IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM,	:	
Plaintiff,	:	
vs.	:	Civil Action No. 5795-VCL
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.	:	

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Chancery Courtroom No. 12C
New Castle County Courthouse
Wilmington, Delaware
Friday, January 21, 2011
10:02 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ARGUMENT AND RULING ON MOTION TO INTERVENE

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APPEARANCES:

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-and-
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THE COURT: Good morning, everyone. I understand I can doubly welcome the Californians. This is your second trip here. Thank you for the extra effort. I'm glad the weather cooperated with us this time.

Good morning, Mr. Nachbar.

MR. NACHBAR: Yes. Wayne Smith, from Gibson, Dunn & Crutcher, my cocounsel, who is happy to not only be in the state of Delaware, but to actually be in the courtroom.

THE COURT: Fantastic. Good to see you, Mr. Smith.

MR. NACHBAR: Shannon German, from my office, is also here with me today.

THE COURT: Welcome.

MR. TUCKER: Good morning, Your Honor. Scott Tucker, Chimicles & Tikellis, on behalf of plaintiffs. With me today is Mr. Jeff Golan, from Barrack Rodos & Bacine, and his associates, Chad Carder and Lisa Lamb.

THE COURT: Welcome to all of you.

MR. TUCKER: With Your Honor's permission, Mr. Golan will be making the presentation on our behalf.

THE COURT: Certainly.

MR. RIGRODSKY: Good morning, Your Honor. I'm here to introduce Scott Shepherd, of the Shepherd Finkelman firm, for plaintiff, U.F.C.W. Local, the proposed intervenor in this case. Also with me at counsel table is Gina Serra, of my office.

THE COURT: Welcome back. Saw you yesterday.

MR. RIGRODSKY: With the Court's permission, Mr. Shepherd will be presenting the argument for the intervenor.

THE COURT: Mr. Shepherd, would you like to lead off? It's your motion.

MR. SHEPHERD: Yes, I would. Thank you. Does Your Honor prefer I stand at the podium or the table?

THE COURT: Podium. Got to get those tips from Mr. Rigrodsky before you come in. He will prep you. He is an experienced guy. He knows his way around.

MR. SHEPHERD: As Your Honor knows, we are here on the motion of U.F.C.W. Local 1776 & Participating Employers Pension Fund to intervene into the Allergan derivative case. Before I start, I

should point out the books and records request, which is the subject or at least part of the motion, documents were produced yesterday afternoon. So although we have not had a chance to look at them, we are at least proceeding on that path as expeditiously as possible; should be able to review them in the very near future.

Rule 24(a) provides for intervention as of right. It has -- the prong under which we are proceeding, 24(a)(2), has three prongs within it. The first is "an interest relating to the property or transaction which is the subject of the action...." And I don't think there is any real dispute that U.F.C.W. has an interest in the subject of the lawsuits.

The second prong is that the applicant is situated such that the disposition of the action may as a practical matter impede the applicant's ability to protect his interests. There is some argument, but I don't think there is any substantial argument, that the resolution of the pending action certainly may -- it may or may not, but it may, as a practical matter, impair the U.F.C.W.'s ability to protect its interests, which brings us to the third

prong, which is unless these interests are protected adequately. That is the prong on which the motion hinges.

The U.F.C.W. submits that its rights are not adequately protected in the pending lawsuit. Shareholders are not protected by quickly-filed complaints even when, as is here, it's a very good job on the available interest that has been made public. We don't question that at all. It's an excellent complaint, given what is available, but not enough is available. Delaware courts have for years counseled that the proper procedure is, in essence, take your time and do it right. In particular, courts have counseled, and even admonished, that the proper procedure is a books and records -- initial procedure is a books and records request under Section 220, and if necessary, a books and records action under Section 220. The reason is, of course, an -- a better informed complaint is almost always better than one that is created with less information.

In the face of -- I would say that is almost a truism, that a better informed complaint is better than a less informed complaint, but in the face of that, the plaintiff's response here is not to come

into court and seek to slow down the action so that it may obtain information from the U.F.C.W. pursuant -- that it receives pursuant to its requests, but rather, it is, "Court, we want to push ahead. We want to chance it on the pending complaint, and if you get better information, then good luck to you. You maybe won't be collaterally estopped. Maybe you will be able to file a Rule 60 motion to undo the judgment."

But the reality of collateral estoppel, the reality of a Rule 60 motion, is that it's very difficult. It's very infrequently granted, and for good reason. It's not at all clear, in fact, that U.F.C.W. would even be considered a party that could move under Rule 60. It's certainly debatable under Delaware law and under federal law.

THE COURT: How much time do you think should be allowed? Here, you guys -- hasn't been too long. And because of timing issues in the other action, not too much has gone on in the other action. But it does create practical problems in terms of when the second plaintiff can come in.

MR. SHEPHERD: Correct. There is a tension that it creates. There is no question about that.

THE COURT: What are your thoughts on how that is best managed?

MR. SHEPHERD: Our thought is that if we had 45 days. We have the documents now, as of today. If we have 45 days, which is, I guess, around the end of February, into March, that should be plenty of time, assuming, as I am, a good faith document production. That should be plenty of time for us to -- well, first possibility is we may notify the Court, "There is nothing there that is any different, and we are going to fold our tent and go away." That, we will probably know fairly quickly, but in -- 45 days I would think would be enough to analyze the new information we obtained and file a proposed complaint.

THE COURT: But in terms of how fast someone moves to get their 220 process started following the announcement of the negative information, what is your thought on how that aspect should be managed, and why did you all move quickly enough?

MR. SHEPHERD: We moved -- look at the precise timing. But the initial announcement of the DOJ settlement was early September 2010. The plea was -- the guilty plea and the settlement were approved on

October 5th. A little less than a month after that, we filed our books and records request. I understand that there is a tension and there has to be some kind of outside limitation, but whatever it is, we submit it's -- two months from the first announcement and a month from the actual approval of the guilty plea is plenty of time.

THE COURT: Sort of an AirGasish approach, where at least this one is something that meets it, huh?

MR. SHEPHERD: There has to be some kind of limitation, but whatever it is, we are within it. At least that's our position.

It can only be that a complaint that results from the currently available public information and whatever information we obtain is either as good as or better than the pending complaint. It cannot be that it will be worse. That fact --

THE COURT: Theoretically, could be worse. But in that case, you wouldn't push it. That is the situation.

MR. SHEPHERD: We wouldn't push it. That is true. We could come up with bad information,

and then we would forward it to them and say, "Good luck," to everyone here.

Under that circumstance, it can only be that U.F.C.W.'s rights are not being adequately protected, and that its Rule 24(a) motion, we submit, should be granted.

Permissive intervention under Rule 24(b)(2), the prong under which we proceed, the argument more or less overlaps that. The only distinction between 24(a) and (b) is that 24(b) gives the Court -- 24(b)(2) gives the Court discretion to consider whether the intervention will unduly delay or prejudice adjudication of the rights of the individual parties. Here, delay is the issue on which both the plaintiff and the defendant focus, but it's not a good issue for them.

First, there is no immediacy to this action. It's not a deal case. It's not a case where there is a preliminary injunction proceeding coming up. Delay of a few months is not going to make any difference to the outcome.

The defendants say, "We know, because we have seen the documents, that you won't be able to plead anything new, and we shouldn't have to re-brief

the various issues." But if we aren't able to plead anything new, then they will either file, more or less, the same brief or they won't have to file another brief at all.

The plaintiff says the delay will let the California cases get ahead. Respectfully, the Court can control its docket, and the issue and focus is on the rights of the shareholders, not whether one case or another has the lead, whatever that means.

To cut through the argument and just to summarize it, if the Delaware courts' admonitions in recent years mean anything, that shareholders should eschew the quick file and attempt to file complaints that will withstand Rule 23.1's heightened pleading requirements, the U.F.C.W.'s motion should be granted under 24(a) or, alternatively, under 24(b).

THE COURT: Thank you. The plaintiff -- the other plaintiffs will speak next, or Mr. Nachbar, someone from your team will speak next?

MR. NACHBAR: Your Honor's preference, but I think Mr. Golan is logically next.

THE COURT: That's fine.

MR. GOLAN: May it please the Court: Jeffrey Golan, for the plaintiff, Louisiana Municipal

Employees' Retirement System. The -- when Allergan announced, and the U.S. Department of Justice announced, the fine and the guilty plea on September 1st, 2010, there was -- that was a massive fine for this company. It wiped out one year's worth of net income. The company pled guilty to a misbranding charge, which included within it the allegation by the government, that it was pleading guilty to that it had actively promoted and marketed BOTOX for off-label uses, which were not approved by the FDA. There were -- available to us at the time was the information that the government pled, a pretty specific document; the press release, that noted that the marketing of BOTOX for off-label uses was the number one corporate priority of this company, and it was part of their strategic plans from at least the period 2000 through 2005.

Available to us were the qui tam complaints filed by three former employees and one former doctor that did business with Allergan, that specifically alleged that this illegal marketing scheme started at least as early as 1997, and carried over at least until 2008. And also available to us after -- between the time we filed our initial

complaint and the amended complaint was information -- was a great deal of information that we obtained through public trials in personal injury and wrongful death cases against the company, by plaintiffs in those cases, who had alleged that they suffered injury because of their off-label -- taking of BOTOX for off-label uses.

THE COURT: Was any of that information going away?

MR. GOLAN: None of it was going away, Your Honor.

THE COURT: Getting this additional information between the time you filed and the time you amended, that helped you. You wrote a better amended complaint. Right?

MR. GOLAN: We did, Your Honor.

THE COURT: What was the rush?

MR. GOLAN: Several things, Your Honor. And we specifically considered these things before we filed our complaint. First of all, in a case -- obviously, Your Honor knows that if a company is the subject of a merger, the subject of a bankruptcy, derivative claims are wiped out.

THE COURT: That's what was on your

mind?

MR. GOLAN: That was not on our mind.

THE COURT: We can set that aside?

MR. GOLAN: Yes. But in this case, as in other cases that we have been involved with, there was -- we were -- we did an analysis of the directors on the current board. Eight of them had been directors since 2004 and prior, which put them within the time period alleged in the information. Two of them came on in 2005. Two of them came on in 2006 and 2008. There was a risk that board members would be -- would resign and would be replaced by additional members. And if that occurred, the plaintiff's demand futility claims clearly would have been potentially harmed.

THE COURT: When was the next annual meeting?

MR. GOLAN: Your Honor, the next annual meeting, I don't recall, in front of me, but --

THE COURT: But your point is that there would have been an election coming up where somebody might have gone off the board. Presumably, that means that in your mind during the two days in which you conducted the extensive investigation

described on pages 26 and 27 of your brief -- during those two days, you perceived that the election of directors was sufficiently imminent that it required you to immediately file. My question is: At that time, when was the annual meeting scheduled?

MR. GOLAN: Your Honor, I don't know the answer to that.

THE COURT: We can set aside that one, too; right?

MR. GOLAN: Our concern -- a concern that we had was that directors could resign, with the government information becoming public, and that could impact the demand futility claims.

THE COURT: How many people worked on this investigation that is described on pages 26 and 27 of your brief?

MR. GOLAN: I worked on it, and at least several of my colleagues worked on it.

THE COURT: How many is "several"? I think of several as three to 14.

MR. GOLAN: Really, two -- two worked on it -- two of my colleagues worked on it in depth. I consulted with two other colleagues, who had been involved in the Pfizer derivative litigation and in a

Schering Plough litigation, to get more background about the FDA rules and the procedures, and what had been alleged, and what the Court ruling had been in the Pfizer case.

THE COURT: How many hours do you think you put in in those two days?

MR. GOLAN: Probably a total of -- all of us involved? Probably a total of 40 to 50.

THE COURT: How many Caremark cases have survived motions to dismiss without prior 220 investigations?

MR. GOLAN: Your Honor, the -- we are not making this a Caremark case. We are alleging --

THE COURT: How about you answer my question? How many Caremark cases have decided motions to dismiss without a prior 220 investigation?

MR. GOLAN: I don't know the answer to that question, Your Honor.

THE COURT: As far as I can tell -- I'm going to ask the same question to the defendant. But there have been two, Abbott Labs and Pfizer. And in Pfizer, you had an explicit requirement of the prior settlement that required board reporting. So there was a direct link to the board.

MR. GOLAN: That's correct, Your Honor.

THE COURT: What is your direct link to the board? Two words. Right?

MR. GOLAN: Our direct link to the board is that the illegal marketing scheme was affirmatively approved by the board in its strategic plans.

THE COURT: Bingo. Those are the two words, strategic plan. That's what you got; right?

MR. GOLAN: Yes, Your Honor. Based on the government information and the government's press release, that this was a -- this was a widespread, board-approved, illegal marketing scheme, that was done in the strategic plans as the number one corporate priority. So -- and we said this in the papers. If we felt that this was a Caremark case, and we were required to show the internal controls and that there may have been red flags and that there were reports that should have put the board on notice of the improper management actions, we clearly would have undertaken a 220 books and records.

THE COURT: If this isn't a Caremark case, what do you think it is?

MR. GOLAN: Your Honor, it's a case under -- that comes under the -- under -- well, more akin to the -- described in Aronson, which is an affirmative board policy and action. It's not a negligence based "We didn't know the information that management was doing."

THE COURT: Of course it's not a negligence case, because Caremark, as we know after Stone, isn't negligence based. One could argue that Caremark was ambiguous. Chancellor Allen used both good faith language and care language. But we now know Caremark isn't care based.

MR. GOLAN: Caremark has been described as the most difficult -- possibly the most difficult standard in Delaware law.

THE COURT: Yeah, but that is what -- look, I have read your motion to dismiss briefing, too. There is a lot of Caremark stuff in there. Now maybe it's Guttman v. Huang, maybe it's Stone v. Ritter. Maybe people aren't actually citing the Caremark case, but you really think this isn't a Caremark case?

MR. GOLAN: Your Honor, we think that this is a breach of loyalty case that -- and a

corporate waste case that is not dependent on whether there were internal controls and whether the board was properly or improperly monitoring.

THE COURT: Here is the thing. That is what Caremark is about. Caremark is about the idea that you have to get the board involved to impose liability on directors. You get the board involved in one of two ways: Either there is an actual decision or the board gets involved through the degree to which it has established a reporting system. Those are the two general categories of board action. But the key is you actually have to have the board involved.

So really what you have is you have two words. You have strategic plan. Now, what analysis did you do, and help me understand why you think that strategic plan gets you past a motion to dismiss?

MR. GOLAN: Your Honor, when a board undertakes a strategic plan, whether it's --

THE COURT: Even though it was board approved? What if this was a management strategic plan? What is your basis for board approval of the strategic plan?

MR. GOLAN: The -- as described in the

information and in the government's press release, this was the number one corporate priority of the company.

THE COURT: Yeah, but I didn't see anything in there about board approval. What if this was the CEO's thing?

MR. GOLAN: Well, the CEO is a member of the board, Your Honor. And --

THE COURT: So you would be imputing knowledge.

MR. GOLAN: But strategic plans are -- as we alleged, strategic plans are -- when undertaken in the kind of setting that these are described in, that there is a strategic plan from 1997 through 2001, that there are annual budgets that are approved by the board, that set targets of how much BOTOX will be sold, both on label, which are four very rare occurrences, and off label, which are much more prevalent. There is the funding of outside groups, surreptitiously, by the company, both We Move, that has dosing guidelines, and the Neurotoxin Institute, when there is lobbying undertaken on behalf of the company. And as the sentencing memo makes clear, there was even a strategic plan put in place for the

years 2007 through 2011.

When those kinds of plans are undertaken, I think it is a reasonable inference that those are board approved plans.

THE COURT: Here is the thing. That is what I would have to decide on the motion to dismiss. And, you know, we all know what strategic plans are. And in the real world, boards generally approve strategic plans. In the real world, boards generally are aware of the types of things that are of the magnitude you are talking about. But in a legal context -- again, if you can cite one, I'm happy to hear it. But if you can cite one where somebody has been able to get past a motion to dismiss without using 220, why run the risk? What is the downside, other than this theory about potential director resignations and, hence, a new board?

MR. GOLAN: Your Honor, we viewed -- two answers to that. We viewed the wealth of information available at the time to be sufficient to present to the Court a viable complaint, both on demand futility and the underlying merits of the claims. We did not -- given the way that the government described the scheme and the strategic

plans and the corporate priority of this company, as the number one priority, we did not view this as an issue that we would have to find underlying reports coming up from management to the board, or to the audit committee, or whatever, because these were strategic plans approved by the board.

And I think there is a -- there is a reasonable, logical inference to be drawn in favor of the plaintiff when strategic plans are alleged in a complaint, especially of the type here, that those are strategic plans approved by successive boards and, in this case, approved by boards that -- where at least eight of the 12 members were in place specifically during the period where the government alleged the wrongdoing, and the company admitted its guilt to that misbranding charge, that included the promotion and marketing for off-label uses.

So I think that -- and in fact, in -- I'm not saying that we were thinking about this at the time, but in reviewing the cases and the briefs that -- especially the reply brief in the Norfolk County case, Your Honor -- that was a case where the plaintiff, on a 220 action, was seeking additional information. And there were certain documents that

were presented by the company in response to the 220; specifically, a special litigation report and underlying minutes. And the Court, while not looking at it dispositively, noted that the documents produced by the company in some senses undercut the claims that the plaintiff 220 actor said that he wanted to investigate.

THE COURT: And from the standpoint of a derivative claim brought on behalf of the corporation, is that a good thing or bad thing?

MR. GOLAN: I think, Your Honor, it's a mixed bag, because under a 220 action, you are entitled to -- clearly, you are entitled to some discovery, but it's limited. It's often limited by -- unless you go through the whole proceeding and are able to present specifically what you didn't get, it's often limited to what the company deems to be relevant to your investigation. And in this case, Your Honor, given the wealth of information that we had, and especially the information we had about the amended complaint -- and I have to say, Your Honor, it's not like it was -- we weren't aware of this 220 action until they moved to intervene.

THE COURT: I'm not suggesting you

should be. I'm focusing on your decision to file two days after the announcement. I had the impression from your papers, from your reference to Pfizer, and I guess today to Schering Plough, that this is a practice area that you were in, in terms of filing after announcements of FCPA-type stuff.

MR. GOLAN: It's certainly an area that we know, Your Honor. We are not --

THE COURT: How often do you do these types of cases?

MR. GOLAN: I wouldn't say that we are -- to the extent Your Honor has deemed firms to be frequent filers, I don't think that we -- we are clearly more discriminating than that.

THE COURT: I'm curious how fast you usually file. Is this a typical situation to be in, two days after, or was this -- what do you normally do?

MR. GOLAN: Derivative cases, it's not typical for us. I'm involved in a case where we made a demand on a board, and we are now negotiating -- we made a demand on a board. I have been involved in -- it's not our typical case. In this case -- well, I will set aside deal cases.

THE COURT: We are talking about situations where there has been either a negative announcement because of FCPA, or because of insider trading, or SEC, or things that are going to lead to derivative actions that are nonexpedited.

MR. GOLAN: Your Honor, it's an unusual case for us to bring this quickly. The reason we filed it as quickly as we did was that, one, the amount of information we had, we felt, was sufficient, both on a demand futility and a merits side, to bring the action derivatively on behalf of the company. And sort of, the -- I mean, I do know that while we are the only case in this Court, there were, subsequently, cases filed within the next week or two by three or four other law firms in California.

THE COURT: How did that affect your decision-making process?

MR. GOLAN: First of all, they were after our case was filed.

THE COURT: How did concern about other people filing affect your decision-making process?

MR. GOLAN: It didn't, Your Honor.

THE COURT: Why are you raising it?

MR. GOLAN: I'm trying -- first of all --

THE COURT: I think it did affect the decision-making process. And I don't say that in a bad way. People are rational economic actors. So the idea that you would try to file first, to try to get control of the case and have the advantage of the first-filed rule, is something you folks do. There is nothing wrong with that. It's the legal system in which you are playing the game. But, I mean, you are telling me that didn't -- that wasn't a factor?

MR. GOLAN: Your Honor, we saw the case. We put people on it. We investigated it. We developed the complaint to the point where we thought, and still believe, that it's a viable complaint under Aronson and under the breach of loyalty rules. And we filed it in this Court. We looked at --

THE COURT: I'm asking a very precise question. Was your desire to have a lead role and have control of the case a factor at all in the timing of when you filed?

MR. GOLAN: Yes, Your Honor.

THE COURT: Of course, it was. And there is -- just -- let's just deal with that and

recognize that there are odd policies out there that induce that type of behavior. But it's not helpful to try to hide that.

MR. GOLAN: Your Honor, what I was pointing out was that we -- and the Court can take this for whatever it feels it's worth. We were not the only firm to make the decision.

THE COURT: Of course not, because it's rational economic behavior for entrepreneurial plaintiff's firms to try to file quickly, just like it's rational economic behavior for defendants to try to hold in the first-filing plaintiff, that didn't have the benefit of 220, because that gives them their best opportunity to get a dismissal, and then they have an advantageous situation going forward.

There aren't any white hats or black hats here. There is an odd system, that creates really strange behaviors, that are individually rational and collectively irrational. But, you know, to say that -- or to try to suggest and try to dodge the question until I actually have to put it to you pointblank and force you to answer it, it's not credibility inspiring.

MR. GOLAN: I apologize to the Court.

The point I was trying to make was two-fold: One, that there were other plaintiffs who clearly felt that there was sufficient information to bring this kind of case, based on the government's information in the press release and other things. They filed in California. They didn't file here. But I would also note that the movant hasn't sought to stay any of the California cases, as far as we know. I find that odd.

THE COURT: Why?

MR. GOLAN: Because if there --

THE COURT: Because they have to spend money in two places?

MR. GOLAN: No. But if there are decisions that they are worried about in our case, in this case, being made without giving the movant time to do its 220 books and records search, and possibly bring a new complaint, then those same concerns should be raised by the California cases.

THE COURT: Where would the 220 action be filed?

MR. GOLAN: 220 would be filed here.

THE COURT: Who would likely oversee the 220 action, given that it would be a related decision?

MR. GOLAN: I assume it would come to the same court.

Your Honor, I would be happy to address the issue preclusion, because we do object -- we do -- we do not think --

THE COURT: Before you get to issue preclusion, now that you know that you have got your friends here, and that they are doing a 220 demand, why the continued press forward? Why not say to me, "We are here for the best interests of the company. If Mr. Rigrodsky and his team get some good information -- we realize that we can't talk to them, because we have already made our pitch, but if they independently find something that is really in the best interests of the company, and we would be welcome at that point, if they wanted to intervene..." -- why press forward on a complaint that gives the defendants their strongest basis to dismiss?

MR. GOLAN: Two things, Your Honor. And we -- first of all, obviously, I don't know whether this is true, but the defendants, in their papers, said that what they are providing to the 220 actor is not going to be helpful to their complaint.

THE COURT: Is that something that you

normally take at face value?

MR. GOLAN: No. No, it isn't, Your Honor. But it is -- I think that our view is that we have a complaint -- we obviously don't.

THE COURT: Come on.

MR. GOLAN: Mr. Nachbar --

THE COURT: Mr. Nachbar and Mr. Smith are great guys, and I give them all -- you know, they are peak players. They have credibility, absolutely. But the idea that you would say that, and you would say, "Well, we trusted them" --

MR. GOLAN: No. No. I do know that they said that. But I also think that --

THE COURT: I'm sorry. It just really struck me as funny. It's not polite for me to react that way. I apologize. But that was a truly incongruous statement.

MR. GOLAN: But under the issue preclusion, under the West Coast Management case, under the Freund versus Lucent Technologies, even under Career Education and Joseph Banks, if this -- first of all, if this Court upholds the complaint, there is absolutely no prejudice, because then we get full discovery, compared to the limited discovery.

The limited discovery --

THE COURT: Look, if this Court upholds the complaint, great. No downside. Fantastic. No question about it.

MR. GOLAN: Under the case law, West Coast Management and the other, assuming that the movant finds and can make heightened allegations over and above those in our complaint, I think the law, at least in this Court, is very clear, that that would not preclude them from coming in and filing their own action. Having said that, if -- and clearly, having filed this case, I was not going to then turn around and say, "That's right. I should have filed a books and records, so I want to join that."

Having said that, I think the 45 days is a long time. I mean, we filed this case in September. They are getting the documents, and they say that they won't be able to, until early March -- but having said that.

THE COURT: How much did they get?

MR. GOLAN: I have no idea, Your Honor.

THE COURT: How can you say whether 45 days is a long time or short time?

MR. GOLAN: I would have thought that whatever they got, they would review within -- they would put enough people on it to review it more quickly than that. Having said that, if there is a good basis for them to join the suit and for us to work together, I'm not -- I'm not opposed to that. But I also -- when we were accused of being inadequate representatives and having not conducted an investigation, when clearly we had, and we think that there is a complaint on file that does meet and surpass the particularity pleading requirements and the demand futility requirements, our belief was that it's more in the interests of the company to let that go forward sooner.

Thank you, Your Honor.

THE COURT: Thank you. Mr. Nachbar, are you going to speak, or Mr. Smith?

MR. NACHBAR: I will speak on behalf of the individual defendants.

A couple of points about the timing, the document production, and then I will address maybe some of the bigger issues, although I don't think we are here to argue the motion to dismiss today. We will touch on it, probably, a little bit.

First issue is the documents produced are -- get it exact -- 3,927 pages. I'm told it's about 270 documents. So I don't think it will take anybody 45 days to review that.

And there has been -- the timing problems here are of the intervenor's making. There was a September 1 announcement. Two months went by before there was any 220 demand. That is a long time. I'm not sure why that happened. And they knew that there was a complaint pending, or at least it was public knowledge that there was a complaint pending.

But even after that -- they make their demand 11/3. The company gets back to them very promptly. And in fact, they send an e-mail thanking the company for its timely response, and then there is negotiation of a confidentiality order. And, now, Ms. Reese was the person who had these discussions and can address the specifics firsthand. I can only do it secondhand, from the e-mail traffic. But there was no, "We will keep them attorneys eyes only. In the meantime, can you get them to us?" And in that process back and forth, there were some pretty long delays. There was ten days of, you know, Ms. Reese -- she can go over the details, but she would send a

draft, and ten days would go without a comment, and then a revised draft, and another eight days would go by, and etc.

We are now four-and-a-half months out, and the documents are first being produced. And we have got, now, a fully briefed motion to dismiss in this Court. We have got a hearing scheduled for February 28th in California. And, you know, we now have these intervenors coming in, saying, "We want the opportunity to take 45 days to look at this and then tell you if there is anything new that somehow will tie this to the board of directors."

There isn't, but, you know, just like you wouldn't expect the plaintiffs to take my word for it, I don't expect Your Honor to take my word for it, and I don't expect the intervenors to make my word for it. But that is what the documents will show.

It's not -- I'm not -- it's not totally take my word for it, though, because the government did have 8.4 million documents that it reviewed before putting out its information. It did have all the board materials relating to the sale of BOTOX. And the fact of the matter is there is nothing in the information tying this in any way to officers

or directors of the company. There are no individual defendant's names. There are no claims against individuals. There are no, you know -- and what the company pled guilty to was a single strict liability misdemeanor.

THE COURT: I completely agree with you. That is why -- and I'm not suggesting that there was any wrongdoing here. But that is precisely one of the reasons why one would think that rationally, if the stockholders were able to act in a united block through a lawyer of their choice, the stockholders would say: "Please file 220 and check this out. And Mr. Nachbar or Mr. -- Ms. Reese or Mr. Smith will produce some documents, and then we will make a decision, because we don't want to have the company incur the -- however much cost it has been to defend motions to dismiss here, to defend motions to dismiss in California, to fly California lawyers hither and yon. We would actually like to make an informed decision about whether we want to file suit. And we will do that after we see the documents. And if the documents indeed are as Mr. Nachbar says they are, we probably won't file. But if the documents permit an inference, because well advised people usually don't

confess to doing activities that would violate federal statutes -- if there is an inference that the board was involved, then maybe we will sue. But we don't know that yet."

MR. NACHBAR: Right. I think if there were a document tying a conduct to the board, it would have been in the government information. So in Mr. Golan's defense -- I'm not used to defending members of the plaintiffs' bar, but in his defense, speaking of inferences, it's a pretty fair inference that the government didn't find any such document, and therefore, whatever argument he, intervenors, people in California, or anybody else is going to make, is going to have to come from, "the board must have known," because there are no documents showing they actually did know.

We think that argument is completely bogus, if I can use a -- hopefully not too strong a word. But we think that argument goes nowhere. But that is the best that any of these folks have or, at the end of the day, will have.

THE COURT: That may well be true. I just don't know the dynamics of settling these things. There are a lot of contexts where people agree in

settlements to charges or agreements or fines that don't involve personal liability for anyone. And it's a way of -- even if, perhaps, there is some evidence suggesting something.

So I don't know how it will turn out, but I hear what you are saying. I do hear who are what you are saying.

MR. NACHBAR: A couple of other points. It's not illegal to prescribe drugs for off-label use. In fact, BOTOX, I understand, is the standard of care for juvenile CP, and yet it's not an approved use. That has to do with how you get FDA approval. You have to do double blind tests and give people placebos. And giving children with JCP placebos is obviously problematic. It has been approved in many, many other countries. And I'm also told that a large percentage of the prescriptions in the United States are for off-label use. It varies by drugs. Some of them, it's a very high percentage. Some of them, it's a smaller percentage. But I think overall it's something like -- 30 percent is a number I have heard. It's not two percent. It's significant.

The strategic plan that is referred to

was a strategic plan from 1997 that talked about selling BOTOX. It was not the top priority. Instead, there was a list of top priorities. There were ten, a dozen, 15, some significant number of them. And sale of BOTOX was one of them. But -- and we believe that the strategic plan was presented to the board. I think the investigation that was done, nobody remembers, whatever it was -- 14 years ago -- getting that strategic plan, but that was the practice. I don't think we have a reason to believe that the practice was not followed. But what is important is that the plan did not address how BOTOX would be sold. It didn't talk about on label or off label. But significantly, the timing of the sales, some of them were -- I think they were beginning -- the increased sales were beginning in 2001 and continuing, some of them, into 2012. There was, simultaneously, a table about the approval process.

So I think a rational director sitting there would think that the sales would ramp up as the approvals came forward, not that somehow they were condoning off-label prescriptions, even though such off-label prescriptions are fully legal. There are some promotions of off-label use that the FDA frowns

upon, considers illegal, prohibits, whatever verb you want to use. And there is a line, and it's pretty gray. And so it's sort of, you know, like pornography. You know it when you see it. Well, you don't always --

THE COURT: Annual meeting bylaws. When you shift those, you know it when you see it.

MR. NACHBAR: Right. You know, it's -- I think the line is actually a lot grayer than that. So how much promotion is too much promotion, I believe, is a gray area. But anyway, there is nothing, we believe, that will tie the board in any way to knowledge of, or participating in, any wrongful or, more importantly, unlawful activity.

That said, you know, practically, where do we go? It seems to me there are probably two alternatives. We think the appropriate alternative, given the delay of these plaintiffs, given the fact that they still don't have a pleading -- a motion to intervene requires a pleading. They still don't have one. We have got a fully briefed motion to dismiss. We think that motion should be decided. We don't think Your Honor will deny the motion, but if Your Honor does, you know, we all agree, no prejudice to

the intervenors. And at that point, whether they intervene or not, we are not looking to fight with this plaintiff or that plaintiff. We are not picking among them. The case would go forward, and whoever champions the stockholders as the derivative plaintiff is our adversary. We don't get to pick that.

If the motion is denied, then we think if there really is something new, if there is some significant document, the intervenors can come forward at that point, and they can say, "You made a right decision, based on the facts before you, but here are these other facts, and they are game changers." If they are game changers, they will change the result. They will change the game. If they are not game changers, then they won't change the game. There are no game changers here. That is why we are willing to go down this path.

The other alternative, I suppose, that is available is to give the intervenors a short period of time and say, "If you have got something, come forward, but come forward in the next week or ten days," or whatever. It's 3,000 pages, 4,000 pages of documents. We have all -- we have reviewed documents, and it doesn't take 45 days to review 4,000 pages of

documents. Just doesn't.

And then, you know, if we go Alternative 2, we ought to have a hearing. And, you know, I do think it is in everybody's interests to have that hearing take place before a California court has to decide whether to stay its action in favor of this action or, alternatively, present the motion to dismiss out there. That is the pending motion, to stay or, in the alternative, to dismiss for demand futility.

We potentially have two courts simultaneously looking at the same issue. I don't think that is in anybody's interests. So we think Alternative Number 1 is the appropriate one. Schedule an argument and decide it, and, you know, I'm repeating myself, but if the motion is denied, no problem. If the motion is granted and plaintiffs have a game changer, they change the game. Alternative -- give them a brief period to come forth with -- you know, hit us with their best shot.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Nachbar. Ms. Reese, how have you been?

MS. REESE: Great. Thank you, Your

Honor. Cathy Reese, Fish & Richardson, on behalf of Allergan, Inc., the nominal defendant here. Ordinarily, I wouldn't rise to speak, but it's a little be different in terms of we were involved in the books and records case, which is what they -- the movant is citing as evidence of their great diligence in this action. And so I would like to begin, if I may, by handing up the e-mails that Mr. Nachbar mentioned to Your Honor. Includes a time line.

MR. RIGRODSKY: Is this in your brief?

MS. REESE: Actually, a lot of this is in the brief. Some of the e-mails are e-mail traffic that has happened since the reply brief. We did mention these, the earlier dates. They are actually in your brief, which are the -- when the qui tam actions were filed, when the DOJ announced the plea, that sort of thing. Where there are tabs, those are the -- those are the e-mail traffic.

The point I would like to make here, Your Honor, is that the premise of their motion is that they have been extraordinarily diligent, and their diligence should be rewarded, not punished. To support that, they rely primarily on pointing toward the plaintiffs' lack of diligence, the two-day filing

after the announcement of the plea. But the absence of one isn't the presence of the other. If you --

If you look at the time line here, the qui tam actions were actually filed in 2007. There was a press release and an 8-K in March of 2008, put out by the company after it received a subpoena from the government, which identified that the government had served the subpoena for documents relating to the promotion of BOTOX. And so then if you look here, the DOJ announced the Allergan plea on September 1st, and they waited more than two months to bring their books and records demand. And we timely replied.

Now this says the demand was dated November 3rd. Actually, if you look under Tab 1, was sent to us and served to us on the 5th. The letter itself was dated the 3rd. And we responded within five business days. Mr. Rigrodsky, in his e-mail on Tab 2, noted it was timely response. And we said, "We will get you the documents as soon as we receive a signed confidentiality agreement and the check for the cost."

We actually sent some of our attorneys out to California the Tuesday after the Friday we received the demand, to go through the documents. We

collected them on an expedited basis and were prepared to produce them once we received the signed confidentiality agreement and the costs. We sent them what we thought was a fairly standard form of confidentiality agreement. They marked it up to -- basically, to allow them to give our board materials to just about anybody, and without having to notify us. And that wasn't acceptable. And you can see the big delays. We tried to respond.

THE COURT: One second.

MR. SHEPHERD: Your Honor, if I may be heard? I object to being -- having this sprung on me at this hearing. And inasmuch as I had no personal involvement in the underlying discussions, I have not been able to talk to anyone who was in the underlying discussions and will be unable to respond.

THE COURT: I will go ahead and listen to it. I understand your objection, and it will make your reply more --

MS. REESE: Your Honor, if you look down the line in each case with respect to the negotiations of the confidentiality agreement, we responded same day, or within two days, and there are a lot of ten-day, seven-day, six-day gaps on their

side. This was not something that was prosecuted diligently. And the fact that they just received the disk yesterday with the documents is because we just received the check and the confidentiality agreement on Tuesday, when we got back from the holiday.

So the importance of that is that there are defects in this motion. And they really are fatal defects. Rule 24(c) says you are supposed to have a pleading with your motion. And they say, well -- footnote 5 of their reply brief they say, "No, we don't need to do that." They cite a case from, I think, 1954, that Judge Seitz decided.

THE COURT: I like old cases, and I like Judge Seitz.

MS. REESE: Yeah, but that's not what Judge Seitz said in this case. In this case Judge Seitz said, "His motion to intervene will not be granted unless and until such a pleading is served and filed."

So it says pretty much the opposite. I don't know of any case that allows you to ignore the requirements of 24(c) when you are seeking intervention. 24(c) uses mandatory language, that a pleading shall -- the motion shall be accompanied by a

pleading. So whose fault is it that it didn't come with a pleading? I think it's their own fault, because they didn't move quickly with this. And had they, they would have known whether they have a case. Right now, they admit they don't know whether they have a claim, and they admitted it in the purposes in the books and records demand, and they admitted it, essentially, in their reply, when they suggest that the plaintiff's complaint doesn't state a claim and won't meet the demand futility high bar. And they don't indicate that they have anything other than what the plaintiffs have at this point.

So this is an unripe motion, and it's unripe because of their own lack of diligence. For those reasons, we believe it should be denied.

THE COURT: Thank you. Anyone else from the defendants' side before I hear a reply? Okay.

MR. SHEPHERD: Your Honor, there is not much that is said that I feel I need to reply to.

On the last point, the Rule 24(c) point, the purpose in the rule of filing a pleading is to put the parties and the Court on notice of what the claim you want to come into court on is. There is no

question what the claim we would like to come into court on is. The very nature of our motion makes it impossible to file a pleading, other than adopt the pending pleading, which we don't want to do.

As to the argument about the delay, as I say, none of this was in the briefs. I was not personally involved in any of the negotiations of the confidentiality agreement, except to hear from time to time that there was negotiations of the confidentiality agreement going back and forth. Mr. Rigrodsky was more involved and could address questions that Your Honor has with that.

THE COURT: I don't have any questions.

MR. SHEPHERD: Beyond that, I don't have anything to say -- I guess I should say we mentioned 45 days. Experience in these matters teaches that it may well be that we look at these documents that we received and say we think there is more, and that takes a little bit of time going back and forth. That is the reason I mentioned 45 days.

THE COURT: Understood.

MR. SHEPHERD: Thank you, Your Honor.

THE COURT: Thank you.

This is an interesting case. It poses interesting issues. I suspect they will be recurring issues and that some day someone will have to write on them, but it won't be me as a result of this hearing today. I'm going to go ahead and give you my thoughts.

This is another example, as I suggested during my discussions with Mr. Golan, of individuals acting rationally in a way that leads collectively to an inefficient and irrational process. And it's inefficient and irrational both from the perspective of the corporation and its stockholders and the judicial system.

Mr. Golan made a reference to whether I would consider him a frequent filer. If all you know about me is that you have read my Revlon decision and maybe saw a recent quote in the Wall Street Journal, where I was quoted about -- making a comment about deal litigation, you might think that I am hostile to plaintiffs' lawyers and to representative litigation. Far from it. What I am hostile to, and on the watch for, is fiduciary shirking and fiduciary self-dealing. That applies to all fiduciaries. It applies to directors. It applies to trustees. It

applies to plaintiffs' counsel and representative plaintiffs when acting as fiduciaries for the class. That is the traditional role of this Court, as a court of equity, to guard against fiduciary misbehavior.

Now, it so happens that the law is quite well developed in some of these contexts -- namely, with directors and trustees -- but less so in others, particularly in terms of class fiduciaries. It also so happens that there have been economic developments and legal developments that have led to significant changes in how representative litigation is pursued. That raises issues, and that's what we are here today about.

If the Allergen Allergan directors willfully, consciously -- pick your adverb -- violated positive law, then there should be remedial consequences. A decision to consciously breach statutory or regulatory requirements is wrongful. There is nothing novel about that. Vice Chancellor Strine has said that in a number of cases. Corporations are not sociopathic pursuers of profit that can ignore their legal obligations to comply with law and other legal requirements.

But stockholders, as a whole, would

want this type of behavior investigated before the cost of defending a proceeding was imposed. If you envision the equityholders as a totality, what would be rational for them is to -- and if there is some way that they could overcome collective-action problems to act in this manner, they would hire a law firm; they would have that law firm do a thorough investigation; they would have that law firm use 220; and then they would make a decision. And if there was no evidence of board involvement and nothing to implicate the fiduciaries at the board level in misconduct, then they wouldn't have any reason to question their fiduciaries' ability to police this type of bad thing.

Clearly, a bad thing happened at Allergan. There is no question about that. The question is whether the board is appropriately situated to seek corrective action for that bad thing or whether the board, in fact, was a wrongful cause of that bad result, in a manner that gives rise, potentially, to fiduciary liability.

Litigation is costly. So if you could envision this totality of stockholders, they would not want to sue willy-nilly and impose on their company the costs of defending multiple actions in multiple

fora, where the cost of briefing on just a motion to dismiss, when you have experienced counsel from big firms, can approach seven figures. It's real money.

If they found something, they would want to sue vigorously and pursue it. But you would want to make a reasoned and rational decision based on all information available, including the possibility of getting Section 220 documents. And at least you would want to try to get Section 220 documents, because there is no time pressure to this. This is a derivative action. There is a three-year statute of limitations. People can move deliberately.

Here you have something very different going on. It's because in our system, the primary folks who police fiduciary behavior at public corporations are entrepreneurial plaintiffs' lawyers. That is great. Why is that great? Because stockholders are rationally apathetic, and so you need an actor who can be incentivized to review fiduciary misconduct. But as with any time when you have somebody who is simultaneously pursuing their own self-interest as well as the interests of others, there is the possibility of conflict.

Plaintiffs lawyers want to get paid.

That is fine. That is what motivates them. To get paid, they have to get a result. To get a result, they have to get control of a case. Traditionally, what our courts and other courts have applied is a first-filed presumption. I understand that is still the rule in California, based on the briefing. That incentivizes people who want to get control of a case, so that they can then get a result and get paid, to file as fast as possible; as in here, two days.

I don't think anybody has a black hat here. I'm not blaming Mr. Golan or his firm. I suspect they are fine lawyers. I suspect they have gotten great results. But they are behaving rationally in an environment where individual rationality breeds irrational collective behavior.

So you have got this rush to file, and you have got a failure to use 220. Where you have a Caremark case -- and there is no doubt this is a Caremark case. No question. The point is, how do you get to the board? And under Caremark, you either get to the board by showing there is an actual decision made, that there were red flags and the board didn't make a decision when they really should have, or you attack the board decision by which the information

should have flowed to the board; i.e., the information system. But in each case what you have is a board decision -- theoretically, a conscious nondecision in the case of red flags -- to act that gets you to the board level.

When plaintiffs have filed Caremark cases after bad things have happened to companies, but without first using 220, they have not been successful. I did some work, looked back at this, to make sure my impression was right: Abbott Labs, in the Seventh Circuit, which I remember shocked everybody when it came out, because they drew an inference just from the idea that it was a big, bad problem, and Pfizer, where there was a prior settlement that required board monitoring and, hence, there was a clearly rational and plausible inference of board involvement.

You do have Caremark cases that have gone forward, most obvious one being AIG, but AIG was brought in the first instance by the company, where the company was involved and they allowed the case to go forward, where the stockholder plaintiff was able to sue. And there was a lot of information there that the plaintiff was able to use. And it was, of course,

a lower standard, because the company hadn't decided to oppose on 23.1.

What this means is it really doesn't make sense from the stockholders' standpoint or the corporation's standpoint to sue before using 220. That is why the Delaware courts keep saying to people, "Use 220. Something bad might have happened here. There might actually be a reason for this to get past a motion to dismiss." But people aren't using 220. And frankly, I think they are not using 220 because of this desire to get control of the case, which as I have already said is people acting rationally, but it doesn't work out.

For the defendants, they are thrilled with this. All else equal, you would love to litigate a complaint where the plaintiff didn't use 220. All else equal, it gives you a huge leg up. Now, there is not going to be, I don't expect, confessions in the 220 documents. Well advised directors of public companies don't do that. But whether to grant a motion to dismiss on Rule 23.1 grounds in this context will depend upon the totality of the circumstances. That's what our cases say. You want some board involvement, but you have to look at the totality of

the circumstances. If there is already a decision that discusses the totality of the circumstances, that has dismissed on Rule 23.1 grounds a case, then the next plaintiff is facing an uphill battle, because at that point the analysis is not on the totality, but on the incremental evidence.

There was a suggestion that a Rule 60 motion could be made. That's one of the most uphill standards around. So it's completely understandable that the defendants would want to hold in the original plaintiff, get a decision on the existing motion to dismiss, put this case, hopefully, behind them, and then have the high ground for any post-220 resolution.

Now, my job I don't think is to do what makes sense for individual plaintiffs' lawyers. Nor do I think my job is to do what makes sense tactically for defendants. I think my job is to do what makes sense for Delaware law and our system as a whole. So that's what I'm now going to try to do.

I'm denying the motion to intervene as premature because it doesn't have a complaint. That denial is without prejudice. The Section 220 process will go forward. I think you can review that volume of documents quite quickly, seven to ten days. I

understand that you may have to have a dialogue with the corporation about things they didn't provide you. I think that can happen quite quickly and that that process can be closed in 30 to 45 days.

If you have problems, you can file a 220 action. That would, in the ordinary course, be assigned to me as a related proceeding. If for some reason it weren't, you could send a letter to the Chancellor, and then he and I could talk about it. Perhaps there would be some good reason to assign it to somebody else. I don't know. He gets to make all the assignment decisions, not me. It would make sense, historically, for it to come to me. We would get any 220 action done in 60 to 90 days.

Now, I'm not encouraging you to make ridiculous requests. I don't want you to make pie-in-the-sky demands. It won't help you to come in on a 220 action if you have asked for silly stuff. But if you are getting stonewalled on things that you legitimately should have under the case law, we will get this done in a timely fashion.

I am taking the motion to dismiss argument off the calendar. There will not be an argument on the motion to dismiss until after the 220

process is over, on the schedule that I'm indicating, and the intervenor has an opportunity to decide whether to make a further motion to intervene. It is simply not efficient from the perspective of judicial resources or, frankly, corporate resources to do things twice, to rule on the motion to dismiss twice. It also gives the defendants an unfair advantage, frankly, because of incentives that our current system places on entrepreneurial lawyers.

Again, I'm not prejudging the motion to dismiss. Mr. Nachbar made a number of great points today. And it was not lost on me when I read through the information that there wasn't a lot, if anything, beyond "strategic plan" to connect this to the board. I don't know how that comes out, and I'm not prejudging it, but this should proceed in an orderly fashion where that decision happens, and happens once.

If there is a renewed motion to intervene, you all need to attach a complaint, because what I'm going to be looking at is whether your complaint adds incremental value over what your friends have done. You don't automatically win this. It may be that Mr. Golan's judgment was right, and I would have to take into account what to do there.

There are competing policies. I, frankly, don't think it makes sense to incentivize people to file two days after. I think it makes sense to give people an incentive to use 220. Maybe I would make you a co-plaintiff. I don't know. I will cross that bridge when I come to it.

Now, in terms of the California proceedings, I'm not in a race with California. I don't think California is in a race with me. I defer to the federal judge out there. I don't know if it's a he or a she. Is it a he or a she?

MR. SMITH: It's a he, Your Honor.

THE COURT: I have no control over how he handles that case. I do strongly believe that it makes the most sense to have these matters adjudicated in one forum. I don't think it makes any sense for there to be multiple decisions on the same issues, whether those be seriatim in one proceeding or whether those be parallel and seriatim in different courts. I would expect the federal judge to have similar reactions about what is rational in terms of how to proceed here, but that is ultimately up to him. If it is helpful, I am happy to speak with him. I don't see a need to impose on his time, but if he thinks that it

would be helpful to get input from me, I'm happy to have that conversation.

Now, what I do strongly believe needs to happen when we have these multijurisdictional proceedings is that the Courts know what is going on in each proceeding. So I will require the defendants, in connection with any hearing in California on scheduling or a motion to dismiss or a motion to stay, whatever the next of those is with the federal judge, to provide a copy of this transcript to the federal court. Once the federal judge there is fully informed of what is going on in Delaware, it is certainly entirely his decision as to what to do, and I don't intend to prejudge that for him.

Now, I recognize that given what I am doing today, there is the potential for tactical maneuvering going forward. I don't know what will happen, but one would envision that the current plaintiffs might drop their suit and try to go elsewhere. I think this needs my approval under 23.1, and I can tell you I'm not inclined to approve it. Likewise, I think if the defendants are inclined to try to pick off plaintiffs, they ought to think hard about it.

I'm not indicating any disinterest in this case. I'm not expressing any view this case has no merit. I don't know whether it has merit one way or the other. That decision, I think, has to be made based on an opportunity for the plaintiff/potential intervenor to get books and records. What I don't want to have, though, is the same type of unpleasantness I'm now having elsewhere, where there has been misunderstandings about how to proceed. I just want to make clear that I am not intending to put this case on a back burner, on hold, or not do anything with it.

Now, what I am trying to do is establish a process where this case can move efficiently, and have it done in the interests of both the defendants and the plaintiffs, and with that happening without an unnecessary advantage to either side. I'm also, frankly, trying to correct for some of the individually rational behavior that generally skews these types of processes.

If after the 220 process Mr. Golan and Mr. Rigrodsky's team want to work something out and move forward together, I'm not ruling that out. And nothing I say today should be construed as any

criticism of Mr. Golan or his firm. There are no white hats. There are no black hats. There are just people acting rationally in the circumstances of the case.

Now, with that, are there any questions from anyone as to how this should move forward?

MR. SMITH: Your Honor, I just have one question. When we -- I presume this is okay. We don't represent the company in California. There are -- and nor does Ms. Reese. They are represented by another firm. They are the ones that have made the motion to stay in California.

THE COURT: I'm ordering the company to do it. Whether the company does it through whomever is fine with me.

MR. SMITH: Okay. I take it you would not object if we used that as support for the motion to stay on the basis that the 220 procedure should be allowed to go forward, and use it as an affirmative basis for the motion?

THE COURT: I certainly wouldn't object to that at all. I think that is entirely rational. My only point is I think it's entirely up

to the federal judge, what he does with his case.

MR. SMITH: Thank you, Your Honor.

THE COURT: Mr. Golan.

MR. GOLAN: Your Honor, I just wanted to assure the Court that we won't -- we are not going anywhere. We will keep our case here. We are -- we think Delaware is the appropriate forum, and we are not going to go file anywhere else. We will stay right here with Your Honor.

THE COURT: I appreciate that. And as I said, I mention that only because I have had a little misunderstanding elsewhere, and I'm trying to avoid any similar type of misunderstanding.

MR. GOLAN: Thank you, Your Honor.

THE COURT: Anybody else? All right. Well, I thank you all for your arguments today, and for your presentations. As I said at the outset, I particularly appreciate the California folks, who have had to make two trips. It's been good to be with you all, and please keep me posted if there is anything that needs to be done on the 220 front. Once that is resolved, in terms of moving this case forward, you know where to find me. Have a good day.

(Recess at 11:24 a.m.)

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CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 62 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated. The ruling was editted by the Vice Chancellor subsequent to the hearing.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 24th day of January, 2011.

/s/William J. Dawson
Official Court Reporter
of the Chancery Court
State of Delaware