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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID PYOTT, HERBERT W. BOYER, LOUIS J. LAVIGNE, GAVIN S. HERBERT, STEPHEN J. RYAN, LEONARD A. SCHAEFFER, MICHAEL R. GALLAGHER, ROBERT ALEXANDER INGRAM, TREVOR M. JONES, DAWN E. HUDSON, RUSSELL T. RAY, DEBORAH DUNSIRE, and ALLERGAN, INC.,	No. 380, 2012
Defendants Below-Appellants,	On Appeal from the Court of Chancery of the State of Delaware
v.	C.A. No. 5795-VCL
LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM and U.F.C.W. LOCAL 1776 & PARTICIPATING EMPLOYERS PENSION FUND,	
Plaintiffs Below- Appellees.	

PLAINTIFFS-BELOW APPELLEES' ANSWERING BRIEF
<u>ON INTERLOCUTORY APPEAL</u>

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Municipal Police Employees' Retirement system and U.F.C.W. Local 1776 & Participating Employers Pension Fund

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NATURE OF PROCEEDINGS

This action stems from Allergan's[1] guilty plea to a criminal "misbranding" charge, in violation of the United States Food, Drug and Cosmetics Act, which resulted in Allergan paying $600 million in civil and criminal fines. Subsequent to the announcement of the Company's agreement to plead guilty to the criminal Information, derivative actions were filed in the Delaware Court of Chancery and in the United States District Court for the Central District of California alleging that the Allergan directors breached their fiduciary duties to the Company and its shareholders. One of the Plaintiffs in the Delaware action, UFCW, sought and obtained books and records using Section 220 of the General Corporation Law, 8 *Del. C.*§ 220, and intervened in this action prior to Plaintiffs jointly filing the July 8, 2011 Complaint. Allergan and its directors moved to dismiss the Complaint. The Court of Chancery denied Defendants' motions in their entirety based on three key rulings. First, the Court determined that a decision dismissing an amended complaint filed in the California federal court did not mandate dismissal of the Delaware action. Second, the Court determined that demand was excused as futile. Third, the Court held the Complaint stated viable derivative claims for breach of fiduciary duty and waste of corporate assets.

This appeal followed. This is Plaintiffs-Below, Appellees LAMPERS and UFCW's Answering Brief.

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[1] Capitalized terms shall have the meaning ascribed to them in Appellants' Corrected Opening Brief, if not otherwise defined herein. Plaintiffs' Verified Second Amended Derivative Complaint, submitted in the Appendix to Appellees' Answering Brief at B001, is referred to as "¶ __," and the Court of Chancery's Opinion as "Op. at ___."

SUMMARY OF ARGUMENT

A. Legal Propositions Upon Which Defendants Rely

I(1). Denied. The Court of Chancery did not err in applying Delaware law to analyze one of the elements of collateral estoppel. The Court of Chancery correctly concluded that privity between corporate shareholders, a sub-element of California's collateral estoppel test, is a matter controlled by the law of the state of incorporation. *See* Op. at 16-19; *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987); *VantagePoint Venture Partners 1996 v. Examen, Inc*., 871 A.2d 1108, 1113 (Del. 2005).

I(2). Denied. The Court of Chancery did not create a new Delaware rule of privity. In holding that a Rule 23.1 dismissal does not preclude a separate derivative action by a different plaintiff because the plaintiff whose action was dismissed was not in privity with the corporation or other stockholders, the Court of Chancery relied on controlling Delaware precedent that the right to bring a derivative action does not come into existence until a shareholder demonstrates that a demand was wrongfully refused or that demand was futile. *See* Op. at 23-26; *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993); *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726 (Del. 1998); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), *rev'd on other grounds, Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000).

I(3). Admitted that the Court of Chancery adopted and applied a "fast-filer presumption," but denied that the Court erred in concluding that the California plaintiffs did not adequately represent Allergan, thereby providing an independent basis for denying collateral estoppel. *See* Op. at 65; *Hanson v. Odyssey Healthcare, Inc.,* 2007 WL 5186795, at *6 (N.D. Tex. Sept. 21, 2007); *In re Career Educ. Corp. Derivative Litig*., 2007 WL 2875203, at *10 (Del. Ch. Sept. 28, 2007).

II. Denied. The Court of Chancery correctly concluded that a reasonable inference can be drawn from the particularized allegations of the Complaint and the documents incorporated therein that Allergan's directors knowingly approved and oversaw a decade-long set of business plans that required illegal off-label marketing and promotional initiatives for BOTOX®, and, therefore, that demand was excused. *See* Op. at 69-81; *Rales*, 634 A.2d at 933 (quoting *Aronson*, 473 A.2d at 814); *In re Massey Energy Co.*, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011).

III. Denied. The Court of Chancery correctly concluded that a complaint that sufficiently pleads a substantial threat of liability for purposes of Rule 23.1 also survives a Rule 12(b)(6) motion to dismiss. Op. at 81; *McPadden v. Sidhu*, 964 A.2d 1262, 1270 (Del. Ch. 2008).

B. Additional Legal Propositions Upon Which Plaintiffs Rely

I. A party asserting collateral estoppel "has the burden of showing that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding." *Proctor v. State*, 931 A.2d 437, 2007 Del. LEXIS 338, at *3 (Aug. 2, 2007) (internal citation omitted); *accord Capano v. State*, 889 A.2d 968, 984 (Del. 2006) (same). Among other reasons, Defendants' collateral estoppel defense is deficient because they failed to demonstrate that the same facts and claims were at issue in the Delaware and California actions.

II. This Court may affirm the Order of the Court of Chancery on the basis of the decision issued by the Court or any other basis fairly presented to the Court below. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995); *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1039-40 & n.29 (Del. 2004). The Court of Chancery's holdings on Defendants' collateral estoppel defense, as well as the viability of Plaintiffs' claims, also may be upheld on grounds not articulated in the Opinion.

STATEMENT OF FACTS

On September 1, 2010, Allergan and the DOJ each announced that Allergan was pleading guilty to the DOJ's criminal Information charging Allergan with illegally marketing and promoting BOTOX® in contravention of provisions of the Food, Drug and Cosmetics Act, 21 U.S.C. §§ 301 *et seq.*, the Public Health Service Act, 42 U.S.C. §§ 262 *et seq.*, and their implementing regulations. Op. at 4, 9. The settlement capped a three-year investigation by the FBI, the FDA's Office of Criminal Investigation, and the Department of Health and Human Services, Office of the Inspector General ("OIG"), and it required Allergan to pay $600 million in civil fines and criminal penalties, equaling 96% of Allergan's 2009 reported net income and exceeding its reported net income in both 2007 and 2008. B7, 49-50 (¶¶ 3, 116-118); Op. at 9-10. As part of the settlement, Allergan also entered into a five-year Corporate Integrity Agreement with the OIG. Op. at 11.

BOTOX® dates back to the 1960s, when the muscle-relaxing properties of botulinum toxin type A were tapped for investigational use in realigning crossed eyes. However, until 2010 the FDA approved BOTOX® for only four therapeutic uses: in 1989 for the treatment of two rare eye muscle disorders associated with dystonia; in 2000 for the abnormal head position and neck pain that accompanies cervical dystonia in patients 16 and older; and in 2004 to treat severe underarm sweating in people 18 years or older when topical agents do not work. B26, 53 (¶¶ 50, 125); Op. at 3. The potential market for these four approved uses was exceptionally small. Op. at 3.

Although physicians may prescribe a product for off-label use, it is illegal for the manufacturer to promote or market the product for anything but FDA-approved uses. Op. at 4. Nevertheless, for many years, Defendants promoted and marketed BOTOX® for off-label use in a number of different ways. From at least 1997 through 2008, aided by its CEO, Defendant Pyott (dubbed "Mr. Botox," by the press), Allergan's Board actively planned and monitored the growth of BOTOX® through massive off-label sales by, among other things, making its sales performance and growth the focus of most Board meetings, approving significant capital expenditures to grow BOTOX® manufacturing capabilities to "meet expected BOTOX demand," and approving and overseeing strategic plans that featured and relied upon BOTOX® sales for off-label uses. *See, e.g.*, B11-15, 28-29, 54-58, 60-63, 65-69, 72, 80-81 (¶¶ 15, 55, 128-129, 136, 138-139, 140, 142, 149, 153, 154, 157, 159, 167-169, 174, 180-181, 191, 217); Op. at 7, 10, 69-74. Indeed, a slide deck summarizing the 1997-2001 Strategic Plan listed BOTOX® treatment for spasticity, migraine, and pain – which were not uses approved by the FDA at the time, but were uses that would allow Allergan to compete in the $6 billion "pain" and "migraine headache" markets – as one of Allergan's "Top Corporate Priorities." Op. at 7; *see also* A277.

Allergan used significant resources to implement a sophisticated network of marketing initiatives designed to increase off-label sales of BOTOX®. Defendants cultivated Allergan's relationship with physicians, which Defendants believed was critical to increasing off-label sales of BOTOX®, through:

- spending $10-$15 million in Board-approved annual funds for the BOTOX ADVANTAGE® Program and the accompanying BOTOX ADVANTAGE® Program Reimbursement Hotline, which provided off-label billing assistance to physicians, including pre-drafted letters to insurance companies or government healthcare programs to obtain reimbursement for off-label BOTOX® prescriptions (B33-34 (¶ 72));

- doubling the size of Allergan's reimbursement support team to "minimize customer barriers" for headache, pain and spasticity – all non-approved uses at the time – as part of this BOTOX ADVANTAGE® Program (B58-59 (¶ 145));

- implementing the Temporary Price Allowance Program, pursuant to which Allergan guaranteed certain physicians – the ones who were historically larger BOTOX® sellers – an off-invoice discount equal to the annual price increase for that year in order to create a spread between the physician's acquisition cost of BOTOX® and the Medicare reimbursement amount (B33-34 (¶ 72)); and

- rewarding these physicians by making them "travelling mentors" to promote off-label uses, pursuant to the Company's Physician Partnership Program. (B33-34, 58-59 (¶¶ 72, 145); Op. at 5-6).

The Allergan Board also approved significant expenditures for Company-controlled organizations and websites that were ***surreptitiously funded by Allergan*** to promote BOTOX® for off-label uses. These included:

- WE MOVE, an educational organization developed by Mitchell Bren, Allergan's chief scientific officer for BOTOX®, which held itself out as an organization focused on "Worldwide Education and Awareness for Movement Disorders Organization," notwithstanding that it was actually funded entirely by Allergan in order to promote the off-label use of BOTOX® (B11, 35-36 (¶¶ 12, 77); Op. at 6);

- The Neurotoxin Institute ("NTI"), an organization whose primary purposes were to promote off-label uses of BOTOX® and provide doctors with off-label information regarding those uses. NTI was supported by an unrestricted educational grant from Allergan and acted under Allergan's control in creating content and setting direction, and Allergan trained its employees to refer physicians to the NTI website. (B36 (¶ 78); Op. at 6); and

- Alliance for Patient Access, an organization also fully funded by Allergan that was designed to lower coverage barriers by payors for off-label uses of BOTOX®. (B28, 35 (¶¶ 54, 76); Op. at 6).

Because of this emphasis on BOTOX® sales and market penetration, BOTOX® was among Allergan's top-selling, specialty pharmaceutical products for nearly a decade, even though it was approved in the United States only to treat the four rare medical conditions. B10-11, 29, 68 (¶¶ 11, 57, 175). From 2000 to 2007, net sales of BOTOX® increased by double digit percentages every year and consistently represented a significant percentage of the Company's total net sales across all product lines. B28 (¶¶ 53-54). This growth, mandated by the Company's Strategic Plans, was impossible to achieve without off-label sales. The Complaint and Opinion highlight two Board-approved Strategic Plans: the 1997-2001 Strategic Plan; and the 2007-2011 Strategic Plan. *See* B54-55, 68 (¶¶ 126, 129, 176); Op. at 6-7, 10, 70-74. Among other things, the 1997-2001 Plan described BOTOX® as having "tremendous growth potential ***as we fund opportunities … such as spasticity, pain, migraine, and tension headache***," although such uses remained off-label until at least 2010. Op. at 7. The 2007-2011 Plan explicitly linked the number of sales representatives to increased off-label sales, such that by February 2008, Allergan had nearly tripled the payroll for its BOTOX® sales force relative to February 2003. *Id.* at 10. Specifically, the Plan referenced that Allergan hired 45 new sales representatives in 2006, when spasticity sales grew by 25%, and 19 in 2007, when spasticity sales grew by 18%. B11 (¶ 14). Defendants were well aware, during the relevant period, that the dramatic growth of Allergan's total net sales of BOTOX® was almost entirely the result of sales of BOTOX® for non-approved uses. *See, e.g.,* B7-8, 27, 69 (¶¶ 11, 52, 179). Between 1999 and 2006, off- label sales for treatment of spasticity grew by 332%, headache grew by 1,407%, and pain by 504%. B11 (¶ 12); Op. at 8.

In 2006, the Allergan Board was told specifically of flagrant, illegal off-label marketing of BOTOX®. On October 24 of that year, Douglas S. Ingram, Allergan's General Counsel, sent an email to Defendants informing them that a month earlier the FDA had contacted Allergan's Regulatory Affairs Department about the off-label marketing of BOTOX® by a frequent Allergan speaker, Dr. Jack Schim, a headache specialist. B37-39 (¶¶ 82-84). Ingram advised the Board members that: Dr. Schim had been making presentations at Allergan-sponsored promotional dinners that were part of Allergan's physician speaker program; the dinner meetings were "directly funded, hosted, and controlled by Allergan"; the presentations were considered "commercial promotion and Allergan is responsible for their content"; and the Company's sales and marketing personnel "made no effort to ensure that the approved material was actually used." B37-39, 67-68 (¶¶ 82-84, 174); Op. at 8-9. Mr. Ingram concluded "[t]his is a potentially serious matter and in the current environment, the chance of receiving Agency action, including but not limited to a Warning Letter, on this matter is in my opinion very high." B67-68 (¶ 174); Op. at 9. The documents attached to Mr. Ingram's email further made clear that Allergan had arranged for Dr. Schim's presentations, had paid him to travel to the meetings and speak about BOTOX®, and that he had presented at eight meetings with doctors around the country in the previous ten months. B38 (¶ 83); Op. at 8.

Even after the Director Defendants were made aware of these illegal marketing activities, and the likelihood of FDA action, ***they continued to discuss and authorize strategic plans and other initiatives that had aggressive directives for BOTOX® revenue that could be reached only through off-label sales***. The 2007-2011 Strategic Plan the Board approved expressly tied increased sales force personnel levels with increased sales of BOTOX® for unapproved uses. B68 (¶ 176); Op. at 10, 74. The Board continued to receive reports highlighting the overwhelming volume of U.S. sales from off-label uses compared to on-label uses. The Board members received, on a regular basis, "Customer Surveys" detailing, among other things, the Company's off-label BOTOX® sales, including a 2007 Customer Survey that showed the U.S. figures sales for the relatively rare four on-label uses, as well as much more widespread sales for off-label uses, such as pain, migraine, and spasticity. B7-8, 27, 69 (¶¶ 11, 52, 179). By 2007, BOTOX® sales for therapeutic uses exceeded $500 million, with 70% to 80% of that total based on sales for off-label uses. B11 (¶ 12). The actions the Company took to market and promote BOTOX® for off-label uses – funding and utilizing WE MOVE, NTI and Alliance for Patient Access to promote off-label uses of BOTOX®, the BOTOX ADVANTAGE® Program Reimbursement Hotline, the Temporary Price Allowance Program, and the Physician Partnership Program, among others – continued into 2009. B8, 68-72 (¶¶ 5, 174-191).

LAMPERS commenced the first derivative action on September 3, 2010, several days before the filing of the related actions in California. Op. at 11-12. UFCW subsequently made its Section 220 demand, later commenced its Section 220 demand action, and after the conclusion of the Section 220 action joined LAMPERS as a co-plaintiff in the Delaware action. Op. at 12-13. UFCW obtained various significant documents from Allergan, which Plaintiffs in the Delaware action then utilized in the Second Amended Complaint filed jointly on July 8, 2011. Op. at 13; *see generally* B001-090.

In the interim, the parties to the California federal action proceeded with briefing on motions to dismiss the California plaintiffs' first complaint, which the federal court dismissed without prejudice. Op. at 13. After Defendants agreed to provide the California federal action plaintiffs with the same documents obtained by UFCW through its Section 220 action, the California plaintiffs filed an amended complaint. Op. at 13. Without argument, the California federal court granted Defendants' renewed motions to dismiss and issued a five-page decision dismissing the case with prejudice. Op. at 13; *see also* A422-426. The Dismissal Order failed to reference numerous allegations that form the basis of Plaintiffs' claims here, including, among others: (1) Allergan's surreptitious funding of organizations such as WE MOVE, NTI and Alliance for Patient Access; (2) Defendants' approval of large expenditures to implement various Company programs tied directly to increasing sales of BOTOX® for off-label uses; (3) Defendants' continuation of the off-label marketing scheme after the incident involving Dr. Schim; (4) Defendants' approval of the Company's 2007-2011 Strategic Plan, which expressly tied increased sales force personnel levels with increased sales of BOTOX® for unapproved uses; and (5) the Customer Surveys provided to the Board that detailed, among other things, the Company's off-label BOTOX® sales. The Dismissal Order specifically notes that plaintiffs there did not pursue a claim under *In re Caremark Int'l Inc. Derivative Litig.,* 698 A.2d 959, 971 (Del. Ch. 1996). A424.

Defendants then sought to use the Dismissal Order to invoke collateral estoppel in the Delaware action. Op. at 13-14. Defendants submitted to the Court of Chancery a heavily redacted version of the amended complaint in the California federal action (A428), and submitted none of the briefing on the motions to dismiss in the California federal action. Plaintiffs opposed Defendants' collateral estoppel argument. B091-114.

On June 11, 2012, the Court of Chancery issued its Opinion upholding Plaintiffs' claims against Defendants, including Plaintiffs' breach of fiduciary duty claim brought pursuant to *Caremark*. After analyzing the allegations in the Complaint as well as documents submitted by Defendants in support of their dismissal motions, the Court of Chancery held that Plaintiffs' particularized allegations raised a reasonable doubt that a majority of the Allergan Board could properly consider a demand. Because the Complaint adequately alleged particularized facts presenting a substantial threat of liability under Rule 23.1, the Court of Chancery found the Complaint necessarily stated a claim under the Rule 12(b)(6) standard.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT COLLATERAL ESTOPPEL DID NOT PRECLUDE THE COURT FROM DETERMINING DEMAND FUTILITY

A. First Question Presented by Defendants on Appeal

Did the Court of Chancery err in failing to give preclusive effect to the final judgment previously entered by the federal court? Plaintiffs' Response: No.

B. Scope of Review

This Court's review of the Court of Chancery's conclusions of law is *de novo*. *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011) ("*King II*").

C. Merits of Argument

The Court of Chancery did not err by declining to give preclusive effect to the decision of the California federal court. Under both California and federal law, collateral estoppel applies to bar consideration of an issue only if all of the following elements are satisfied:

> (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (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.

Hydranautics v. FilmTec Corp., 204 F.3d 880, 885 (9th Cir. 2000). Federal law also requires a "full and fair opportunity to litigate" the issue in the prior action, which also is read into California law. *See Wolfson v. Brammer*, 616 F.3d 1045, 1064 (9th Cir. 2010); *Kerner v. Superior Court*, 141 Cal. Rptr.3d 504, 536 (Cal. App. 2 Dist. 2012) ("Even if the minimal requirements for application of collateral estoppel are satisfied, courts will not apply the doctrine if considerations of policy or fairness outweigh the doctrine's purposes as applied in a particular case [citation omitted], or if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding").[2]

Collateral estoppel does not apply to bar Plaintiffs from litigating the issue of demand futility here because three of these requirements have not been satisfied. First, Plaintiffs were neither a party nor in privity with the plaintiffs in the California action. Second, Defendants failed to meet their burden of showing that the issue previously decided is identical to the one presented to the Court of Chancery. And third, even if there was privity, Plaintiffs were not adequately represented in the California action such that Plaintiffs had a full and fair opportunity to litigate the issue.

Each of these grounds either formed the basis of the decision of the Court below or was presented to it. Accordingly, each provides a proper basis for this Court to affirm the decision of the Court of Chancery on this point. *Unitrin*, 651 A.2d at 1390; *Tooley*, 845 A.2d at 1039-40 & n.29.

1. The Court of Chancery correctly found that no privity exists between the California and Delaware plaintiffs

a. The Court of Chancery's application of Delaware's internal affairs doctrine to the privity prong of the collateral estoppel analysis was not erroneous

Defendants do not dispute that demand futility is a matter of substantive law to be determined pursuant to the law of the state of incorporation. *See* Appellants' Br. at 13; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108-09 (1991) ("[A] court that is entertaining a derivative action … must apply the demand futility exception as it is defined by the law of the State of incorporation."). Instead, Defendants take issue with Court of Chancery's assertion that whether a stockholder of a Delaware corporation can sue derivatively after another stockholder unsuccessfully attempted to plead demand futility raises a question of demand futility law, arguing that it does not and urging the application of non-Delaware, federal law to the resolution of this question. Appellants' Br. at 13. However, the Court of Chancery properly concluded that this question involves "managerial prerogatives within a corporation," and thus is governed by Delaware law pursuant to the internal affairs doctrine. Op. at 20. Indeed, matters relating to

[2] The elements are substantively the same under Delaware law. *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000).

the relationships between and among shareholders and directors of a Delaware corporation – a prong of the collateral estoppel test directly at issue here - is a quintessential element of Delaware corporate law and is properly decided by Delaware courts under the internal affairs doctrine.

As this Court stated in *McDermott*, 531 A.2d at 215, "[t]he internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs." *Accord VantagePoint,* 871 A.2d at 1113 ("It is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs."); *CTS Corp. v. Dynamics Corp. of Am*., 481 U.S. 69, 91, 107 (1987) ("[a] State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs").

In this context, "internal corporate affairs" include "those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders." *VantagePoint*, 871 A.2d at 1113; *accord McDermott*, 531 A.2d at 214 ("Internal corporate affairs involve those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."). The underlying premise of the doctrine is that "in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions." *VantagePoint*, 871 A.2d at 1112; *see also Edgar v. MITE Corp*., 457 U.S. 624, 645 (1982) (internal affairs doctrine is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs - matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders…."). As this Court explained in *McDermott,* application of the internal affairs doctrine is "one of serious constitutional proportions - under due process, the commerce clause and the full faith and credit clause…." 531 A.2d at 216.

Whether two different shareholders who each filed complaints asserting derivative claims on behalf of a company can be said to have acted in privity with each other, before either shareholder has demonstrated demand is excused or wrongfully refused, is a question for Delaware courts to decide under the internal affairs doctrine. As the Court of Chancery noted, applying the internal affairs doctrine to determine whether successive shareholders are in privity after the first has attempted to plead demand futility "promotes the important objective of treating directors, officers, and stockholders uniformly across jurisdictions." Op. at 21.

Defendants cite no cases that reject application of the internal affairs doctrine to the question of privity between and among shareholders and a corporation, nor do they dispute the fundamental principle of Delaware law that "a stockholder whose litigation efforts are opposed by the corporation does not have authority to sue on behalf of the corporation until there has been a finding of demand excusal or wrongful refusal." Op. at 23. Instead, Defendants state that a derivative case is brought in the name of a corporation and the corporation is the real party in interest. *See* Appellants' Br. at 14 (citing cases). No one disputes this legal truism, but it does not compel a reversal of the ruling of the Court below.

Defendants assert that *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141 (Del. 1989), "shows that the Court of Chancery's use of the internal affairs doctrine cannot be justified by reference to Delaware law." Appellants' Br. at 12. This is incorrect. In *Cavalier Oil*, this Court considered whether, in appraisal proceedings, the Court of Chancery properly held that defendants failed to establish a sufficient basis for the assertion of *res judicata* as to prior claims brought in two separate suits in Virginia federal court. This Court decided that Virginia law controlled the determination of whether *res judicata* applied. However, *Cavalier Oil* and the present action diverge in one critical respect – there were no issues pertaining to whether the parties in the *Cavalier Oil* case were in privity because the parties were the same in all three of the actions being considered in *Cavalier Oil*. The decision simply did not involve any issues of privity, *id.* at 1141-42, and the Court of Chancery's Opinion as to this issue does not remotely conflict.

Defendants also claim that in *In re Sonus Networks, Inc. Shareholder Derivative Litig.*, 499 F.3d 47 (1st Cir. 2007), the First Circuit Court of Appeals applied the law of the forum state, Massachusetts, to assess privity. Appellants' Br. at 13. But the *Sonus* court actually held that "[a]lthough no Massachusetts case has specifically said so, if the shareholder can sue on the corporation's behalf, it follows that the corporation is bound by the results of the suit in subsequent litigation…." *Id.* And when assessing whether the first plaintiff fairly and adequately represented the corporation (which, if answered in the negative, would preclude collateral estoppel), the First Circuit looked to the law of Delaware, where Sonus was incorporated, on demand futility and standing. *Id.* at 66-68. Accordingly, the Court of Chancery did not err in its choice of law analysis or otherwise refuse to follow relevant precedent.

b. Under well-settled Delaware law, privity does not exist between the Delaware and California plaintiffs

It is rooted in American and Delaware law that "[a] person who is not a party to an action is not bound by the judgment in that action…." *Kohls v. Kenetech Corp.*, 791 A.2d 763, 769 (Del. Ch. 2000) (quoting Restatement (Second) of Judgments § 62 cmt. c (1982)); *see also Taylor v. Sturgell*, 553 U.S. 880, 899 (2008) ("Our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party.") (citation omitted). The United States Supreme Court has identified only six limited exceptions to this rule under Federal law: first, where a nonparty agrees to be bound; second, where there is a "pre-existing substantive legal relationship"; third, in "certain limited circumstances" such as "class actions … and suits brought by trustees, guardians, and other fiduciaries," where there is adequate representation by someone with the same interests as the nonparty; fourth, where the nonparty "assumed control" over the prior litigation; fifth, relitigation by proxy; and sixth, where there is a "special statutory scheme" that is "otherwise consistent with due process." *Taylor*, 553 U.S. at 893-95 (citations omitted). Indeed, in *Taylor*, the Court ***rejected*** an attempt to expand the exceptions under the proposed doctrine of "virtual representation," which would impute privity if the "relationship between a party and a non-party is 'close enough'" under a factual analysis. *Id.* at 898.[3]

Delaware law is similarly restrictive. In *Kohls*, the Court of Chancery found only three exceptions under Delaware law: first, in an authorized representative action; second, if there was a "specific type of pre-existing legal relationship;" and third, if there is "some conduct that 'falls short of becoming a party but which justly should result in his being denied opportunity to relitigate the matters previously in issue.'" *Kohls*, 791 A.2d at 769 (citing Restatement (Second) of Judgments § 62 (1982)). The Court further stated that in analyzing privity, one shareholder is not presumed to bind others:

> Being fellow stockholders is plainly not the type of legal relationship that fits the second exception listed above. ***An individual shareholder is not, solely because of potentially aligned interests, presumed to act in the place of (and with the power to bind) the other stockholders***.

[3] Defendants' arguments based on *Taylor* are addressed below at 17-18.

Kohls, 791 A.2d at 769 (emphasis added). There is no exception that would establish privity between Plaintiffs here and the plaintiffs in the California action under Delaware law.

i. Privity does not attach between independent shareholders until there is a Rule 23.1 denial

Delaware law has long held that a shareholder's authority to bring an action on a corporation's behalf arises when, and only when, there has been a finding of demand excusal or wrongful refusal.

> Because directors are empowered to manage, or direct the management of, the business and affairs of the corporation, the right of a shareholder to prosecute a derivative suit is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused because the directors are incapable of making an impartial decision regarding such litigation.

Rales, 634 A.2d at 932 (citation omitted). This Court similarly stated in *Kaplan*:

> The right to bring a derivative action does not come into existence until the plaintiff shareholder has made a demand on the corporation to institute such an action or until the shareholder has demonstrated that demand would be futile.

540 A.2d at 730. *Accord Aronson*, 473 A.2d at 811 (discussing "two-fold" nature of derivative actions); *Schoon v. Smith*, 953 A.2d 196, 202 (Del. 2008) (same).

Without the authority conferred by a Rule 23.1 adjudication to proceed on behalf of the corporation, a shareholder cannot bind the corporation or any other shareholder and privity cannot attach between two unrelated shareholders. Indeed, under the Delaware Code, "dismissal pursuant to Rule 23.1 [is] with prejudice ***to the named plaintiffs only***." Rule 15(aaa) (emphasis added); *accord W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 642 (Del. Ch. 2006) ("It is common practice in this court where there are inadequate allegations of demand futility to dismiss derivative suits with prejudice as to the named plaintiff, but not as to the corporation or its other stockholders.").

Here, the California plaintiffs were never authorized to assert their derivative claims on behalf of Allergan as they did not survive the Defendants' Rule 23.1 motion. The California plaintiffs were individual investors, separate from and without any legal relationship to the two institutional investors who are Plaintiffs here, and thus, the Court of Chancery properly found there is no privity between the separate plaintiffs.

That holding is faithful to the cautionary approach to preclusion articulated by Delaware courts, the United States Supreme Court, and other federal courts. *See, e.g., Kohls, supra*, 791 A.2d at 767-70; *Taylor, supra*, 553 U.S. at 892; *Ji v. Van Heyningen*, 2006 WL 2521440, at *5 (D.R.I. Aug. 29, 2006) (expressing "genuine concerns about blocking a separate suit by a nonparty shareholder for the initial plaintiff's pleading deficiencies" and rejecting attempt "to apply issue preclusion to a nonparty to the initial proceeding"); *cf. Papilsky v. Berndt*, 466 F.2d 251, 257 (2d Cir. 1972) ("Courts traditionally have exhibited understandable caution in according *res judicata* effect to a prior derivative action in which the present plaintiff stockholder did not participate."). Ultimately, by drawing the collateral estoppel line at a Rule 23.1 denial, the Court of Chancery was appropriately cautious of the adverse implications that a more simplistic approach to collateral estoppel, such as that advocated by Defendants, would have on the corporation and absent shareholders.

Attacking the decision of the Court of Chancery, Defendants argue that a final judgment holding that a given set of allegations does not establish demand futility should be given preclusive effect against successive suits because "the corporation is the real party in interest." They further contend the Court of Chancery erred by failing to recognize that demand futility and shareholder privity are distinct questions under Delaware law, such that the identity of the first or successive shareholders has no bearing on the demand futility question. Appellants' Br. at 16. To support this position, Defendants cite to *Sonus, supra,* 499 F.3d 47, *LeBoyer v. Greenspan*, 2007 WL 4287646 (C.D. Cal. June 13, 2007), and *Henik v. Labranche*, 433 F. Supp. 2d 372 (S.D.N.Y. 2006). However, the decisions in these cases are not binding on this Court and are inconsistent with Delaware law.

In *Sonus*, the issue was whether to give preclusive effect to an earlier state court decision that found no demand futility. 499 F.3d at 53. On appeal, the First Circuit analyzed the demand futility question in reference to privity and held that preclusion applied to the subsequent derivative suit. *Id.* at 64. As shown above, *Sonus* is wrongly decided under Delaware law. Moreover, the *Sonus* case presents several exceptions to its holding that a prior adjudication of a plaintiff's failure to adequately plead demand futility in one case is binding on a plaintiff-shareholder in another case. Specifically, the first shareholder "must fairly and adequately represent the corporation," which cannot occur, for instance, if there is "some issue peculiar to the state court plaintiffs or the adequacy of their representation…." *Sonus*, 499 F.3d at 64. In this connection, entirely apart from the Court of Chancery's discussion of the inadequacy of the California plaintiffs as "fast-filers," it is telling that the California district court found that the California plaintiffs failed to plead an actionable "*decision* by board members," A425 (emphasis in original), and that the California plaintiffs did not pursue a *Caremark* claim. Given these findings by the California court, when judged against the facts alleged in the Complaint in this Action, the documents that Defendants presented to the Court of Chancery in support of their motion (which the Court of Chancery analyzed in the Opinion), and the reasonable inferences therefrom, the Delaware Complaint clearly did not suffer the same deficiency that the California complaint did, thus making the latter "peculiar" to the California plaintiffs. *See* Op. at 2, 7, 10, 69-81 (finding Plaintiffs adequately alleged a series of Board decisions that made demand futile under the *Aronson* test). Therefore, even under *Sonus*, there is no basis to preclude the Delaware action from going forward as a result of the prior proceedings in California.

LeBoyer and *Henik* do not support Defendants' position for similar reasons. In citing to *LeBoyer* (Appellants' Br. at 16), Defendants rely on that court's holding that "differing groups of shareholders who can potentially stand in the corporation's stead are in privity for the purposes of issue preclusion." 2007 WL 4287646, at *3. But the court in *LeBoyer* based its privity analysis not on Delaware law of privity, but on Ninth Circuit authority. *Id*. Because Delaware law applies to the question of privity here, Defendants' reliance on *LeBoyer* is misplaced. The same is true for Defendants' reliance on *Henik*, which does not cite a single Delaware case on the question of privity. 433 F.Supp.2d at 380. Indeed, in *W. Coast Mgmt.*, the Court of Chancery stated that "[e]quitable considerations render dubious" the "recent federal case law, albeit interpreting other states' law … that collateral estoppel bars all subsequent plaintiffs from relitigating demand futility." 914 A.2d at 643 n.22.

Defendants further cite to the U.S. Supreme Court decision in *Taylor*, claiming that, of the "six categories of cases in which 'nonparty preclusion' has been found constitutionally acceptable … [p]reclusion of other shareholders by one shareholder's attempt to show demand futility *fits comfortably* within several [of these] categories…." Appellants' Br. at 16 (emphasis added). As noted above, however, ***none of these categories applies to shareholder derivative actions, much less to the Rule 23.1 context***. For the "pre-existing substantive legal relationship[s]" exception, the *Taylor* Court provided examples such as "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." 553 U.S. at 894. As examples of situations involving "adequate representation," the Supreme Court identified "properly conducted class actions" and "suits brought by trustees, guardians, and other fiduciaries." *Id.* at 894. And for the "special statutory schemes" exception, the *Taylor* Court provided examples such as "bankruptcy and probate proceedings," and "*quo warranto* actions or other suits that, 'under [the governing] law, [may] be brought only on behalf of the public at large.'" *Id.* at 895. Defendants offer no support as to why any of these exceptions would encompass a claim of privity between shareholders before one shareholder has survived a Rule 23.1 motion. Notably, in *Taylor*, the Supreme Court expressly warned against courts following a "close enough" approach to issues of privity. *Id.* at 898.

In this regard, a California Court of Appeals has stated that "the concept of a 'properly conducted class action'" expounded in *Taylor* "suggests a class action that has been certified following a hearing in which the named representatives have established they satisfy the requirements of rule 23, and then litigated to judgment or settled, not an individual lawsuit in which a motion for class certification was denied." *Johnson v. GlaxoSmithKline, Inc.*, 83 Cal. Rptr.3d 607, 618 n.8 (Cal. App. 2 Dist. 2008). Because putative class representatives are only confirmed as adequate upon certification, the *Johnson* court opined that *Taylor* "would appear to preclude the use of collateral estoppel to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit…." *Id.* By analogy, a "properly conducted" derivative action is one that has survived a Rule 23.1 motion, where the shareholder plaintiff has likewise been found to be an adequate representative of the corporation and, by implication, other shareholders. The *Johnson* case thus bears directly on how a California state court would interpret the issue of privity in the context of a Rule 23.1 denial.

Defendants also claim that *Career Education* supports the position that shareholder privity exists before a Rule 23.1 denial. While the *Career Education* Court noted that "[b]ecause the corporation is the true party in interest in a derivative suit, courts have precluded different derivative plaintiffs in subsequent suits" (2007 WL 2875203, at *10), the Court never addressed the privity question that is central in this case: whether, short of a Rule 23.1 denial, privity exists amongst shareholders such that a shareholder has the authority to sue on the corporation's behalf and collateral estoppel applies. As the Court of Chancery here aptly observed, there were good reasons why the Court in *Career Education* did not address this question:

> Notably, the plaintiffs in *Career Education* "concede[d] that collateral estoppel or issue preclusion applie[d] to their Rule 23.1 arguments" and contended only that they should not be precluded from raising issues not addressed in the prior action. [2007 WL 2875203, at *7.] The *Career Education* Court therefore accepted that a Rule 23.1 dismissal would have preclusive effect, did not grapple with the authority issue, and analyzed only whether (i) the plaintiffs in the prior proceeding provided adequate representation and (ii) the two cases involved different issues.

Op. at 35-36. Thus, the *Career Education* Court was not required to address the question of when privity properly exists for collateral estoppel purposes. In contrast, Plaintiffs here at all times contested the preclusive effect of the California Dismissal Order. B091-114. As such, the privity question was ripe and appropriate for the Court of Chancery to decide in the present case.[4]

Defendants also criticize the Court of Chancery's reliance on *Rales* and other cases, claiming that these decisions "do not require or even suggest that a second shareholder can make the same demand futility allegations that another court has already rejected." Appellants' Br. at 19. Defendants' criticism misses the point. In citing to *Rales* and *Cantor v. Sachs*, 162 A. 73 (Del. Ch. 1932), among other Delaware cases, the Court of Chancery was simply reiterating what has long been the law in Delaware – that is, that a shareholder's authority to sue on the corporation's behalf arises when, and only when, there has been a finding of demand excusal or wrongful refusal. Op. at 23-26. As the Court of Chancery observed, the logical implication of this well-settled statement of law is clear: "The granting of a Rule 23.1 motion does not address claims brought in the name of the corporation. It addresses only the first phase of the derivative action in which the stockholder sues individually." Op. at 26. Conversely, when a Rule 23.1 motion is denied, the second phase of the derivative action is triggered and the shareholder now has the authority to sue

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[4] *In re M&F Worldwide S'holders Litig.*, 799 A.2d 1164 (Del. Ch. 2002), also cited by Defendants, is even less on point. The issue in *M&F Worldwide* pertained to a motion to disqualify law firms participating in the settlement of a consolidated shareholder derivative action, and did not concern issues of privity or collateral estoppel in a Rule 23.1 context. *Id*. at 1166-67.

on behalf of the corporation. It is only at this point that privity should be deemed to exist between shareholders.

Lastly, Defendants criticize the Court of Chancery for relying on *Kohls* and *Grimes v. Donald*, 673 A.2d 1207 (Del. 1996). Appellants' Br. at 21. Defendants assert that *Kohls* involved direct, not derivative claims. But the Court of Chancery's denial of preclusion in *Kohls* did not rest on, much less address, this direct versus derivative distinction. 791 A.2d at 767-70. It rested instead on the determination that, notwithstanding the foundational principle that "[a] person who is not a party to an action is not bound by the judgment in that action," none of the three exceptions to this principle applied. *Id*. at 769-70. Indeed, as the *Kohls* court made clear, "***[a]n individual stockholder is not, solely because of potentially aligned interests, presumed to act in the place of (and with the power to bind) the other stockholders***." *Id*. at 769 (emphasis added). As for *Grimes*, that case involved a single shareholder in a single derivative action seeking to assert different legal theories in support of the same claim. 673 A.2d at 1210. *Grimes* did not involve different shareholders bringing separate derivative actions. *Id*. at 1219-20. Accordingly, the Court below was correct to cite to *Grimes* for the point that "[t]he same stockholder therefore cannot attempt to plead demand futility, lose, and then try again," and it properly read *Grimes* to apply only to preclusion issues involving the same stockholder, not different ones as here. Op. at 33-34.

In addition to lacking legal support, the logical implications of Defendants' position that shareholders are in privity with each other for collateral estoppel purposes even before one of them survives a Rule 23.1 motion confirm that the position is without merit. Specifically, if Defendants are correct that all shareholders are in the same position before a Rule 23.1 determination is made, *i.e.*, "in privity" with one another, one shareholder's demand on a company would necessarily preclude another shareholder from alleging demand futility because "the stockholder making the demand concedes the independence and disinterestedness of a majority of the board to respond." *Rales*, 634 A.2d at 935 n.12; *accord Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990). Thus, Defendants would have this Court hold that, after one shareholder made a demand, Defendants should then be able to use that demand to preclude a separate shareholder from arguing futility of demand based on the same set of facts. This is clearly not the law.

In *Avacus Partners, L.P. v. Brian*, 1990 Del. Ch. LEXIS 178 (Oct. 24, 1990), Chancellor Allen rejected the argument made by defendant Infotech that "its response to a demand by another dissatisfied shareholder conclusively demonstrate[d] that demand by Avacus would not have been futile." *Id.* at *28-

29. In *Avacus*, not only did another shareholder make a demand on Infotech concerning the same transactions challenged by Avacus, but in response to the demand, Infotech had established a special committee composed of two newly appointed board members to investigate the transactions, which committee had issued a report recommending that no action be taken with respect to the challenged transactions. *Id.* at *29. Nevertheless, Chancellor Allen held that Avacus had adequately alleged that demand was futile, and that "the responses of the Infotech board to another shareholder's demand is not sufficient to compel dismissal of Avacus's claims at this point." *Id.* at *31. Other courts have similarly held that one shareholder's demand on a corporation does not bar a separate shareholder from alleging that demand is futile. *See, e.g., In re FirstEnergy S'holder Derivative Litig.*, 320 F. Supp. 2d 621, 625-26 (N.D. Ohio 2004) (finding the argument to be "meritless"); *Matter of Prudential Ins. Co. Derivative Litig.*, 282 N.J. Super. 256, 273-74 (Ch. Div. 1995).

Defendants' argument, taken to its logical conclusion, runs directly contrary to Delaware precedent interpreting the long-established interplay between shareholders who make a demand and separate shareholders who have alleged that demand is excused. In this way, rather than arguing that the Court of Chancery made an error in applying applicable law, Defendants' argument is properly seen for what it is: an attempt to have this Court overrule well-established Delaware precedent and procedure and allow defendants in derivative cases to skirt liability by pitting one shareholder against another unrelated shareholder. This Court should reject Defendants' invitation to overwhelmingly shift the balance of equities in derivative cases in favor of defendants, and should uphold the Court of Chancery's ruling.

ii. Defendants' policy arguments are <u>unpersuasive</u>

Defendants further criticize the Court of Chancery's privity analysis as overly "formalistic," and ask this Court to consider the public policy implications of rejecting their position that there is privity between shareholders prior to a Rule 23.1 denial. Appellants' Br. at 18. They first cite a policy goal of avoiding duplicative litigation. Clearly, that is a laudable goal. However, the holdings of this Court on matters involving internal affairs of Delaware corporations (a) must be grounded in Delaware law, and (b) must not trample on the interests of shareholders in protecting a corporation from breaches of fiduciary duties by the company's directors and other potential malfeasors. Indeed, while this Court recognized in *King II*, 12 A.3d 1140, that "it is wasteful of the court's and the litigants' resources to have a regime that would require a corporation to litigate repeatedly the issue of demand futility," the

Court also recognized that a corporation's interest in avoiding repetitive litigation must be balanced with the shareholders' interest in investigating and protecting the corporation. *Id*. at 1150-51 (corporation's interest in avoiding repeated litigation is insufficient to bar a shareholder's rights to books and records under Section 220, even if the shareholder already initiated a derivative action).

Defendants next argue that the Court of Chancery's conclusion that a prior Rule 23.1 dismissal is not binding but, rather, may provide persuasive authority and could operate as *stare decisis*, offends the "ancient policy foundations of collateral estoppel." Appellants' Br. at 18. This argument presupposes that collateral estoppel applies here, the very issue that this Court is entertaining on appeal, since the "policy foundations of collateral estoppel" cannot be offended if collateral estoppel does not apply in the first place. This argument, thus, attempts to put the cart before the horse, which is directly contrary to the U.S. Supreme Court's admonition in *Taylor* that a "close enough" confluence of interests is not sufficient to establish the privity element for collateral estoppel to apply. *See* 553 U.S. at 898 (rejecting argument that preclusion is equitable and should be applied "whenever the relationship between a party and a non-party is 'close enough'"). The other cases Defendants cite in this regard – *Kent County, State of Md. v. Shepherd*, 713 A.2d 290 (Del. Supr. 1998) and *Thompson v. D'Angelo*, 320 A.2d 729 (Del. 1974) – are inapposite as they involved situations where privity, *res judicata*, or collateral estoppel had been established.

Defendants' contention that refusing to adopt the proposition that privity attaches prior to a Rule 23.1 denial would permit relitigation *ad infinitum* (Appellants' Br. at 18) is equally unfounded. While the Court of Chancery recognized that companies may have to litigate the Rule 23.1 issue twice under its ruling, *see* Op. at 34, 36; A659 (7/6/12 Trans. at 61), courts would still look to prior decisions as potentially persuasive authority, if not as *res judicata*. As the Court of Chancery stated in *Kohls*, the "[n]ormal respect for the principle of *stare decisis*" should be more than sufficient to deter subsequent derivative actions based on the same allegations following a Rule 23.1 dismissal, to the extent such litigants can be deterred. *Kohls*, 791 A.2d at 770; *see also* Op. at 82 ("the California Judgment is not persuasive because it adopts one possible defendant-friendly inference from the pled facts"). In any event, even under the current regime, Delaware corporations may already be exposed to parallel actions that compel defendant corporations to brief multiple Rule 23.1 motions. Moreover, adopting Defendants' proposition that privity attaches before a Rule 23.1 denial would only aggravate the "race-to-the courthouse" mentality of litigants in different courts that this Court, and the Court of Chancery, have been so concerned about.

Defendants next assert that affirming the decision below would put Delaware "at odds with every court in every jurisdiction," which could "reduce the incentive for corporations to incorporate (or remain incorporated) in Delaware." Appellants' Br. at 19. While jurisdictional harmony may be generally preferable, a Delaware court is not obliged to follow decisions purportedly applying Delaware law from other jurisdictions where, as here, those decisions conflict with controlling Delaware law. *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 558 (Del. 2002) ("Federal decisions interpreting Delaware statutory law are, of course, not binding on this Court or the Court of Chancery."). Delaware is the premier state of incorporation because Delaware corporate law is well-developed and properly allocates rights and responsibilities between corporations and their shareholders. *See* John Gapper, *Capitalist Punishment*, Financial Times (London), Jan. 19, 2005, at 16 ("The two key constituencies are stockholders and management, and we more or less go up the fairway because if we go up either side, it would hurt us") (quoting now-Chancellor Strine); Rolin P. Bissell, *The "Race to the Top" in State Corporate Law: The Delaware Model*, Washington Legal Foundation, Nov. 2004, *available at http://www.wlf.org/upload/1104WPBissell.pdf* (describing "The Delaware System" as advantageous to companies incorporating in Delaware based on the State Legislature's role in creating and amending, as warranted, the Delaware General Corporation Law, the excellence of the State courts, and the Delaware corporate bar). Indeed, given the high percentage of companies incorporated in Delaware (*see* Chamber of Commerce *Amicus* Br. at 3) and the need for predictability (*id.* at 3, 6), Delaware courts have an obligation to see that Delaware law, upon which companies ***and shareholders*** rely, is decided correctly.

Finally, Defendants assert "[t]here is nothing inequitable about a litigant asking one court to give the judgment of another court full faith and credit." Appellants Br. at 20. While they have such a right, that right is strictly limited to the few exceptions identified by the U.S. Supreme Court in *Taylor*, none of which apply here. More fundamentally, it is even more inequitable to wrest away a party's right to her day in court without her consent or authorization. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment … in litigation in which he is not designated as a party …. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and the statute of the United States … prescribe"). As the U.S. Supreme Court further stated in *Parkland Hosiery Co., Inc. v.*

Shore, it is "a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard." 439 U.S. 322, 327 n.7 (1979).

Accordingly, there is neither legal nor policy support for Defendants' position regarding the ruling of the Court below that Plaintiffs here were not in privity with the California plaintiffs.

2. Defendants have not met their burden of showing that the same issue was actually decided in the prior <u>litigation</u>

As this Court has recognized, "[t]he party asserting collateral estoppel has the burden of showing that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding." *Proctor*, 2007 Del. LEXIS 338, at *3 (internal citation omitted); *accord Capano*, 889 A.2d at 984 (same). Here, however, Defendants did not meet their burden of showing that the issues they sought to bar from consideration by the Court of Chancery on collateral estoppel grounds were actually decided by the California court, nor did they show that the actions were based on the same factual underpinnings.

First, the plaintiffs in the California action abandoned their *Caremark* claim in their amended complaint. *See* A422 (California Dismissal Order) at 424 ("Plaintiffs no longer advance a claim under *Caremark*"). In contrast, Plaintiffs here have alleged a *Caremark* claim and the Court of Chancery upheld it. Op. at 66-81. As a result, there is no basis on which to preclude the litigation of that claim in the Court of Chancery. This is not unlike the situation in *Johnson v. GlaxoSmithKline, supra*, 83 Cal. Rptr. 3d at 616, where the court held that the denial of class certification in two prior cases (which were final and on the merits) did not preclude determination of class issues in a third case brought by a different plaintiff and asserting claims on behalf of only a subset of the classes asserted in the first two cases. The *GSK* court explained that the party asserting collateral estoppel is obligated to demonstrate that the issue actually litigated and finally decided in the first action was *identical* to the factual issue as to which preclusion is sought. *Id*. at 624.

Second, while the Court of Chancery undertook an extensive investigation of the facts underlying Plaintiffs' allegations here, including a review of documents provided by Defendants to the Court, there is no indication that many of Plaintiffs' allegations of fact or the underlying documents were presented to, or considered by, the California court. *Compare* A422 (California Dismissal Order) at 425-26 *with* Op. at 2-11 & 69-81; *see* *also* A658 (7/6/12 Trans. at 60) ("after going through the documents the plaintiffs supplied, I concluded that the California Judgment treated this case as if the complaint had only made bare allegations unsupported by internal documents").

Finally, Defendants failed to provide Plaintiffs or the Court of Chancery with either the actual complaint filed in California (instead providing only a heavily redacted version of the complaint) or the briefs submitted on the dismissal motions in the California Action. As this Court observed in *Kahn v. Lynch Commc'n Sys.*, "the production of weak evidence when strong is, or should have been, available can only lead to the conclusion that the strong would have been adverse." 638 A.2d 1110, 1119 n.7 (Del. 1994); *see also Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 (Del. Ch. 2000). Defendants' failure to submit an un-redacted version of the complaint filed in California therefore constitutes an admission that the allegations set forth in the California complaint are materially weaker than those pressed by Plaintiffs here. In any event, under no circumstances should Defendants be permitted to rely on a heavily redacted complaint in support of their collateral estoppel argument.

Thus, even apart from the reasons discussed by the Court of Chancery in support of its conclusion that collateral estoppel does not bar Plaintiffs from prosecuting the Delaware action, and the reasons stated above, Defendants' failure to establish that the facts and issues they sought to foreclose from relitigation were actually presented to and decided by the California federal court provides an independent basis to affirm the Opinion of the Court below.

3. The Court of Chancery correctly concluded that Plaintiffs were not adequately represented in the California action

As an independent basis for denying collateral estoppel stemming from the California decision, the Court of Chancery found that the California plaintiffs were inadequate representatives. Examining whether the California plaintiffs adequately represented Allergan and its shareholders was appropriate, since it is universally recognized that inadequate representation by a prior plaintiff who is dismissed under Rule 23.1 will not preclude a subsequent action filed by a different plaintiff from proceeding. *See In re Career Educ.*, 2007 WL 2875203, at *10; *Norfolk County Ret. Sys. v. Jos. A. Bank Clothiers*, Inc., 2009 Del. Ch. LEXIS 20, 28-29 (Feb. 12, 2009); *Sonus*, 499 F.3d at 64.

The Court of Chancery found that by filing their derivative action "without first conducting a meaningful investigation," by seeking to inspect documents under Section 220, the California plaintiffs "failed to fulfill the fiduciary duties they voluntarily assumed as derivative action plaintiffs." Op. at 64. Per the Court below, the decision to forego the use of 8 *Del. C.* § 220 was made not to benefit Allergan or its shareholders, but so the California plaintiffs could "benefit themselves by rushing to gain control of a case that could be harvested for legal fees." *Id*. It was this reasoning that led the Court of Chancery to hold, in the alternative, that collateral estoppel did not preclude the litigation of this Action because the California plaintiffs failed to provide adequate representation. *Id*. at 65.

Defendants' assertion that the Court of Chancery should have applied California law, and not Delaware law, when considering the adequacy of the California plaintiffs is wrong. Inadequate representation is an exception to application of collateral estoppel and, as such, is not subject to review under the rendering court's law. Moreover, the cases that discuss inadequacy of representation in the collateral estoppel context overwhelmingly rely on the Restatement (Second) of Judgments § 42(e) for support and not the law of the rendering court. *See, e.g., Hanson*, 2007 WL 5186795, *5-6.

Defendants' arguments that the Court of Chancery's fast-filer presumption conflicts with this Court's holdings in *King II* and *White v. Panic*, 783 A.2d 543 (Del. 2001) ("*White II*") is equally unpersuasive. This Court in *King II* and *White II* was not presented with nor decided the issue of whether a shareholder plaintiff who fails to seek books and records under 8 *Del. C.* § 220 before filing a plenary action is an adequate representative for the purpose of collateral estoppel. In *King II*, this Court gave the Court of Chancery discretion in addressing a derivative plaintiff's failure to conduct a books and records demand and acknowledged "[t]o the extent that the premature filing of a plenary derivative action may be a potential abuse," remedies are available to the Court of Chancery, including denying lead plaintiff status to "fast-filers," dismissing the derivative complaint with prejudice and without leave to amend as to the named plaintiff, and granting leave to amend conditioned on the plaintiff paying defendants' attorneys' fees incurred on the initial motion to dismiss. 12 A.3d at 1151-52. Notably, *King II* explicitly stated that these examples were "intended only as illustrative" and "that such remedies are for the plenary court to fashion and impose in the plenary action." *Id*. at 1152.

Likewise, Defendants' citation to *Sonus* (Appellants' Br. at 25) for the proposition that "the first plaintiff is an inadequate representative only if the allegations in its complaint are 'so grossly deficient as to be apparent to the opposing party'" is misleading. The actual statement from the First Circuit in *Sonus* states that the level of inadequacy must be "representation 'so grossly deficient as to be apparent to the opposing party.'" 499 F.3d at 66. The views of this Court and the Court of Chancery that plaintiffs should use 8 *Del. C.* § 220 before filing a plenary action are widely known amongst the corporate litigation bar. Indeed, in this Action, the Court of Chancery stayed proceedings on Defendants' motions to dismiss LAMPERS' complaint pending the completion of Plaintiff UFCW's Section 220 action. A85-148 (1/17/11 Trans.). Defendants were well aware that the California plaintiffs did not seek books and records under 8 *Del. C.* § 220 and, as such, would not be considered adequate by the Court of Chancery to represent the interests of Allergan or its shareholders.

Here, the Court's finding that the California plaintiffs were inadequate representatives does not alter substantive law, as Defendants argue. Rather, the finding that the California plaintiffs were inadequate merely served as an alternative basis for the Court's decision that Plaintiffs here are not and should not be bound by a decision reached by the California federal court in a case brought by other plaintiffs who had not sought documents through a Section 220 books and records demand. This finding falls squarely within the Court's discretionary powers to fashion a remedy in the plenary action.

II. THE COURT OF CHANCERY CORRECTLY HELD DEMAND WAS FUTILE

A. Second Question Presented by Defendants on Appeal

Was it unreasonable to infer from the documents relied upon by the Court of Chancery that every one of the Company's directors consciously intended the Company to break federal food and drug law? Plaintiffs' Response: No.

B. Scope of Review

This Court reviews the denial of a Rule 23.1 motion to dismiss on demand futility grounds *de novo*. *Brehm*, 746 A.2d at 253-54.

C. Merits of Argument

The Court of Chancery did not err in finding that the Complaint alleged with particularity that a demand that Allergan's directors take action would have been futile. Rule 23.1 requires that a plaintiff "allege with particularity" demand excusal or wrongful refusal. Ct. Ch. R. 23.1. But the particularity requirement does not affect a court's duty to accept all such allegations as true. *Rales*, 634 A.2d at 931 ("well-pleaded factual allegations … are accepted as true on such a motion"). Moreover, while Rule 23.1 requires that a plaintiff plead facts, the plaintiff "is not required to plead evidence" and is entitled "to all reasonable factual inferences that logically flow from the particularized facts alleged…." *Brehm*, 746 A.2d at 254 & 255; *accord Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).

Moreover, a plaintiff is not required to demonstrate a reasonable probability of success on the merits. *Rales*, 634 A.2d at 934. Rather, demand futility is satisfied if the particularized facts alleged create a "reasonable doubt" that "(1) the directors are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Rales*, 634 A.2d at 933 (quoting *Aronson*, 473 A.2d at 814). Here, the Court of Chancery found that Plaintiffs satisfied the demand futility requirement by providing particularized factual allegations demonstrating that there is reasonable doubt that the Board exercised a valid business judgment.

Contrary to Defendants' assertion, the Board is not entitled to a presumption of good faith here. Op. at 67-69. The presumption of good faith is rooted in the business judgment rule, which is afforded to Delaware directors if, for instance, the misconduct allegedly resulted in losses stemming from taking business risks. *See, e.g.*, *In re Citigroup, Inc. S'holder Litig.*, 964 A.2d 106, 130 (Del. Ch. 2009). However, the business judgment rule, and thus the presumption of good faith, does not apply where the misconduct alleged involved losses arising from illegal activity. *In re Goldman Sachs Group, Inc. S'holder Litig.*, 2011 WL 4826104 (Del. Ch. Oct. 12, 2011) ("imposing *Caremark*-type duties on directors to monitor business risk is fundamentally different from imposing on directors a duty to monitor fraud and illegal activity") (internal quotation omitted). Thus, a director's decision to consciously approve or turn a blind eye toward a corporation's illegal activities can never be a valid exercise of business judgment under Delaware law. *In re Massey*, 2011 WL 2176479, at *20 ("Delaware law does not charter law breakers"); *accord Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 163-64 (Del. Ch. 2004); *Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *11 (Del. Ch. Dec. 18, 2002).

Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993), which Defendants cite, does not contradict the principle that the business judgment rule does not protect decisions based on illegal activity. There, a shareholder challenged the fairness of a lawful decision by the board to merge the corporation. *Id.* at 351-57. Finding that the business judgment rule applied, which entitled the directors to a presumption of good faith, this Court nonetheless concluded that the plaintiff provided sufficient evidence from discovery to rebut the business judgment rule as to the duty of care claim, but remanded the duty of loyalty claim for further consideration. *Id.* at 366, 371. Here, Plaintiffs are still at the pleadings stage and are challenging the Director Defendants' decisions to approve a series of business plans and undertake other actions that contemplated illegal activity. As the Court of Chancery held, the Director Defendants are not entitled to the presumption of good faith provided by the business judgment rule. Op. at 67-68.

Based on the allegations of fact in the Complaint, the documents provided by Defendants in support of their dismissal motions, and reasonable inferences therefrom, the Court of Chancery found that demand was futile because Plaintiffs had alleged particularized facts to "reasonably infer that the Board knowingly approved and monitored a business plan that contemplated illegality." Op. at 69. In reaching that conclusion, the Opinion specifically cites to the following allegations and documents: (1) the slide presentation to the Board summarizing the Strategic Plan for 1997-2001 and the actual, written strategic plan; (2) allegations that Allergan deployed an array of programs to support off-label BOTOX® use, including but not limited to the U.S.-Reimbursement assistance cited in the 1997-2001 Strategic Plan documents; (3) allegations that the Board regularly monitored BOTOX® sales and was aware of its significant annual sales growth, especially for off-label uses; (4) the FDA inquiries into the off-label marketing conducted by Dr.

Schim, an Allergan-sponsored speaker; (5) the Board's subsequent approval of the 2007-2011 Strategic Plan that explicitly linked the number of sales representatives to increased off-label sales; and (6) the continuity of most of the Board membership. Op. at 70-75.

Citing to certain 1997-2001 Strategic Plan documents and the 2006 email discussing the Schim incident, Defendants contend the Court of Chancery erred because "the only possible reading of the documents is that Allergan's directors intended the Company to comply with the law." Appellants' Br. at 28. Defendants' argument is misplaced. While Defendants seek to focus on a limited range of documents pertaining to the 1997-2001 Strategic Plan, the Court properly considered the documents and Plaintiffs' allegations as a whole, and cited specific slides and text from which a reasonable inference of misconduct could be inferred. Op. at 70-73. One was a slide projecting that BOTOX® sales would increase from $86.1 million to $141.1 million in North America in four years (A272 (Plan Slide 28)), and another designated maximizing sales of BOTOX® for "Spasticity, migraine, and pain" uses as a "Top Corporate Priorit[y]." A277 (Plan Slide 56); *see also* A272 (Plan Slide 30). None of those uses was approved by the FDA at that time. Moreover, the text of the written 1997-2001 Strategic Plan confirmed and expounded on the strategy of expanding BOTOX® sales in the United States through unapproved uses. *See* A288, 293, 295, 299 and 311. While Defendants argue that other slides and certain text from the documents "show[] conclusively that the Board was approving a plan under which future sales would be driven by future FDA approvals" (Appellants' Br. at 30), it was certainly a reasonable inference that Plaintiffs' allegations of particularized facts, together with the portions of the documents referenced in the Opinion, sufficiently supported Plaintiffs' case, and satisfied the *Aronson* test cited above.

Defendants further assert that the Court of Chancery incorrectly assumed that "Allergan could not legally communicate data about unapproved uses of BOTOX therapeutic with the medical community without violating the FDCA…." Appellants' Br. at 29 (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011)). The Court of Chancery did no such thing, and the *Sorrell* decision is inapposite. In *Sorrell*, the U.S. Supreme Court held that Vermont's Prescription Confidentiality Law, which restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors, violated the First Amendment because it unjustifiably imposed specific, content-based limitations on commercial speech. 131 S. Ct. at 2672. There is nothing in *Sorrell* that provides or implies that off-label marketing and promotion by a pharmaceutical company can be legal.

As for the Schim incident, Defendants assert the Court of Chancery misinterpreted an e-mail from the general counsel in October 2006 informing the

Board that the FDA was investigating off-label marketing by Dr. Schim, the Allergan-sponsored headache doctor, at Allergan-sponsored and controlled dinner programs around the country. Appellants' Br. at 30-31. But the point of the Schim email is not that the Board was complicit in Dr. Schim's wrongful conduct. The point, properly recognized by the Court of Chancery, is that "the Schim incident should have further illuminated the serious legal risks posed by Allergan's various programs for supporting off-label use, including its sponsored-speaker program, and the existence of a culture of non-compliance at the company." Op. at 80. Nevertheless, the Board "subsequently approved iterations of the business plan that further ramped up Allergan's support for off-label use," specifically the 2007-2011 Strategic Plan. *Id.* Thus, while Defendants argue the Court of Chancery committed a "fundamental error" when analyzing the Board's strategic plan documents and the Schim email, the Opinion evidences that the Court did precisely what it should have done – review, in their totality, the particularized fact allegations in the Complaint as well as the documents Defendants submitted for the Court's consideration, draw reasonable inferences from the allegations and documents in Plaintiffs' favor, and determine that Plaintiffs sufficiently pled demand futility. *Cf. Tellabs, Inc. v. Makor Issues, Ltd.*, 551 U.S. 308, 323 (2007) ("The strength of an inference cannot be decided in a vacuum").

Indeed, the reasonable inferences from the strategic plan documents and Schim email are even stronger when viewed in light of other specific allegations of fact: the Board's funding of numerous programs designed to support off-label BOTOX® use (B11-15, 29-37, 39, 57, 60, 62 (¶¶ 15, 57-81, 85, 139, 151, 157)); the surreptitious nature of the Board's funding of WE MOVE, NTI and Alliance for Patient Access (B28, 35-36 (¶¶ 54, 76-78)); the Board's approval of significant expenditures tied to increasing sales and marketing personnel for BOTOX® (B10, 11, 68 (¶¶ 10, 14, 176)); the Board's approval of substantial lobbying to expand Medicare and Medicaid coverage for off-label uses of BOTOX® (B39 (¶ 85)); the Board's regular monitoring of BOTOX® sales and its awareness of the significant growth in sales for off-label uses (B11-15, 53-74 (¶¶ 15, 125-199); the Board's approval – after the Schim incident – of the 2007-2011 Strategic Plan ***that explicitly linked the number of sales representatives to increased off-label sales*** (B11, 68-69 (¶¶ 14, 176-177)); and the continuity of most of the Board membership throughout the period (B79-82 (¶¶ 215-220)).

Specifically with regard to the Schim e-mail, while the general counsel identified a series of remedial measures in response to the FDA investigation, neither the email nor any other documents produced by Defendants show that the remedial measures were carried out or that the Board followed up on this known violation of FDA rules and regulations. Defendants' attempt to characterize the email as demonstrating "a corporate culture that detected a problem, investigated it, corrected the underlying causes, and imposed severe consequences on those responsible" is undermined by the facts that it took an FDA investigation to initiate that process, there was no document produced pursuant to the Section 220 action showing the Board took any actions in response to the Schim incident, and the *qui tam* complaints that asserted the scheme continued into 2009. Allergan's corporate culture hardly "detected" this problem. Rather, the FDA identified it after Dr. Schim had spoken at eight meetings in the previous ten months. B38 (¶ 83). And, even when confronted by an FDA investigation and a known instance of illegal conduct, there is no indication the Board undertook any kind of internal investigation, that it monitored to see whether the measures identified were actually carried out, or that it directed the company's management to take any measures beyond those identified in the general counsel's email. None of the Board minutes show that the Schim incident and email were even discussed by the Board, and even after the Schim e-mail, the Board approved of the 2007-2011 Strategic Plan. Viewed in context, these facts permit the reasonable inference that the Board went "through the motions," "rather than make good faith efforts to ensure that [Allergan] cleaned up its act." *In re Massey*, 2011 WL 2176479, at *19.

Not only is demand properly excused based on the second *Aronson* prong, but it is also excused because, at a minimum, a majority of the Board is not disinterested or independent in making a decision that has a substantial likelihood of resulting in their personal liability. Delaware courts have consistently held there exists a disabling conflict of interest for pre-suit demand purposes when "the potential for liability is not a mere threat but instead may rise to a substantial likelihood." *In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1269 (Del. Ch. 1995) (internal quotations omitted); *see also In re Cooper Co., Inc. S'holder Derivative Litig.*, 2000 Del. Ch. LEXIS 158, *17 (Oct. 31, 2000).

Here, ten of the twelve Director Defendants were on the Board from at least 2000 to 2005, the period in which Allergan ***admitted*** that off-label misconduct took place. B79-80 (¶ 216). The other two (Directors Dunsire and Hudson) joined the Board in 2006 and 2008, meaning that they, too, either approved the 2007-2011 Strategic Plan or were on the Board when it was being implemented. Based on the facts identified above and in the Complaint, each of the Board members is directly potentially implicated in Allergan's illegal off-label marketing practices and, as a result, each of the Director Defendants faces a substantial likelihood of personal liability from their breach of fiduciary duties such that there is a reasonable doubt that they are or can be disinterested and independent.

Accordingly, the Chancery Court did not err in finding that making a demand would have been futile.

III. THE COURT OF CHANCERY CORRECTLY HELD THE COMPLAINT STATES VIABLE CLAIMS FOR RELIEF

A. Third Question Presented by Defendants on Appeal

Are there legal differences between the standards for showing demand futility and those for stating claims upon which relief can be granted, such that the denial of a Rule 23.1 motion does not automatically mean that the complaint has stated a claim against every defendant on every count under Rule 12(b)(6)? Plaintiffs' Response: No.

B. Scope of Review

This Court reviews the denial of Rule 12(b)(6) motion *de novo*. *Gadow v. Parker*, 865 A.2d 515, 518 (Del. 2005).

C. Merits of Argument

The Court of Chancery did not err in upholding Plaintiffs' claims, having found that the Complaint sufficiently alleges demand futility. As the Court of Chancery appropriately recognized, a "complaint that pleads a substantial threat of liability for purposes of Rule 23.1 'will also survive a 12(b)(6) motion to dismiss.'" Op. at 81 (quoting *McPadden*, 964 A.2d at 1270); *see also Citigroup*, 964 A.2d at 139 (the standard for pleading demand futility under Rule 23.1 "is more stringent than the standard under Rule 12(b)(6)").

Given the Court's demand futility finding, Defendants do not contest the sufficiency of Plaintiffs' claim of breach of fiduciary duty, except with respect to two of the Directors, Dunsire and Hudson, who joined the Board in 2006 and 2008, respectively. Under Rule 12(b)(6), the Court could only dismiss the claims against these Defendants if it "determine[d] with 'reasonable certainty' that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint." *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001). Defendants Dunsire and Hudson joined the Board in 2006 and 2008, respectively, and both served on the Board during the time that Allergan was operating under its 2007-2011 Strategic Plan. B79-80 (¶ 216). Both knew or should have known of the Schim incident, the Company's and the Board's focus on BOTOX®, and Allergan's potential liability, including potential criminal liability, from off-label marketing. B86-87 (¶¶ 233-235). Yet, both approved of or participated in the implementation of the 2007-2011 Strategic Plan, which continued to focus on the illegal off-label marketing of BOTOX®. B79-80, 86-87

(¶¶ 216, 233-235). As shown above, the Board continued to take actions to support the illegal marketing and promotion of BOTOX® for unapproved uses through at least December 2008 (*see* B11-15 (¶ 15), and discussion above), when both Defendants Dunsire and Hudson were on the Board. Accordingly, the Court of Chancery correctly held that the fiduciary duty claims against Defendants Dunsire and Hudson did not warrant dismissal under Rule 12(b)(6).

Defendants further argue that the Complaint does not state a claim for waste of corporate assets. Appellants' Br. at 34. They assert the claim for waste should be dismissed because the Complaint fails to allege a transaction that was "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration…." Appellants' Br. at 34 (citation omitted). However, the Complaint does identify the "one sided" transactions – the Board's actions that resulted in the implementation of Allergan's illegal off-label marketing strategy. These transactions caused corporate waste in the form of: (1) $600 million in payments and a guilty plea to settle civil and criminal cases brought by the U.S. Government and *qui tam* plaintiffs; (2) a multitude of other costs such as payments for personal injury cases involving off-label uses of BOTOX®; (3) the corporate funds that have and will be paid out in fees and expenses in response to the Government's investigation and compliance program; and (4) the funds allocated by Allergan to finance the illegal off-label marketing and promotional scheme. B49-59 (¶¶ 115-147). Any consideration that Allergan received from implementing the off-label marketing strategy was vastly inadequate in light of those payments and the guilty plea. *See Citigroup*, 964 A.2d at 138-39 (denying motion to dismiss claim that severance agreement constituted waste of corporate assets because of limited consideration received from departing employee).

Thus, the Court of Chancery was correct in upholding the breach of fiduciary duty and waste of corporate assets claims against all of the Director Defendants.

CONCLUSION

The Court of Chancery correctly denied Defendants' motions to dismiss. For the reasons stated above and set forth in the Vice Chancellor's Opinions below, the Court of Chancery's Order denying Defendants' motions to dismiss should be affirmed.

Dated: September 13, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 13, 2012, she caused to be served by LexisNexis File & Serve a copy of the foregoing PLAINTIFFS-BELOW APPELLEES' ANSWERING BRIEF ON INTERLOCUTORY APPEAL upon the following counsel of record:

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