IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, Plaintiff, v. DAVID PYOTT, HERBERT W. BOYER, LOUIS J. 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, Defendant, and ALLERGAN, INC., Nominal Defendant.	C.A. No. 5795-VCL

DEFENDANTS' OPPOSITION TO U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND'S MOTION FOR INTERVENTION

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. (the "Individual Defendants") and nominal defendant Allergan, Inc. ("Allergan" or the "Company" and together with the Individual Defendants, "Defendants"), by and through their undersigned attorneys, hereby oppose the Motion for Intervention (the "Motion") filed by U.F.C.W. Local 1776 & Participating Employers Pension Fund ("UFCW Fund") in the above-captioned action. The grounds for Defendants' opposition are as follows:

INTRODUCTION

1. UFCW Fund's Motion is untimely and inappropriate at this stage in the proceedings. UFCW Fund made its initial demand for books and records two months *after* plaintiff Louisiana Municipal Police Employees' Retirement System ("Plaintiff") instituted this action and now seeks to intervene nearly three months later. Briefing has been completed on Defendants' motions to dismiss for failure to plead demand futility and failure to state a claim, and oral argument on those motions was already scheduled at the time UFCW Fund filed its Motion. To the extent UFCW Fund's intervention would delay the litigation and require Defendants to re-brief these issues, Defendants are opposed, particularly because Plaintiff's argument that demand is excused is based on information that is readily available from public documents and UFCW Fund's application is premised on the mere *possibility* that it *may* uncover additional facts relevant to the pending claims.

2. Rather than permit intervention at this juncture, Defendants urge this Court to first decide Defendants' pending motions to dismiss. If the motions to dismiss are granted and UFCW Fund subsequently obtains new facts relevant to the claims asserted in this action—which Defendants believe it will not—UFCW Fund, or Plaintiff, may file a motion pursuant to Court of Chancery Rule 60(b) at that time. If Defendants' motions to dismiss are denied, however, Defendants will take no position as to whether UFCW Fund is permitted to intervene in this action, as long as the replacement does not cause further undue delay or lead to duplicative claims.

FACTUAL AND PROCEDURAL HISTORY

I. PLAINTIFF'S DERIVATIVE ACTION

3. On September 1, 2010, Allergan entered into a settlement agreement with the United States government (the "Government") following an investigation into the

Company's past marketing practices and sales of BOTOX® (onabotulinumtoxinA) ("BOTOX") for certain therapeutic (non-cosmetic) uses. In connection with the settlement, Allergan agreed to plead guilty to a single strict liability misdemeanor charge of misbranding related to conduct that allegedly occurred between 2000 and 2005 and to pay the Government $375 million. Allergan also agreed to pay $225 million to settle civil actions against it under the False Claims Act while continuing to deny liability associated with those civil allegations (collectively, the guilty plea and payments are referred to as the "Government Settlement"). Allergan issued a press release on September 1, 2010 announcing the settlement.

4. On September 3, 2010, two days after the Government Settlement was announced, Plaintiff filed a Verified Derivative Complaint on behalf of Allergan alleging various breaches of fiduciary duty by the Individual Defendants in connection with the events leading up to the Government Settlement. Plaintiff did not make a pre-suit demand. Soon after, at least four additional shareholder derivative suits were filed: three in the U.S. District Court for the Central District of California, which have since been consolidated, and a fourth in California State Superior Court. Argument on nominal defendant Allergan's motions to stay the consolidated California District Court action in favor of this action, or in the alternative, to dismiss the consolidated action for failure to make a pre-suit demand and the individual defendants' motions to dismiss for failure to state a claim, are scheduled for argument on February 28, 2011. The parties to the California state court action have agreed to postpone setting a date by which defendants must respond to the complaint until after this Court rules on Defendants' motions to dismiss.

5. On October 5, 2010, a federal judge approved the Government Settlement, and on October 11, 2010, Plaintiff filed a Verified Amended Derivative Complaint (the

"Complaint" or "Am. Compl."), in which it alleged that the Individual Defendants breached their fiduciary duty of loyalty and committed waste when they "allowed the Company to aggressively and illegally promote its flagship drug, BOTOX, for uses not approved by the [FDA], pay kickbacks to doctors in violation of the federal anti-kickback laws, make false and misleading statements in Allergan's annual proxy statements, and commit other violations of the Civil False Claims Act." Am. Compl. ¶ 1. Many of the allegations in the Complaint are based on the criminal information filed by the U.S. Department of Justice in connection with the Government Settlement (the "Information"), which summarizes the Government's investigation and its claims against Allergan as well as the terms of the Government Settlement. *See* Am. Compl. ¶ 98. The Amended Complaint alleges that, based upon the detailed publicly-disclosed facts that the Information sets forth, pre-suit demand is excused.

6. On October 25, 2010, Allergan and the Individual Defendants filed motions to dismiss the Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1, on the grounds that the Complaint fails to state a claim against the Individual Defendants and fails to plead demand futility, and also filed opening briefs in support thereof.

7. Plaintiff filed a Memorandum of Law in Opposition to Defendants' Motions to Dismiss on November 24, 2010. Defendants filed their reply briefs in support of their motions to dismiss on December 8, 2010. Oral argument on Defendants' motions to dismiss was scheduled for December 17, 2010, but has now been moved until after the Court rules on UFCW Fund's motion to intervene and to stay.

II. UFCW FUND'S SECTION 220 DEMAND

8. On November 5, 2010, more than two months after the Government Settlement was announced, and the Plaintiff's Complaint was filed in this Court, UFCW Fund's counsel sent an email to Allergan's counsel in this action, attaching a letter dated November 3,

2010, in which it demanded inspection of books and records pursuant to Section 220 of the Delaware General Corporation Law (the "Section 220 Demand"). At the time of UFCW Fund's Section 220 Demand, Defendants had already filed motions to dismiss Plaintiff's Complaint for failure to plead demand futility and failure to state a claim. UFCW Fund gave as its purported purpose for the Section 220 Demand, the following:

> The purposes for the demand inspection are:
>
> 1. To investigate potential wrongdoing, mismanagement, and breaches of fiduciary duties by the members of the Company's Board of Directors or others in connection with the events, circumstances, and transactions described above;
>
> 2. To assess the ability of the Company's Board of Directors to consider impartially a demand for action (including a request for permission to file a derivative lawsuit on the Company's behalf) related to the items described in this demand; and
>
> 3. To take appropriate action in the event the members of the Company's Board of Directors did not properly discharge their fiduciary duties, including the preparation and filing of a shareholder derivative lawsuit, if appropriate.

9. Allergan responded to the Section 220 Demand by letter dated November 15, 2010, in which it objected to the Section 220 Demand on various grounds, including that UFCW Fund's "interests in connection with the subject matter of the Demand are being protected, according to the alleged class representatives, through the pending class and derivative litigation in Delaware and California." Nonetheless, Allergan agreed to search "its central repository of materials to collect responsive, finalized, non-privileged documents of the Board of Directors (the 'Board') or any regular or specially created committee thereof to comply with the Demand" and stated that, upon the execution of an appropriate confidentiality agreement and "[s]ubject to the objections in [its] letter, Allergan will provide copies of any finalized, non-privileged portions of any documents presented to the Board and maintained in the Company's

central repository of Board materials ('Final Board Materials') that are responsive to the requests in the Demand."

10. Allergan's counsel sent UFCW Fund a draft confidentiality agreement on November 19, 2010, and a revised agreement on December 1, 2010. UFCW Fund did not respond until December 15, 2010, when its counsel provided additional revisions to the agreement. As of the time of filing, a confidentiality agreement has not been executed and the terms of the agreement are still being negotiated. Once UFCW Fund does execute the confidentiality agreement, Allergan's counsel will produce any documents that are responsive to the Section 220 Demand, subject to Allergan's objections.

11. UFCW Fund filed its Motion seeking to intervene and to stay on November 30, 2010, more than a month after Defendants filed their opening briefs in support of their motions to dismiss the Complaint and six days after Plaintiff filed its opposition to Defendants' motions to dismiss.

ARGUMENT

I. STANDARD UPON A MOTION TO INTERVENE

12. In certain circumstances, a nonparty may intervene in a case pending before the Court either as of right or as permitted by the Court in its discretion. *See In re Food Ingredients Int'l, Inc.*, 2010 WL 4812967, at *5 (Del. Ch. Nov. 18, 2010). To intervene as of right, Court of Chancery Rule 24(a) relevantly provides that:

> [u]pon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id. (quoting Del. Ct. Ch. R. 24(a)). A movant seeking to intervene pursuant to Rule 24(a) must claim that it has "an interest in the subject of the litigation." *Id.* at *6. The Court then considers "the validity of that claimed interest . . . by reference to the allegations accompanying the motion to intervene" and accepts such allegations a true. *Id.* (quoting *Harris v. RHH Partners, L.P.*, 2009 WL 891810, at *3 (Del. Ch. Apr. 3, 2009)).

13. A movant who does not have a right to intervene may still be permitted to intervene under Rule 24(b), which permits intervention "(1) [w]hen a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." *Id.* (quoting Del. Ct. Ch. R. 24(b) and citing *United Rentals v. RAM Holdings, Inc.*, 2007 WL 4327770, at *1 (Del. Ch. Nov. 29, 2007)).

14. "Necessarily, however, under either variety of intervention the applicant must, as a threshold matter, present a potentially valid claim." *Id.* (quoting *United Rentals*, 2007 WL 4327770, at *1). "[M]ere incantations of equitable principles will not stave off denial of a motion to intervene if the intervenor lacks standing to bring the claim or otherwise makes a claim that is inherently flawed as a matter of law." *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *3 (Del. Ch. Oct. 19, 2006) (citing *Flynn v. Bachow*, 1998 WL 671273, at *4 (Del. Ch. Sept. 18, 1998)). "A claim is inherently flawed or futile if it would not survive a motion to dismiss under either Court of Chancery Rule 23.1 or Rule 12(b)(6)." *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

II. UFCW FUND DOES NOT HAVE A RIGHT TO INTERVENE.

15. UFCW Fund does not claim that it has a statutory right to intervene. Instead, it seeks to intervene to protect its alleged rights with respect to the derivative claims asserted by Plaintiff because UFCW Fund believes that it *may* obtain documents in response to its Section 220 Demand that are relevant to the claims asserted in the Complaint. UFCW Fund

contends that, if it gathers and analyzes such information, it will "be able to effectively represent UFCW Fund's and the other shareholders' interests against the [Individual Defendants]." *See* Motion ¶ 20. In particular, UFCW Fund asserts that, if it is permitted to intervene, it *could possibly* allege additional facts relevant to Plaintiff's pending claims that it *might* obtain in response to its Section 220 Demand.

16. In evaluating a motion to intervene, the Court considers "the ability of the current plaintiff to represent adequately the proposed intervener's interest in the litigation." *See Flynn v. Bachow*, 1998 WL 671273, at *4 (Del. Ch. Sept. 18, 1998) (citing *In re MAXXAM, Inc./Federal Dev't*, 698 A.2d 949, 954 (Del. Ch. 1996)). Here, UFCW Fund's untimely Motion fails to show how Plaintiff is unable to represent its interests or how it could better prosecute this action. In fact, if the vigor with which a plaintiff prosecutes an action is any indication, UFCW Fund's delay of two months following the announcement of the Government Settlement to make its demand, delay in negotiating and executing the confidentiality agreement that is the precursor to production of the documents UFCW Fund says it needs to assess whether the directors committed any actionable misconduct, and additional delay of nearly a month before filing its motion to intervene, indicate that it is not best suited to prosecute this action.

17. Moreover, there is no information that UFCW Fund would obtain in response to its Section 220 Demand that would somehow make it a better representative in this action. Most of the facts at issue in this action come from publicly filed documents, including the Information and the publicly announced terms of the Government Settlement. *See* Am. Compl. ¶ 98. Importantly, nothing in the Information or the Government Settlement supports Plaintiff's allegation that the Board approved strategic plans that sought to take advantage of off-label marketing or that the Board approved or implemented such plans. Nor will any Board

materials UFCW Fund obtains in response to its Section 220 Demand, once it has executed a confidentiality agreement, reveal any new facts or information that would suggest otherwise. In fact, as UFCW Fund will soon find, the Board materials reflect that there were never any approvals of alleged off-label marketing or promotion.

18. UFCW Fund offers no facts to show that Plaintiff is an inadequate representative of the stockholders' and the Company's interests. UFCW Fund does not possess—nor will it obtain—any information that would enable it to more adequately prosecute Plaintiff's claims. Furthermore, even if UFCW Fund were to obtain any information relevant to the claims, it or Plaintiff likely could seek relief pursuant to Court of Chancery Rule 60(b). *See Food Ingredients Int'l,* 2010 WL 4812967, at *6-7 (denying motion to intervene "under the rubric of either mandatory or permissive intervention" but noting that the movant might possibly be entitled to seek Rule 60(b) relief from the Court's previous orders in the pending case); *but see Braasch v. Mandel*, 172 A.2d 271, 274 (Del. 1961) (suggesting that movants seeking to intervene could not proceed under Rule 60(b) for relief from a judgment because Rule 60(b) "is confined to motions by 'a party or his legal representative' and, consequently, they labor under the same difficulty of never having become parties"). Accordingly, UFCW Fund fails to demonstrate a right to intervene and its Motion should be denied.

III. UFCW FUND SHOULD NOT BE PERMITTED TO INTERVENE AT THIS TIME.

19. Nor should this Court, prior to deciding the pending motions to dismiss, permit UFCW Fund to intervene. Its application is unripe. UFCW Fund admits that it currently has no more information than Plaintiff already has pled, which pleading UFCW Fund speculates will be dismissed if the current motions are permitted to proceed without it. Instead, UFCW Fund speculates that, in the future, it *may* have better information that *may possibly* enable the

Complaint to withstand a motion to dismiss. Had it not, for three months, sat on its rights to employ the tools at hand or move to intervene, UFCW Fund could have cured this ripeness issue. Now, however, UFCW Fund asks this Court to consider hypotheticals, rather than the facts at hand. As this Court recently stated in *Food Ingredients*, 2010 WL 4812967, at *5, "under either variety of intervention the applicant must, as a threshold matter, present a potentially valid claim," meaning a claim that would "survive a motion to dismiss under either Court of Chancery Rule 23.1 or Rule 12(b)(6)."

20. Here, UFCW Fund essentially has conceded twice that it does not yet have a claim that could survive a motion to dismiss under either Rule 23.1 or Rule 12(b)(6). First, in the stated purposes for its Section 220 Demand, UFCW Fund states that it seeks books and records "to assess the ability of the Company's Board of Directors to consider impartially a demand," indicating that UFCW Fund has not yet determined whether demand would be futile. In addition, according to UFCW Fund's stated purposes for inspection, it has not yet determined whether it has a claim for breach of fiduciary duty, let alone one that could withstand a motion to dismiss pursuant to Rule 12(b)(6). Rather, UFCW Fund purports to seek inspection to "investigate *potential* wrongdoing" and "take appropriate action *in the event* the Company's Board of Directors did not properly discharge their fiduciary duties." (emphasis added). Second, central to UFCW Fund's motion to intervene is its assumption that the Complaint will not withstand the pending motions to dismiss. If that is the case, UFCW Fund has no potentially valid claim and, to the extent that it speculates that it may have one in the future, its motion is unripe as a result of its own failure to proceed with alacrity.

21. Permitting UFCW Fund to intervene prior to deciding the motions to dismiss would unreasonably delay this litigation and deny Defendants speedy resolution of what

they contend is an unmeritorious case. Moreover, if the Court denies Defendants' motions to dismiss, UFCW Fund's current motion to stay to present additional claims about demand futility will be moot. *See Off v. Ross*, 2008 WL 5053448, at *5 n. 12 (Del. Ch. Nov. 26, 2008) (noting that motion to intervene filed by objector to settlement of derivative action—whose objection to the settlement was based on the claim that the settlement was adverse to the objector's derivative claims pending in New York—was moot because the Court was not approving the settlement and, therefore, the case in Delaware would likely be stayed pending resolution of the New York action and the objector had no need to intervene in the Delaware action to preserve his rights in the Delaware action at that time). If the case proceeds, Defendants take no position about whether UFCW Fund should be permitted to intervene, or the terms of any such intervention, so long as intervention does not unduly delay the litigation or lead to duplicative claims.

CONCLUSION

22. For the foregoing reasons, UFCW Fund's Motion for Intervention should be denied.

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December 17, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of December, 2010, she caused to be served by LexisNexis Files & Serve a copy of the foregoing DEFENDANTS' OPPOSITION TO U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND'S MOTION FOR INTERVENTION upon the following counsel of record:

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