EFiled: Feb 29 2012 6:51PM EST
Transaction ID 42797229
Case No. 5795-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM and U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND, Plaintiffs, v. 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.	)	C.A. No. 5795-VCL

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

INTRODUCTION

1. Because Plaintiffs[1] in this action failed to cooperate with the plaintiffs who filed identical claims in the California District Court, Allergan and the Directors were forced to litigate in two forums. The California District Court has already ruled that demand is not futile. That decision binds Plaintiffs in this lawsuit pursuant to the law of the forum that

[1] All defined terms used herein have the definitions given to them in The Defendants' Memorandum Regarding the Preclusive Effect of the California District Court's Dismissal of the Federal Derivative Action ("Defendants' Memorandum" or "Defs.' Mem.") filed with the Court on February 2, 2012.

rendered the judgment. Simply put, Plaintiffs in this action—shareholders suing derivatively in the name of Allergan, just as the plaintiffs in the California District Court are shareholders suing derivatively in the name of Allergan—should not be rewarded for their failure to coordinate with other shareholders also seeking to sue in Allergan's name, nor should that failure warrant ignoring the preclusive effect of the California District Court's dismissal order in the Federal Action.

2. As an initial matter, Delaware law could not be more clear—to determine the preclusive effect of a judgment, a Delaware court applies the law of the jurisdiction in which the judgment was entered. Plaintiffs acknowledge this standard in their brief. *See* Plaintiffs' Answering Brief to Defendants' Memorandum ("Answering Brief" or "Ans. Br.") at 8 n.4.

3. Under the law of the Ninth Circuit and the Central District of California, Plaintiffs are precluded from relitigating demand futility in this Court. The shareholder plaintiffs in the Federal Action and in this case all bring their claims on behalf of the Company, and therefore are in privity. The allegations and, more importantly, the issues, in both cases are essentially the same. The plaintiffs in both cases base their allegations on precisely the same information, as the plaintiffs in both actions filed their operative pleadings *after* Allergan provided them with the same Section 220 documents. The applicability of collateral estoppel turns on whether the issues are identical, not whether the plaintiffs made factual assertions that were identical in all aspects. Here, the issue—whether demand is futile—is exactly the same.

4. Accordingly, collateral estoppel precludes Plaintiffs from relitigating the demand futility issue before this Court.[2]

[2] Plaintiffs contend that application of collateral estoppel is discretionary. *See* Ans. Br. at 16. While the Ninth Circuit and the Central District of California do not appear to have addressed the issue squarely, several other federal courts have held that defensive issue preclusion is (Continued . . .)

ARGUMENT

I. THE ISSUE PRECLUSION LAW OF THE NINTH CIRCUIT AND THE CENTRAL DISTRICT OF CALIFORNIA APPLIES.

5. Plaintiffs spend more than six pages of their Answering Brief arguing that Delaware issue preclusion law applies. Ans. Br. at 6-13. But Delaware courts have made it abundantly clear that the preclusive effect of a ruling or judgment is determined by the law of the jurisdiction in which the ruling or judgment has been entered. *See Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141 n.3 (Del. 1989) ("The effect of a valid judgment as a conclusive adjudication between the parties and persons in privity with them on facts which were or might have been put in issue in the proceedings is determined by the law of the state where the judgment was rendered.");[3] *Thompson v. D'Angelo*, 320 A.2d 729, 734 (Del. 1974) ("[A]s long as the order of the District Court [for the Eastern District of Pennsylvania] stands it is the duty of the Courts of this State to accord it the same force and effect as would be given to it by a Pennsylvania Court."); *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *10-11 (Del. Ch. Sept. 28, 2007) (applying Seventh Circuit law to determine the preclusive effect of a federal court ruling requiring demand) (Defs.' Mem. Ex. B); *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 642 (Del. Ch. 2006) (the Court of Chancery "gives the

---

(. . . continued)
mandatory where all elements have been satisfied. *See, e.g., Kairys v. INS*, 981 F.2d 937, 940 (7th Cir. 1992) (except in its offensive non-mutual incarnation, collateral estoppel is not a discretionary doctrine "in the sense that the tribunal asked to apply it has a free-swinging, uncanalized discretion to apply it or not"), *cert. denied*, 507 U.S. 1024 (1993); *Ackerman v. Am. Airlines, Inc.*, 924 F. Supp. 749, 753 (N.D.Tex.1995) (when the requirements of collateral estoppel have been met and plaintiffs had a full and fair opportunity to litigate the issue, "the application of defensive collateral estoppel is mandatory"). Regardless, equity supports application of the doctrine in this case.

[3] *Cavalier Oil* and other key authorities cited herein are included in the Compendium of Key Authorities submitted to the Court contemporaneously with this reply. The Compendium does not include authorities provided as exhibits to the Defendants' Memorandum submitted to the Court on February 2, 2012, which are referred to herein as "Defs.' Mem. Ex. __."

same preclusive effect to the judgment of another state or federal court as the original court would give").

6. Indeed, Plaintiffs do not cite to a single case where a Delaware court applied Delaware law to determine whether a judgment rendered in another jurisdiction precluded subsequent litigation of an issue in Delaware. In fact, Plaintiffs acknowledge that Delaware courts have held repeatedly that the law of the foreign jurisdiction applies. *See* Ans. Br. at 8 n.4 (The preclusive effect of a foreign judgment "is determined by the law of the state where the judgment was rendered.") (quoting *Cavalier Oil*, 564 A.2d at 1141)); *see id*. ("'[T]he doctrines of *res judicata* and collateral estoppel require that the same effect be given a [foreign] judgment rendered upon adequate jurisdiction as [the foreign court] itself would accord such a judgment.'") (quoting *Columbia Casualty Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991)). Plaintiffs make no attempt to explain why these holdings do not apply here.

7. Instead, Plaintiffs argue that this Court should apply the "most significant relationship" test (and the Restatement's version of it) to determine which forum's law applies. *See* Ans. Br. at 9. And according to Plaintiffs, under the "most significant relationship" test, this Court should reconsider and redecide the merits of the demand futility issue. *Id*. at 10 (considerations under the "most significant relationship" test "support this Court's independent review of the Second Amended Complaint's demand futility allegations").[4] But even if the "most significant relationship" test applied, which it does not,[5] the test only would determine

[4] Plaintiffs argue that this Court should refuse to apply collateral estoppel and instead hear the merits of the demand futility issue because it involves the application of Delaware law. *See* Ans. Br. at 10 ("[T]he interests of this State in applying its laws will best be served if the Dismissal Order is *not* given a preclusive effect."). But Plaintiffs never assert that Judge Carter misunderstood or misapplied Delaware law.

[5] As support for their argument that the Court should apply the Restatement's "most significant relationship" test, Plaintiffs cite cases (*see* Ans. Br. at 9) that applied the Restatement to (Continued . . .)

which forum's issue preclusion law applies. Plaintiffs do not attempt to apply Delaware's *issue preclusion* law in their Answering Brief.[6]

8. The choice of law principles that apply in the issue preclusion context are clear from this Court's jurisprudence. 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 and require dismissal of this action.

II. PLAINTIFFS MAY NOT RELITIGATE THE DEMAND FUTILITY ISSUE.

A. The California District Court Decided the Demand Futility Issue First.

9. Plaintiffs emphasize that they filed their Delaware complaint ***six days*** before the complaint was filed in the California District Court, and that another shareholder, Local 1776, rather than the shareholder plaintiffs in the Federal Action (or the current Plaintiff in this action), served a Section 220 request ***two months*** after the lawsuits were filed in this Court

(. . . continued)
determine conflicts of law in other circumstances, such as a tort action involving a dispute over the meaning of a term in an uninsured motorist policy, *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40-47 (Del. 1991), a dispute over the meaning of an indemnity clause where the contract was silent as to choice of law, *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1116 (Del. 1978), and a dispute over whether, under a provision in several insurance contracts, an insurer could be liable for punitive damages awarded against the insured, *Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 682, 686-90 (Del. Super. Ct. 1989). The circumstances in this case are completely different.

[6] Application of Delaware's rule on issue preclusion would not change the result here, because Delaware's test and the Ninth Circuit test are substantially the same. *Compare* Defs.' Mem. at 4 (providing the Ninth Circuit test), *with In re Wickes Trust*, 2008 WL 4698477, at *7 n.53 (Del. Ch. Oct. 16, 2008) (Under Delaware law, issue preclusion applies where: "(1) the issue previously decided is identical to the present issue; (2) the issue was fully adjudicated on the merits; (3) the parties against whom the doctrine is invoked . . . were parties to the litigation or in privity with a party to the prior litigation; and (4) the parties against whom the doctrine is raised had a full and fair opportunity to litigate the issue.") (quoting *Advanced Litig., LLC v. Herzka*, 2006 WL 2338044, at *7 (Del. Ch. Aug. 10, 2006)). The fact that Plaintiffs were not parties to the Federal Action would not bar application of issue preclusion under Delaware law. *See id*. at *7 & n.56 (citing *Chrysler Corp. v. New Castle County*, 464 A.2d 75, 78 (Del. Super. Ct. 1983)).

and the California District Court. *See, e.g.*, Ans. Br. at 7. Issue preclusion does not turn on who was the first to file, but rather, whether a court has already decided the issue. Although Plaintiffs emphasize Local 1776's filing of a Section 220 action (*see* Ans. Br. at 7-8), that belated request has no bearing on the application of issue preclusion here. The plaintiffs in the Federal Action received the ***exact same Section 220 documents*** as Plaintiffs in this case received, and the plaintiffs in both actions filed amended complaints after they received those Section 220 documents from Allergan. *See* Ans. Br. at 3 ("Defendants then agreed to provide the California Federal Action plaintiffs *with the same documents obtained by Local 1776 through its Section 220 demand*.") (emphasis added).

10. Moreover, Allergan and the Directors should not be punished for the plaintiffs' failure to coordinate their efforts. After all, it was not Allergan or the Directors who insisted on pursuing this action in two different forums. In fact, Allergan (not Plaintiffs in this action) moved to stay the Federal Action pending the outcome of this case. The plaintiffs in both actions could have coordinated their efforts, but they did not, despite this Court's misgivings about having "the same issues" litigated in multiple forums. Mot. to Intervene Tr., *Louisiana Mun. Police Empls. Ret. Sys. v. Pyott*, C.A. No. 5795-VCL, at 58 (Del. Ch. Jan. 21, 2011) ("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."). Plaintiffs should not be rewarded for their refusal to cooperate and for imposing twice the litigation expense on Allergan—the company for whose benefit they purportedly bring this derivative case—and the Directors.

11. Plaintiffs in this action chose not to coordinate with their brethren in California, despite knowing that that action was proceeding, that the California District Court would be asked to rule that pre-suite demand was required, and that a ruling for the defendants could preclude this action from proceeding. In this circumstance, Plaintiffs cannot plausibly claim that application of collateral estoppel is unfair. In fact, the Court of Chancery recently criticized a plaintiff asserting a derivative claim in Delaware for failing to coordinate with other plaintiffs asserting similar claims, including a demand futility argument, in the Southern District of New York, and suggested that there should be some adverse implication from the plaintiff's failure to reach out to the other plaintiffs. *See City of New Orleans Empls. Ret. Sys. v. Bensinger*, C.A. No. 4042-CS, Tr. at 52-54, 64 (Del. Ch. Jan. 24, 2012) ("*Bensinger* Oral Arg. Tr.") (questioning whether the plaintiff "ever engaged in any meaningful way after I stayed this care to discuss with [the plaintiffs in New York] a strategy, for example, building around [the New York plaintiffs' operative] complaint"). The Court observed that it would not make good sense to "go through a moot court exercise if you're in a circumstance where there's a final judgment in a matter [in another jurisdiction] where there was adequate representation about the [demand futility] issue." *Id*. at 78.

B. Plaintiffs in this Case are in Privity with the Plaintiffs in the Federal Action.

12. Derivative claims are the property of the company, which is why a shareholder must make a demand on the company's board or adequately allege demand futility to pursue derivative claims on the company's behalf. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 820 (Del. Ch. 2005). Accordingly, "[b]ecause the corporation is the true party in interest in a derivative suit, courts have precluded different derivative plaintiffs in subsequent suits." *Career Educ. Corp.*, 2007 WL 2875203, at *10 (citing *Henik ex rel.*

LaBranche & Co. v. LaBranche, 433 F. Supp. 2d 372, 280 (S.D.N.Y. 2006), and *LeBoyer v. Greenspan*, 2006 WL 2987705, at *3 (C.D. Cal. Oct. 16, 2006)). Here, because the plaintiffs in the Federal Action and Plaintiffs in this action are Allergan shareholders that purported to bring derivative actions, each has asserted Allergan's claims. Therefore, they are necessarily in privity for purposes of issue preclusion. *See LeBoyer v. Greenspan*, 2007 WL 4287646, at *3 (C.D. Cal. June 13, 2007) (The privity requirement is satisfied in derivative actions because "in both suits the plaintiff is the corporation itself.") (Defs.' Mem. Ex. E).

13. Plaintiffs argue throughout their Answering Brief that because they were not active participants in the Federal Action, issue preclusion does not bar them from litigating the same issues in this Court. *See, e.g.*, Ans. Br. at 1 ("Defendants now seek to use the Dismissal Order in this Court, even though Plaintiffs were never involved in the California Federal Action."); *id*. at 3 ("Neither LAMPERS nor Local 1776 had any involvement with the California Federal Action, including with any of the complaints filed there or the briefing in connection with the motions to dismiss."); *id*. at 14 ("[I]t is clear that contrary to Defendant's argument . . . Plaintiffs here are not in privity with the California Federal Action plaintiffs for purposes of collateral estoppel."). But the California District Court expressly rejected this argument in *LeBoyer*. In that case, the plaintiff argued that because he did not participate in the derivative action brought in state court, he was not precluded from raising the demand futility issue in federal court. The court held that the plaintiff was estopped from litigating demand futility. Specifically, the court held that in derivative actions, "the differing groups of shareholders who can potentially stand in the corporation's stead are in privity for purposes of issue preclusion." *LeBoyer*, 2007 WL 4287646, at *3.

14. Plaintiffs wholly fail to address *LeBoyer*'s holding in their Answering Brief. They point to no cases applying the law of the Central District of California or the Ninth Circuit, let alone cases where a shareholder plaintiff asserting derivative claims was deemed not to be in privity with another shareholder plaintiff for purposes of issue preclusion. Plaintiffs cite several cases, but none suggests that collateral estoppel should not apply here.

15. For instance, Plaintiffs rely on *West Coast Management & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636 (Del. Ch. 2006), in which, according to Plaintiffs, the Court of Chancery expressed unease over the majority rule that applies collateral estoppel to the claims of other shareholders. Ans. Br. at 14, 15 n.6. In *West Coast Management*, the same shareholder that brought the initial derivative action in Colorado federal court later brought a derivative action in Delaware. The Court held that collateral estoppel barred the same plaintiff from relitigating the demand futility issue in Delaware. 914 A.2d at 644.

16. As an initial matter, *West Coast Management* does not apply the issue preclusion law of the Ninth Circuit and Central District of California, which controls in this case. Moreover, the Court of Chancery expressly stated in *West Coast Management* that it was not deciding, "as it is unnecessary to this opinion," whether collateral estoppel would bar subsequent plaintiffs from relitigating demand futility, and therefore any discussion on the issue is purely dicta. *Id*. at 643. Finally, when the Court of Chancery noted in *West Coast Management* that the majority position on shareholder privity was "dubious," the Court was referring to the privity rule's application in a much different context than this case. The Court noted that "[p]reventing subsequent individual plaintiffs from bringing potentially meritorious suits based *on additional information gained in a section 220 demand*" may undercut the purpose of Section 220, and that the policies behind collateral estoppel may not apply where a second plaintiff "makes

substantially different allegations of demand futility based on *additional information*." *Id*. at 643 n.22 (emphasis added).

17. Those concerns simply are not present in this case. The plaintiffs in the Federal Action and Plaintiffs in this case received the same Section 220 documents, both filed an amended complaint after receiving those documents, and both raised the same issues in their amended complaints. Ans. Br. at 3. Even the Court in *West Coast Management* recognized that a prior suit by another shareholder with similar allegations of demand futility can bar another shareholder from filing the same suit. 914 A.2d at 643 n.22 ("[A] prior suit by another plaintiff with similar allegations of demand futility may bar a second plaintiff from filing the same suit."); *see Career Educ. Corp*., 2007 WL 2875203, at *10-11 (relying on recent federal cases and "the dictum in West Coast" to find that plaintiffs in subsequent derivative action were precluded from litigating demand futility where federal court previously dismissed action by different plaintiffs in an earlier action on demand futility grounds). Indeed, if collateral estoppel does not apply, a company can be required to litigate demand futility again and again, in multiple forums, until one plaintiff is successful, or until the plaintiffs' bar runs out of stockholders. *See Bensinger* Oral Arg. Tr. at 54 ("So when you got the stay here, you thought that the natural idea would be the plaintiffs would test out their case up in New York. . . . And when that ended, if the plaintiffs lost, you just do a do-over in Delaware. . . . You'd also do that in California and Nassau County.").

18. Plaintiffs also rely on *In re FirstEnergy Shareholder Derivative Litigation*, 320 F. Supp. 2d 621 (N.D. Ohio 2004), to support their argument that they should not be precluded from relitigating demand futility. Again, *FirstEnergy* does not purport to apply the issue preclusion law of the Ninth Circuit or the Central District of California, and therefore has

no bearing on this case. In fact, *FirstEnergy* does not involve the doctrine of collateral estoppel at all. In *FirstEnergy*, the defendant argued that once one shareholder makes a demand, all other shareholder plaintiffs are barred from arguing demand futility. *Id*. at 625. The court disagreed. It held that if plaintiffs have no knowledge of another shareholder's demand, the shareholder plaintiffs arguing demand futility "have not ceded the absence of facts supporting a finding of futility." *Id*. at 626. But whether a plaintiffs has conceded or waived an argument through their behavior is an entirely different question from whether a final judgment of one court on a particular issue precludes other plaintiffs from relitigating that same issue. Accordingly, *FirstEnergy* does not speak to the question presented in this case.

19. Plaintiffs cite dicta from cases applying the laws of other jurisdictions in a desperate attempt to skirt the clear law of many federal courts, including the Central District of California. *See* Ans. Br. at 14 (citing *Brandin v. Deason*, 941 A.2d 1020, 1025 n.17 (Del. Ch. 2007)). In *Brandin*, however, the Court of Chancery acknowledged that "[s]everal federal courts have held that once a derivative plaintiff has suffered dismissal of his complaint for failure to adequately allege demand futility, the doctrine of collateral estoppel bars *all subsequent plaintiffs* from relitigating demand futility." 941 A.2d at 1025 n.17 (emphasis added). Furthermore, *LeBoyer* squarely held that shareholder plaintiffs are in privity for purposes of issue preclusion because their claims are brought on behalf of the company. *LeBoyer*, 2007 WL 4287646, at *3. Privity therefore exists in this case.

C. The Issue Raised by Plaintiffs in this Case is the Same as the Issue Raised by the Plaintiffs in the Federal Action.

20. The issue in both the Federal Action and this case is whether the plaintiffs had to make a demand on Allergan's board before bringing a derivative action in connection with Allergan's agreement to settle criminal and civil claims regarding its marketing of

BOTOX® for therapeutic uses. The Federal Action resolved that issue, holding that demand is not futile and thus is required. The plaintiffs in the Federal Action recently filed a motion for reconsideration, claiming that the California District Court failed to consider certain factual allegations espoused in their complaint. Again, the California District Court found that the plaintiffs' allegations—which characterized a document the plaintiffs received from Allergan pursuant to Section 220 in a way that the plaintiffs contended would excuse demand—were "at best, a stretch of the imagination." Order Denying Mot. for Reconsideration, *In re Allergan, Inc.*, No. SACV-10-01352, at 2 (C.D. Cal. Feb. 22, 2012). The facts simply did not support the plaintiffs' argument that the Board members made a decision to promote the use of off-label marketing, and there is no reason to believe that the Directors would be incapable of impartially considering a demand. *Id*. at 3. The California District Court's decision with respect to this issue binds Plaintiffs in this case.

21. Plaintiffs argue that issue preclusion does not apply to their Complaint because not all of the exact grounds supporting their position on demand futility were presented by the shareholders in the Federal Action. *See, e.g.*, Ans. Br. at 3-4 (arguing that they have asserted "viable claims not being alleged in the California Action"); *id*. at 14 (arguing that a *Caremark* claim was not presented in Federal Action); *id*. at 17 (arguing that the Second Amended Complaint contains "information" that was either not presented or not addressed in the Federal Action). But this same argument has been rejected by the Ninth Circuit. *See, e.g.*, *Kamilche Co. v. United States*, 53 F.3d 1059, 1063 (9th Cir. 1995) (relitigation of issues, not merely the precise arguments that support them, are precluded); *Pendleton v. McCarthy*, 844 F.2d 792 (9th Cir. 1988) (collateral estoppel bars litigation of the same issue, even where the plaintiff sued different defendants and advanced different theories).

22. In *Kamilche Co.*, the issue was whether California owned certain real property. In the first action, the court determined that the property was owned by a private party. In the second action, the defendant tried to argue that California owned the property through adverse possession. The defendant had not raised the adverse possession argument in the first action. The court held that "once an issue is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Id*. at 1063 (internal quotations omitted). Because the issue litigated in both actions was who owned the property, the defendant was precluded from arguing that California owned the property even though it raised a new theory to support its position.

23. Similarly here, the issue in the Federal Action and in this case is whether the plaintiffs had to make a demand on the Board before bringing their derivative claims. For purposes of issue preclusion, it is irrelevant whether all of the plaintiffs' theories for why demand is excused were raised in the Federal Action. The issue of demand futility related to Allergan's settlement of BOTOX® marketing claims was litigated and decided in the Federal Action, which precludes relitigation of the issue now.

24. Indeed, this is exactly what the Central District of California held in *LeBoyer*. There, the court explained that in both the state action and federal action the issue was the same: "whether a demand on the board to sue directors over the 2003 restatement would have been futile." *LeBoyer*, 2007 WL 4287646, at *1. Specifically, the makeup of the board was the same for both challenges—two of the directors were insiders and presumed interested—and the issue was whether any of the three outside directors was interested. *Id.* Here, just as in *LeBoyer*, the demand futility issue is exactly the same in both the state and federal actions: whether it would have been futile to make a demand on the Board to sue the Directors and the Company

over the settlement of criminal and civil claims regarding the Company's marketing of BOTOX® for therapeutic uses. And here, just as in *LeBoyer*, Plaintiffs should be precluded from relitigating the demand futility issue, regardless of the theories they now raise in support of their position.

25. Finally, Plaintiffs spend two pages of their Answering Brief detailing the factual allegations that they have raised in the Second Amended Complaint that were not expressly discussed in the Federal Dismissal Order. *See* Ans. Br. at 4-5. As explained above, the applicability of collateral estoppel does not depend on whether identical facts or theories are involved, but on whether the issues in the two actions are the same, and here the issues are identical. Even more fundamentally, however, the scope of an order's preclusive effect cannot depend on the factual allegations that are recited therein. Indeed, Plaintiffs have pointed to no cases where a party could avoid collateral estoppel by showing that the court did not discuss all of the factual allegations in its order.[7]

26. In each action, the plaintiffs quoted voluminously from the same government documents and used selective portions of the same Section 220 documents to try to show that the Directors approved off-label marketing of BOTOX®. In each case, the defendants' motions to dismiss demonstrated that the documents cited fail to provide support for plaintiffs' claims. Now, Plaintiffs quibble over whether the plaintiffs in each case relied on the exact same portions of the exact same documents, and whether the California District Court discussed each and every document (mis)cited in the complaints. If such quibbles were all it took, a company could face the same demand futility argument endlessly, as each plaintiff could

[7] Just because the Federal Dismissal Order did not mention a particular allegation does not mean that the allegations were not asserted in the Federal Action or that the California District Court did not consider those allegations in deciding the demand futility issue.

simply add to its complaint a few new snippets from the extensive Section 220 documents that were produced. That is simply not the law.

CONCLUSION

For these reasons, in addition to the reasons set forth in the Defendants' Memorandum and the Defendants' briefs in support of their motions to dismiss, Plaintiffs' action should be dismissed with prejudice.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Kenneth J. Nachbar
Kenneth J. Nachbar (#2067)
Shannon E. German (#5172)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Defendants David E. I. 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

OF COUNSEL:

GIBSON, DUNN & CRUTCHER LLP
Wayne W. Smith
Jeffrey H. Reeves
Kristopher P. Diulio
3161 Michelson Drive
Irvine, CA 92612-4412

FISH & RICHARDSON P.C.

/s/ Cathy L. Reese
Cathy L. Reese (#2838)
Jose P. Sierra (#2366)
Joseph B. Warden (#5401)
222 Delaware Avenue, 17th Floor
P.O. Box 1114
Wilmington, DE 19899
(302) 652-5070
Attorneys for Nominal Defendant Allergan, Inc.

February 29, 2012

5783453