. Civ. A. 12508, 1993 WL 179335, at *9 (Del. Ch. May 20, 1993)).

The other considerations of the Restatement (Second) equally support this Court's independent review of the Second Amended Complaint's demand futility allegations;

such a determination would protect the justified expectations of shareholders of a Delaware corporation, would clearly support certainty, predictability and uniformity, and, given this Court's acumen in the substantive law of Delaware, the sufficiency of the allegations would be more easily and definitively determined.

Defendants assert that "the needs of the interstate and international systems" will be impinged upon if this Court does not give preclusive effect to the Dismissal Order. Putting aside that this view is based on the faulty premise that Plaintiffs are in privity with the California Federal Action plaintiffs, there is no basis for such a slavish approach to collateral estoppel in the circumstances presented here.

Initially, the California Court's interest in how this Court uses the Dismissal Order is limited since the California Court was applying Delaware law. Dismissal Order at 3. Although the principle of comity may permit one state to give effect to the laws of another state, *Columbia Casualty*, 584 A.2d at 1218, this is based on "respect and deference" to the other state. *Id.* The need for respect and deference to the California Court is severely diminished here because it was purporting to apply the law of Delaware, not California.[5] Therefore, no other State has a greater interest in the preclusive effect of the Dismissal Order than Delaware.

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[5] Application of the "full faith and credit" clause of the U.S. Constitution is not dispositive. The *Columbia* Court determined that even "the preclusive effect of [a] jury's findings" in a previous action did not "directly implicate[]" a state court's "judicial proceeding." *Id.*, 584 A.2d 1218. Defendants have made no showing that such fundamental interests are at stake here. In addition, application of the "full faith and credit" clause requires a showing of "conflicting interests," which Defendants have likewise never made. *See McDermott Inc. v. Lewis*, 531 A.2d 206, 218 (Del. 1987) ("A party bringing a full faith and credit claim [bears] the burden of establishing that conflicting interests of a foreign state were superior to those of the forum state") (citing

Moreover, Defendants' motions to dismiss, as well as their new procedural argument, raise novel issues under Delaware law. Clearly, based on the Section 220 document production, Plaintiffs have now established that Allergan's Board did, in fact, approve strategic plans, over a decade-long period, that anticipated and called for significant increases in off-label sales of BOTOX®, and Plaintiffs further assert, based on those same documents and others obtained through counsel's investigation, that the Board directed and encouraged the marketing and promotion of BOTOX® for off-label uses. Whether the accumulation of facts pleaded in the Second Amended Complaint satisfies the tests under Delaware law for demand futility and whether such facts state viable claims under Delaware law present novel issues for this Court to decide. Similarly novel are the procedural questions, now being raised by Defendants, which include (a) whether the decision of the California Federal Court, dismissing, based on its interpretation of Delaware law, a shareholder derivative complaint on demand futility grounds, should be given preclusive effect by a Delaware court over a separate and distinct group of shareholders' allegations of demand futility, and (b) whether one group of shareholders should be considered in privity with another, separate group of shareholders for purposes of collateral estoppel. The existence of these novel issues further accentuate the need for this Court to determine the issues afresh, thereby ensuring that Delaware law is correctly applied. *See, e.g.*, *Ryan*, 918 A.2d at 350 (recognizing that Delaware's interest in the appropriate application of its law "increases greatly in actions

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Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935)). Here, as demonstrated, there is no jurisdiction other than Delaware that has a greater interest in the supposed preclusive effect of the Dismissal Order.

addressing novel issues" and "more weight must be accorded to [the interest of Delaware courts in applying Delaware law] where the law is novel"); *In re Chambers*, 1993 WL 179335, at *3 ("actions raising novel and substantial issues of Delaware corporate law are best resolved in Delaware courts") (citation and internal quotations omitted).

Given Delaware's overriding interest in the application of its law to matters involving the conduct of corporations organized under its statutes, and the treatment of their shareholders, it is patently clear that Delaware has the most significant interest in the application of its law to the claims asserted in this action. Accordingly, this Court should apply Delaware law in determining whether the Dismissal Order should be afforded any preclusive effect.

B. Plaintiffs Should Not Be Collaterally Estopped From Presenting Their Case To This Court.

The rights of Plaintiffs as shareholders of the Company are determined by the law of the state of the Company's incorporation. *See State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal.App.4th 434, 443, 8 Cal.Rptr.3d 56 (2003); *see also Levine*, 219 A.2d at 147 ("[T]he right of a stockholder to bring a derivative action is ... to be determined by the law of the state or country of incorporation"). In Delaware, "[i]t is common practice ... where there are inadequate allegations of demand futility to dismiss derivative suits with prejudice as to the named plaintiff, ***but not as to the corporation or its other stockholders***." *West Coast Mgmt & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 642 (Del. Ch. 2006) (emphasis added); *see* Ct. Ch. R. 15(aaa) (providing that dismissals based on the pleadings "shall be with prejudice (and in the case of complaints brought pursuant to Rules 23 or 23.1 ***with prejudice to the named plaintiffs only***) ....")

(emphasis added). In light of these pronouncements of Delaware law, it is clear that, contrary to Defendants' argument, *see* Defendants' Mem. at 7, Plaintiffs here are *not* in privity with the California Federal Action plaintiffs for purposes of collateral estoppel.

This conclusion is juxtaposed against Defendants' argument, which mirrors the trend noted in *West Coast*, *Brandin v. Deason*, 941 A.2d 1020, 1025 n.17 (Del. Ch. 2007) and other courts, whereby the doctrine of issue preclusion is used offensively to prevent the relitigation of demand futility, regardless of whether the person against whom issue preclusion is used was even a party to the initial proceeding. *See West Coast*, 914 A.2d at 643 n.22 (citing *LeBoyer v. Greenspan*, No. CV 03-5603-GHK (JTLx), 2007 WL 4287646 (C.D. Cal. June 13, 2007); *Henik ex rel. LaBranche & Co., Inc. v. LaBranche*, 433 F.Supp.2d 372, 381 (S.D.N.Y. 2006); *In re Sonus Networks, Inc. S'holder Deriv. Litig.*, 422 F.Supp.2d 281, 294 (D.Mass. 2006); *but see Ji v. Van Heyningen*, No. CA 05-273 ML, 2006 WL 2521440, at *5 (D.R.I. Aug. 29, 2006) (expressing "genuine concerns about blocking a separate suit by a nonparty shareholder for the initial plaintiff's pleading deficiencies" and rejecting attempt "to apply issue preclusion to a nonparty to the initial proceeding")). According to the *West Coast* court, these decisions are "dubious" based on "[e]quitable considerations." *Id.* at 643 n. 22 ("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"); *see In re FirstEnergy Shareholder Deriv. Litig.*, 320 F.Supp.2d 621, 626 (N.D. Ohio 2004) ("It may be reasonable, even just, to preclude a

shareholder from raising demand futility when the shareholder (or a co-plaintiff) has previously made a demand on the board. ... The same equities, however, do not weigh in favor of one shareholder being able to bind all other shareholders based on a demand of which the other shareholders had no knowledge. In such a situation, the shareholders arguing demand futility have not ceded the absence of facts supporting a finding of futility).[6] Notwithstanding the *West Coast* court's obvious unease, Defendants rely extensively on *LeBoyer*, 2007 WL 4287646, among the decisions that the *West Coast* court singled out as dubious. Defendants' Mem. at 4-8.

Defendants' attempt to short-circuit this Court's review of the Second Amended Complaint by invoking the supposed preclusive effect of the Dismissal Order should be denied. The use of defensive collateral estoppel requires, *inter alia*, that "each of the parties has a full, free and untrammeled opportunity of presenting all of the facts pertinent to the controversy." *Chrysler Corp. v. New Castle County*, 464 A.2d 75, 80 (Del. Supr. 1983) (quoting *Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 262 (Del. Supr.

[6] As observed by the *West Coast* court, allowing issue preclusion to be asserted against subsequent shareholders' efforts to assert derivative claims would be contrary to the policy that Section 220 seeks to foster. *See West Coast*, 914 A.2d at 643 n.22 ("Preventing subsequent individual plaintiffs from bringing potentially meritorious suits based on additional information gained in a [8 Del. Code §] 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"). Indeed, the *King* Court cited several decisions in which stockholder-plaintiffs, whose actions were dismissed for failure to adequately plead demand futility, were nonetheless "permitted ... to utilize the Section 220 inspection process to gather new information and replead their derivative complaints." *Id.*, 12 A.3d at 1146. Here, as noted above, Local 1776 pursued this route and obtained certain documents from Allergan, which Plaintiffs used in the Second Amended Complaint.

1934)). Here, Plaintiffs were not parties to the California Federal Action and thus have not had an opportunity to argue the merits of their demand futility claim.

Furthermore, Defendants' argument ignores that application of the collateral estoppel doctrine is discretionary, not automatic. *See, e.g.*, *Olson v. Motiva Enterprises, L.L.C.*, No. Civ. A. 02C-04-263JRS, 2003 WL 21733137, at *7 (Del. Supr. July 22, 2003) (confirming that parties' agreement to not raise collateral estoppel argument at trial was "appropriate and enforceable," and that the "right to raise collateral estoppel [is] subject to the sound discretion of the trial judge") (citation and internal quotations omitted); *see also Raytech Corp. v. White*, 54 F.3d 187, 190 (3d Cir.), *cert. denied*, 516 U.S. 914 (1995) (indicating that application of both variants of collateral estoppel are "within the discretion of the trial court") (citing *ParkLane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)). California courts likewise recognize the discretionary nature of collateral estoppel. *See, e.g.*, *People v. Ochoa*, 191 Cal.App.4th 664, 669, 119 Cal.Rptr.3d 648, 651 (2 Dist. 2011) ("[B]ecause collateral estoppel is ultimately subject to considerations of public policy, the doctrine's application is not automatic") (citation omitted).

Finally, Defendants argue that because the plaintiffs in the California Federal Action had access to the same documents and information obtained through Local 1776's Section 220 demand, the Dismissal Order must be given full, preclusive effect. *See* Defendants' Mem. at 2, 6. This argument is without merit. First, given the heavy redactions in the version of the Federal Action complaint submitted by Defendants (Exhibit F to Defendants' Mem.), there is no way to adequately compare and evaluate the

allegations against those in Plaintiffs' Second Amended Complaint. Second, based on the extensive investigation made of other sources – including, for instance, testimony from certain personal injury trials – the Second Amended Complaint here contains information that was specifically developed by Plaintiffs for this case alone. And third, as shown above, the California Court's decision failed to refer to so many of the allegations that are contained in the Second Amended Complaint here supports that this Court should not accept Defendants' bald assertion that the Dismissal Order absolutely bars and precludes this Court from considering Plaintiffs' demand futility allegations, as well as the substantive claims (which were not addressed at all in the Dismissal Order) presented in this case.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that this Court should exercise its discretion, decline to give preclusive effect to the Dismissal Order entered in the California Federal Action, and fully consider all allegations and claims asserted in this action by Plaintiffs, Louisiana Municipal Police Employees' Retirement System and U.F.C.W. Local 1776 & Participating Employers Pension Fund.

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