



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.)

C.A. 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.)

**THE DEFENDANTS' MEMORANDUM REGARDING THE
PRECLUSIVE EFFECT OF THE CALIFORNIA DISTRICT
COURT'S DISMISSAL OF THE FEDERAL DERIVATIVE ACTION**

Defendants David E.I. Pyott, Louis J. Lavigne, Jr., Herbert W. Boyer, Ph.D., Deborah Dunsire, M.D., Michael R. Gallagher, Gavin S. Herbert, Dawn E. Hudson, Robert A. Ingram, Trevor M. Jones, Ph.D., Russell T. Ray, Stephen J. Ryan, M.D., and Leonard D. Schaeffer (collectively, the "Director Defendants"), and Nominal Defendant Allergan, Inc. ("Allergan" or the "Company," and together with the Director Defendants, "Defendants") hereby submit this supplemental memorandum regarding the preclusive effect that the dismissal of the

federal derivative action on demand futility grounds has on the derivative action pending before this Court, and state as follows:

INTRODUCTION

1. The plaintiffs in this action (“Plaintiffs”) are precluded from litigating demand futility because another court has ruled—in a shareholder derivative action based on the same underlying facts—that demand is not futile. Because that decision binds Plaintiffs here, their Second Amended Derivative Complaint (the “Complaint” or “Del. Compl.”) should be dismissed with prejudice.

2. After Allergan agreed to settle criminal and civil claims regarding its marketing of BOTOX® for therapeutic uses, multiple shareholder derivative actions were filed in this Court (the “Delaware Action”), the United States District Court for the Central District of California (the “Federal Action” and the court, the “California District Court”), and the California Superior Court. In each action, the plaintiffs alleged that members of Allergan’s Board of Directors (the “Board” or the “Directors”) breached their fiduciary duties in connection with Allergan’s marketing of BOTOX®, and each complaint alleged that demand was futile.

3. The California District Court dismissed the plaintiffs’ first complaint in the Federal Action without prejudice. The plaintiffs in the Federal Action then obtained the same documents that the Company had provided to Plaintiffs in the Delaware Action pursuant to a Section 220 demand by U.F.C.W. Local Fund 1776 & Participating Employers Pension Fund (“UFCW Fund”). *See 8 Del. C. § 220.* The plaintiffs in the Federal Action used those Section 220 documents to amend their complaint. Defendants renewed and re-briefed their motions to dismiss on demand futility grounds.

4. On January 5, 2012, the California District Court dismissed the Federal Action with prejudice. Specifically, the California District Court concluded that the plaintiffs

had failed to allege that: (i) demand is futile; (ii) the Directors are interested for purposes of considering a demand; (iii) there is any evidence that the Directors “would be subject to a substantial likelihood of liability”; or (iv) there is any evidence that the Directors “have broken the law or acted in any way that would be an invalid exercise of business judgment.” Order Granting Motions to Dismiss, *In re Allergan, Inc. S’holder Deriv. Litig.*, Case No. SACV-10-01352 (C.D. Cal. Jan. 17, 2012) (“Federal Dismissal Order”) at 5 (Exhibit A).

ARGUMENT

I. NINTH CIRCUIT LAW APPLIES IN DETERMINING THE PRECLUSIVE EFFECT OF RULINGS BY THE CALIFORNIA DISTRICT COURT.

5. The preclusive effect of a ruling or judgment is determined by the law of the forum in which the ruling or judgment has been entered. *See Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141 (Del. 1989); *Thompson v. D’Angelo*, 320 A.2d 729, 734 (Del. 1974). Accordingly, the Delaware Court of Chancery “gives the same preclusive effect to the judgment of another state or federal court as the original court would give.” *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 642-43 (Del. Ch. 2006) (noting but not deciding that “when the original decision is in federal court, federal issue preclusion law likely applies”); *see In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *10-11 (Del. Ch. Sept. 28, 2007) (applying Seventh Circuit law to determine preclusive effect of federal court decision that demand was not excused) (Exhibit B). Because the Federal Action was pending in the California District Court, the law of the Ninth Circuit and the Central District of California govern the preclusive effect of the Federal Dismissal Order dismissing the Federal Action.

II. COLLATERAL ESTOPPEL BARS FURTHER LITIGATION OF THE DEMAND FUTILITY ISSUE IN THIS CASE.

6. In the Ninth Circuit, a federal district court decision has preclusive effect where (1) an identical issue was necessarily decided in the previous proceeding, (2) “the first proceeding ended with a final judgment on the merits,” and (3) “the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.” *Kona Enterprises, Inc. v. Estate of Bishop ex rel. Peters*, 243 F. App’x 274, 278 (9th Cir. 2007) (internal quotations omitted) (Exhibit C); *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (citations omitted) (Exhibit D).

7. This standard is satisfied where a court dismisses a shareholder derivative action on the grounds that the shareholder failed to make a pre-suit demand or to adequately allege demand futility, and a second shareholder that also failed to make a demand attempts to bring a separate action in another court. *See LeBoyer v. Greenspan*, 2007 WL 4287646, at *1-4 (C.D. Cal. June 13, 2007) (Exhibit E).¹ Because this Court is presented with a similar situation to the situation in *LeBoyer*, collateral estoppel should bar relitigation of the demand futility issue in this case and instead require dismissal of the Complaint with prejudice.

8. In *LeBoyer*, 2007 WL 4287646, at *1, the plaintiffs filed a shareholder derivative action in the Los Angeles County Superior Court alleging that certain directors and officers of a company were responsible for alleged injuries to the company resulting from a restatement of its financials. The plaintiffs alleged that demand was excused because a majority of the five-member board of directors of the company was sufficiently conflicted for purposes of

¹ In *Leboyer*, the first action was in California state court, and therefore the *Leboyer* court applied California collateral estoppel law. Although California’s collateral estoppel standard is split into five elements instead of three, it is substantively identical to the federal standard. *See Hydranautics*, 204 F.3d at 885 (describing the collateral estoppel standard that applies “[u]nder both California and federal law”).

considering a demand. *Id.* The California state court disagreed, concluding that none of the three outside directors was interested and therefore the plaintiffs had failed to allege adequate facts to show that a demand would have been futile, and the California state court dismissed the action. *Id.*

9. Another shareholder of the company brought a derivative action in the California District Court alleging “identical claims,” and also claimed that demand was excused because a majority of the company’s directors was interested for purposes of considering a demand. *Id.* at *2. The California District Court dismissed the plaintiff’s derivative claims on the grounds that the state court’s decision regarding the demand futility issue precluded litigation of the same issue in the federal action. *Id.* at *3-4.

10. First, the *LeBoyer* court explained that the issue of whether a demand to sue the directors regarding the restatement of the company’s financials would have been futile and, more specifically, whether any of the three outside directors were interested for purposes of considering a demand, “was squarely presented in both cases.” *Id.* at *2. In addition, the issue was necessarily decided because the California state court was required to decide this issue in dismissing the action with prejudice on the grounds that the plaintiffs had failed to adequately allege demand futility. *Id.*

11. Second, the California District Court explained that the state court decision was final and on the merits because “demand futility is a substantive issue respecting the allocation of corporate control, or more specifically, exhaustion of intracorporate remedies.” *Id.* at *2-3. Indeed, the *LeBoyer* court reasoned, if a decision regarding demand futility was not final and on the merits, “it could be infinitely litigated in subsequent suits by successive

individual plaintiffs suing in a derivative capacity. Such a result would run against the clear purpose of preclusion doctrines.” *Id.* at *3.

12. Third, the California District Court concluded that, even though different shareholders brought the state and federal derivative actions, the privity requirement was satisfied because “in both suits the plaintiff is the corporation itself.” *Id.* The Court explained that “the differing groups of shareholders who can potentially stand in the corporation’s stead are in privity for the purposes of issue preclusion.” *Id.*

13. Finally, in *LeBoyer*, the California District Court rejected the plaintiff’s argument that the issue presented in the federal action had not been “actually litigated” in the state court action because the plaintiff had alleged facts in the federal action that had not been alleged, or litigated, in the state court action. *Id.* at *2. The court explained that, to the extent the plaintiff presented additional evidence in the federal action, the plaintiff had shown no reason why the evidence could not have been offered in the state court action. *Id.* (“The failure of a litigant to introduce relevant available evidence on an issue does not necessarily defeat a plea of collateral estoppel.”) (quoting *People v. Sims*, 651 P.2d 321 (Cal. 1982)).

14. Here, for the same reasons as in *LeBoyer*, collateral estoppel bars relitigation of the demand futility issue and warrants dismissal of the Complaint. First, the issues in the Delaware Action and the Federal Action are identical—*i.e.*, whether the shareholders are excused from making a demand on Allergan’s Board in connection with their claims regarding the marketing of BOTOX® for therapeutic uses. The plaintiffs in the Federal Action—who received the same documents that the Company had provided to Plaintiffs in this action pursuant to UFCW Fund’s Section 220 demand—argued that “[d]emand is excused because the Director Defendants’ conduct is not a valid exercise of business judgment” and because “a majority of the

Board faces a substantial likelihood of liability and is not disinterested and independent.” First Amended Verified Shareholder Derivative Consolidated Complaint, *In re Allergan, Inc. S’holder Deriv. Litig.*, Case No. SACV-10-01352 (C.D. Cal. July 11, 2011) (the “Federal Complaint”) ¶¶ 68, 71 (Exhibit F).

15. Plaintiffs here make the exact same allegations, claiming that demand is excused because “[t]he directors are not disinterested and independent” and “Defendants’ conduct was not a valid exercise of business judgment and the Board members face a substantial likelihood of liability arising from the misconduct.” Del. Compl. ¶¶ 73, 76. Accordingly, the demand futility issue “was squarely presented” in both cases. *LeBoyer*, 2007 WL 4287646, at *2. In addition, the California District Court necessarily decided the demand futility issue in the Federal Action because the shareholders in that action argued that demand was futile and had every opportunity and incentive to litigate it at that time.² As the Federal Dismissal Order makes clear, Judge Carter considered the issue and necessarily rejected the plaintiffs’ arguments when he dismissed the action with prejudice. Federal Dismissal Order at 3-5.

16. Second, Plaintiffs in this action are in privity with the plaintiffs in the Federal Action for purposes of collateral estoppel. The complaints in both the Federal Action and the Delaware Action purported to bring derivative claims. As such, both actions were brought on behalf of Allergan and therefore, under *LeBoyer*, 2007 WL 4287646, at *3, the

² To the extent that a plaintiff in a second-filed derivative action believes that the first-filed plaintiff is not appropriately advancing “demand futility” arguments, his remedy is to seek to intervene in the first-filed action. *See City of New Orleans Employees’ Ret. Sys. v. Bensinger*, C.A. No. 4042-VCS, Tr. at 49 (Del. Ch. July 17, 2009) (Exhibit G); *see also Teachers Ret. Sys. of La. v. Scrushy*, 2004 WL 432122, at *12 (Del. Ch. Mar. 2, 2004) (If the plaintiff in the Delaware derivative action wishes to make sure that the interests of the company’s shareholders are “competently championed” in prior-filed derivative actions pending in Alabama, “its able counsel should intervene in the Alabama Derivative Actions and engage their fellow plaintiffs’ lawyers in discussions with a view toward helping with the effective prosecution of the derivative claims in that forum.”) (Exhibit H).

plaintiff shareholders who stand in Allergan's stead are in privity for purposes of issue preclusion.

17. Third, the demand futility issue was resolved by the California District Court in a final decision on the merits. Judge Carter dismissed the Federal Complaint with prejudice, holding that demand was not excused because there was "no evidence that [the Directors] would be subject to a substantial likelihood of liability" and "no evidence that [the Directors] have broken the law or acted in any way that would be an invalid exercise of business judgment." Federal Dismissal Order at 5. As the *LeBoyer* court recognized, demand futility is a substantive issue that, once decided, has preclusive effect. *See LeBoyer*, 2007 WL 4287646, at *3.

18. Accordingly, because all of the Ninth Circuit's collateral estoppel requirements are satisfied here, Plaintiffs are barred from relitigating the issue of demand futility. *See LeBoyer*, 2007 WL 4287646, at *2-3; *see also W. Coast Mgmt.*, 914 A.2d at 642 ("This court gives the same preclusive effect to the judgment of another state or federal court as the original court would give.").

19. Dismissal is particularly warranted here because the Federal Action was dismissed with prejudice. *Cf. W. Coast Mgmt.*, 914 A.2d at 943-45. In *West Coast Management*, the Court of Chancery concluded, after applying a four-part issue preclusion test,³ that a shareholder plaintiff could not litigate its derivative claims in the Court of Chancery after a

³ The Court of Chancery applied the Delaware test for issue preclusion, *see W. Coast Mgmt.*, 914 A.2d at 643 ("Issue preclusion applies if: (1) the issue sought to be precluded is the same as that involved in the prior action; (2) that issue was actually litigated; (3) the issue was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment.") (citing *Berkowitz v. Vari*, 1999 WL 16781, at *4 (Del. Super. Ct. Mar. 3, 1999)), but noted that "Colorado law on issue preclusion is substantially the same." *Id.* (citing *Natural Energy Res. Co. v. Upper Gunnison River Water Cons. Dist.*, 142 P.3d 1265, 1280 (Colo. 2006)).

similar action by the plaintiff had been dismissed *without prejudice* by the United States District for the Central District of Colorado (the “Colorado District Court”). *Id.* at 643-44. The Court of Chancery explained that there could be “no serious dispute” that all but one of the collateral estoppel elements was satisfied. *Id.* at 643.

20. The only element in question was whether the Colorado District Court’s dismissal of the derivative claims on demand futility grounds was “finally” decided because the claims were dismissed “without prejudice.” *Id.* at 643-44. The Court of Chancery concluded, however, that regardless of whether the prior dismissal was “with or without prejudice,” the shareholder plaintiff was “estopped from relitigating demand futility” because that issue had been actually litigated in the Colorado District Court and the Colorado District Court’s determination regarding demand futility “is binding and preclusive on [the plaintiff] in any subsequent litigation between the parties as a matter of issue preclusion.” *Id.* at 644.

21. Here, there is “no serious dispute” that all of the elements of collateral estoppel are satisfied, because the California District Court dismissed the Federal Action “with prejudice.” *See W. Coast Mgmt.*, 914 A.2d at 643.

22. Lastly, the policy reasons behind the collateral estoppel doctrine are served by its application in this case. If collateral estoppel did not apply here, Allergan shareholders could continue to file derivative actions raising the same issues as the issues raised in this action and in the California actions, thereby taking multiple bites at the apple and forcing Allergan and its Directors to engage indefinitely in costly litigation with no assurance that one court’s final decision on the merits will be determinative of the issues.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the briefs of the Director Defendants and Nominal Defendant Allergan in support of their motions to dismiss, all Defendants respectfully request that this Court dismiss Plaintiffs' Complaint with prejudice.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the February 2, 2012, she caused to be served by LexisNexis Files & Serve a copy of the foregoing THE DEFENDANTS' MEMORANDUM REGARDING THE PRECLUSIVE EFFECT OF THE CALIFORNIA DISTRICT COURT'S DISMISSAL OF THE FEDERAL DERIVATIVE ACTION upon the following counsel of record:

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