



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. 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. )

**DEFENDANTS' MEMORANDUM IN SUPPORT OF  
THEIR MOTION TO STAY PROCEEDINGS PENDING  
APPLICATION FOR AND RESOLUTION OF INTERLOCUTORY APPEAL**

Defendants David E.I. Pyott, Herbert W. Boyer, Ph.D., Louis J. Lavigne, Jr., Gavin S. Herbert, Stephen J. Ryan, M.D., Leonard D. Schaeffer, Michael R. Gallagher, Robert A. Ingram, Trevor M. Jones, Ph.D., Dawn E. Hudson, Russell T. Ray, and Deborah Dunsire, M.D. and nominal defendant Allergan, Inc. (collectively, "Defendants"), by and through their undersigned attorneys and pursuant to Court of Chancery Rule 65(d) and Delaware Supreme Court Rules 32(a) and 42(e), hereby submit this memorandum in support of their motion for an order staying proceedings in this Court pending resolution of Defendants' interlocutory appeal. *See* Del. Supr. Ct. R. 32(a) and 42(e); Del. Ct. Ch. R. 65(d).

## BACKGROUND

This Court is familiar with the facts stated in the plaintiffs' Second Amended Derivative Complaint (the "Complaint") as well as with the procedural history of this action. For purposes of this motion, the relevant facts are as follows:

On June 11, 2012, this Court issued an Opinion denying Defendants' motions to dismiss plaintiffs' Complaint. This Court held that collateral estoppel did not require dismissal of the Complaint, even though a federal court in California had dismissed, with prejudice, a derivative complaint asserting nearly identical claims, based on identical documents, for failure to allege demand futility. This Court also held that demand was excused because the Complaint adequately alleged demand futility and that the Complaint had sufficiently stated a claim to survive dismissal.

On June 21, 2012, Defendants filed an Application for Certification of Interlocutory Appeal (the "Application"), in which they asked this Court to certify its Opinion for interlocutory review by the Delaware Supreme Court. A hearing before this Court on Defendants' Application is scheduled for July 6, 2012. Defendants' Notice of Appeal is due to be filed in the Delaware Supreme Court on July 11, 2012.

The parties discussed further proceedings in this action pending resolution of Defendants' interlocutory appeal. Defendants requested that plaintiffs agree to a stay at least until a ruling on the pending Application. Plaintiffs declined to agree.

## ARGUMENT

### I. RELEVANT LEGAL STANDARD

Stays pending appeal are governed by Delaware Supreme Court Rule 32(a). *See* Del. Supr. Ct. R. 32(a); Del. Ct. Ch. R. 62(d). Supreme Court Rule 32(a) provides that "[a] stay . . . pending appeal may be granted or denied in the discretion of the trial court." Del. Supr. Ct.

R. 32(a). In deciding whether or not to grant a stay pending appeal, the Court of Chancery is required:

(1) to make a preliminary assessment of likelihood of success on the merits of the appeal;

(2) to assess whether the petitioner will suffer irreparable injury if the stay is not granted;

(3) to assess whether any other interested party will suffer irreparable injury if the stay is granted; and

(4) to determine whether the public interest will be harmed if a stay is granted.

*See Klig v. Deloitte LLP*, 2010 WL 3489735, at \*10-11 (Del. Ch. Sept. 7, 2010) (quoting *Kirpat, Inc. v. Del. Alcoholic Bev. Control Comm'n*, 741 A.2d 356, 357 (Del. 1998)) (Exhibits A and B hereto). These factors must be balanced with “all of the equities involved in the case together.” *Id.* at \*11 (quoting *Kirpat*, 741 A.2d at 358).

II. A STAY OF PROCEEDINGS PENDING DEFENDANTS’ APPLICATION FOR INTERLOCUTORY REVIEW AND RESOLUTION OF THE INTERLOCUTORY APPEAL IS WARRANTED HERE.

As shown below, each of the factors for granting a stay of proceedings is satisfied here and the balance of the equities tips in favor of granting a stay. Indeed, a stay is particularly warranted here because the outcome of the appeal could obviate the need for discovery or other proceedings entirely. *See Unisuper, Ltd. v. News Corp.*, 2006 WL 207505, at \*5 (Del. Ch. Jan. 19, 2006) (granting motion to stay proceedings pending interlocutory appeal of Court of Chancery decision denying defendants’ motion to dismiss because resolution of the appeal could “avoid the need for [the] expense [of discovery] altogether”) (Exhibit C hereto).

A. Likelihood of Success on the Merits

The “likelihood of success” factor is met here because the Opinion presents three serious legal questions that raise a fair ground for review by the Supreme Court. When preliminarily assessing the Defendants’ likelihood of success on the merits of their appeal, this Court need not “second guess its decision.” *Wynnefield P’ners Small Cap. Value L.P. v. Niagara Corp.*, 2006 WL 2521434, at \*1 (Del. Ch. Aug. 9, 2006) (citation omitted) (Exhibit D hereto). Rather, it need only consider whether the case presents “a serious legal question that raises a fair ground for litigation and thus for more deliberative investigation.” *Wynnefield*, 2006 WL 2521434, at \*1; *Klig*, 2010 WL 3489735, at \*11 (citing *Kirpat*, 741 A.2d at 358). This factor is satisfied where the Court of Chancery’s decision declined to follow prior precedent. *Cf. Klig*, 2010 WL 3489735, at \*11 (finding that, because Court’s “discretionary ruling cohered with prior precedent and the principles [the applicant] embraced at the time, there is no fair ground for further litigation,” and therefore the “likelihood of success” factor weighed against a stay).

As Defendants’ Application makes clear and the Opinion itself acknowledges, the Opinion does not cohere with prior precedent of this Court and other courts. Rather, it extends or departs from existing law in several ways. *See* Application ¶ 7. *First*, the Opinion declines to give an order of a federal court the same preclusive effect that the order would receive in that court. *See id.* As the Opinion recognizes, its holding is contrary to “a growing body of precedent” (including the Court of Chancery’s previous decision in *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203 (Del. Ch. Sept. 28, 2007)), holding that the dismissal of a shareholder derivative lawsuit under Rule 23.1 for failure to plead demand futility precludes successive shareholder plaintiffs from relitigating the demand futility issue on the same facts. Application ¶ 7 (citing Op. at 14 n.1).

*Second*, the Opinion expressly conflicts with numerous federal court decisions by concluding that shareholders of a corporation are not “in privity” with one another for collateral estoppel purposes until one of the shareholders survives a motion to dismiss for failure to adequately allege demand futility. Application ¶ 7 (citing Op. at 22-27).

*Third*, the Opinion’s “fast-filer presumption” is new and the Opinion applies the newly-announced presumption to rule that shareholders in another case were inadequate plaintiffs, even though those shareholders had conducted an extensive investigation including receipt and review of all documents produced pursuant to a Section 220 demand. *Id.* Neither the existence of such a presumption nor its application in this context has been authorized by the Delaware Supreme Court. *Id.*

Because the Opinion candidly declines to follow prior precedent and creates a new rule that has not been considered by the Supreme Court, the appeal raises serious legal questions that are fair grounds for review by the Supreme Court and, therefore, the “likelihood of success” factor is satisfied.

B. Threat of Irreparable Injury to Defendants

There is no question that Defendants will be irreparably harmed if they must answer the Complaint and proceed with discovery before the Supreme Court decides the interlocutory appeal. If the Supreme Court accepts the interlocutory appeal and ultimately decides that, as the California federal court previously determined, the Complaint should be dismissed, then this action will be terminated. If proceedings in this Court are not stayed pending that determination, Defendants will have incurred the burden and expense of needless discovery and other proceedings. Because a stay will avoid the expense of discovery and other pre-trial preparations, and could avoid the need for such expense altogether, a stay is warranted. *See Unisuper*, 2006 WL 207505, at \*5.

Furthermore, unless proceedings are stayed, plaintiffs will receive information – through Defendants’ answers and discovery – to which they may not be entitled and of which plaintiffs “cannot later erase all memory.” *Klig*, 2010 WL 3489735, at \*11. Accordingly, a ruling that requires Defendants to answer the Complaint and proceed with discovery prior to the Supreme Court’s resolution of the interlocutory appeal “cannot be undone” and therefore weighs in favor of granting a stay. *See Klig*, 2010 WL 3489735, at \*11 (noting that the consequences of the Court’s ruling could not be undone if the plaintiffs were allowed to proceed with discovery and gain access to privileged documents that were the subject of the interlocutory appeal) (quoting *Wynnefield*, 2006 WL 2521434, at \*2).

C. Plaintiffs Will Not Be Harmed by a Stay

There is limited, if any, harm to plaintiffs by granting a stay for the short period while the appeal is pending. First, there is no urgency to commence document discovery here because plaintiffs already have obtained a substantial amount of documents in this case through their Section 220 demand, in response to which Defendants produced nearly 6,700 pages of documents. Moreover, Defendants have put “litigation holds” in place, limiting any risk that documents will be destroyed inadvertently.<sup>1</sup>

Second, this case has not been expedited, no trial date has been set, and no factors related to the litigation or exogenous to it require immediate resolution of plaintiffs’ claims. *See Klig*, 2010 WL 3489735, at \*11. This action has been pending for nearly two years and has proceeded at a measured pace. Accordingly, plaintiffs will not be harmed by an additional, short delay pending resolution of Defendants’ interlocutory appeal. In fact, they could be spared from

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<sup>1</sup> If this motion is granted, as an added precaution, Defendants will recirculate appropriate litigation hold memoranda.

incurring needless expenses if they press forward with this case before the appeal is resolved. If the Supreme Court declines to accept the appeal, or accepts the appeal and affirms the Opinion, then Defendants can file their answer promptly and discovery will proceed according to a schedule agreed upon by the parties.

D. The Public Interest Will Not Be Affected by a Stay

There will be no harm to the public if a temporary stay is granted while the appeal is pending. In fact, appellate review of the Opinion could serve the public interest because it potentially could end the litigation without further burden and expense on the Court. *See Unisuper*, 2006 WL 207505, at \*5 (granting stay pending interlocutory appeal where “[a]ppellate review of the Opinion could potentially end this lawsuit without further expense of discovery and trial, thus serving considerations of justice”). Plaintiffs can point no harm to the public that would result from a short stay pending an appeal that could terminate the litigation and obviate the need for the Court to incur the expense of overseeing discovery and holding a trial in this action. Therefore, this factor also supports granting a stay.

E. The Equities Tip in Favor of Granting a Stay

Because, as demonstrated above, the Opinion presents serious legal questions that raise fair grounds for review by the Supreme Court and each of the other factors supports a stay until the appeal is resolved, the equities tip heavily in favor of granting a stay of proceedings in this Court. The Supreme Court has held that the trial court must “balance all of the equities involved in the case together.” *Kirpat*, 741 A.2d at 358. Here, Defendants have made an exceptionally strong showing that there is a “serious legal question that raises fair ground for litigation,” and the remaining factors also weigh in favor of a stay. Accordingly, like the Court in *Unisuper*, this Court should exercise its discretion to stay proceedings during the pendency of the interlocutory appeal.

CONCLUSION

For the reasons explained above, a stay pending resolution of Defendants' Application for interlocutory appeal is merited. Accordingly, Defendants respectfully request that this Court grant their motion for a stay pending their application for, and the Supreme Court's resolution of, an interlocutory appeal.

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June 28, 2012

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 28, 2012, she caused to be served by LexisNexis Files & Serve a copy of the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO STAY PROCEEDINGS PENDING APPLICATION FOR AND RESOLUTION OF INTERLOCUTORY APPEAL upon the following counsel of record:

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