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Case Number 412,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYLE ELLIS, derivatively on behalf of ABBVIE INC.,	)	
	)	No. 412, 2018
Plaintiff-Appellant,	)	
	)	On Appeal from the Court of Chancery of the State of Delaware,
v.	)	C.A. No. 2017-0342-SG
RICHARD A. GONZALEZ, ROBERT J. ALPERN, ROXANNE S. AUSTIN, WILLIAM H.L. BURNSIDE, EDWARD M. LIDDY, EDWARD J. RAPP, GLENN F. TILTON, ROY S. ROBERTS, and FREDERICK H. WADDELL,	)	
Defendants-Appellees,	)	
- and -	)	
ABBVIE INC., a Delaware corporation,	)	
Nominal Defendant-Appellee.	)	

PLAINTIFF-APPELLANT'S OPENING BRIEF

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Dated: September 24, 2018

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NATURE OF PROCEEDINGS

Plaintiff-Appellant Kyle Ellis ("Plaintiff"), a stockholder of nominal defendant AbbVie Inc. ("AbbVie" or the "Company"), brought this shareholder derivative action against the members of AbbVie's board of directors ("Board") and certain officers for breaches of fiduciary duty. Plaintiff alleges that in 2014, after months of negotiations, AbbVie and non-party Shire plc ("Shire") entered into an agreement for AbbVie to acquire Shire for approximately $54 billion. Designed to generate tax savings for AbbVie, the proposed merger was to be structured as a corporate "inversion," whereby AbbVie would merge with and into Shire, with AbbVie as the surviving entity.[1] The members of the Board directly and actively participated in all aspects of the merger negotiations. The prospect of the merger evaporated, however, when, on September 22, 2014, the U.S. Department of the Treasury ("Treasury Department") announced a plan to curb the significant tax benefits associated with corporate inversions.

[1] "A corporate inversion is a corporate reorganization in which a company changes its country of residence by resituating its parent element in a foreign country. Inversions are — or were — attractive as a strategic business maneuver because they allow a corporation to adopt a foreign country's more favorable tax or corporate governance regime. In the past few decades, inversions have become especially popular among corporations domiciled in the United States, due to the United States' onerous — relative to that of many other countries — corporate tax code, under which a U.S. corporation must pay a relatively high tax (up to 35%) both on all income earned within U.S. borders and on income earned outside U.S. borders when that foreign income is repatriated to the domestic corporation." *SEPTA v. AbbVie Inc.*, 2015 Del. Ch. LEXIS 110, at **5–6 (Del. Ch. Apr. 15, 2015), *aff'd*, 132 A.3d 1 (Del. 2016). Unless otherwise noted, all internal citations and quotation marks are omitted, and all emphasis is added.

On September 29, 2014, subsequent to the Treasury Department's announcement, AbbVie filed with the U.S. Securities and Exchange Commission ("SEC") statements from Defendant Richard A. Gonzalez (CEO) and Chris C. Turek (V.P., Enterprise Strategies), reassuring shareholders that the merger was still on track and that AbbVie was still committed to completing the merger. In reality, however, the Board had convened an emergency meeting immediately after the Treasury Department's announcement to reassess its recommendation in favor of the merger. Plaintiff alleges that the Board both (1) knew of the September 29, 2014 statements and (2) was already in the process of reassessing its recommendation that AbbVie shareholders vote in favor of the merger. The Board had a duty to disclose this material information to correct the false and misleading information contained in the September 29, 2014 statements.

In October 2014, AbbVie withdrew its recommendation in favor of the proposed inversion, causing the price of Shire's common stock to plummet. The Board's failure to timely correct the false and misleading September 29, 2014 statements exposed AbbVie to lawsuits by Shire's shareholders.

On July 10, 2018, the Court of Chancery issued a Memorandum Opinion ("Opinion") (attached as Exhibit A), granting Defendants' motion to dismiss for failure to plead sufficient facts to excuse demand under Court of Chancery Rule 23.1 ("Rule 23.1"). Plaintiff timely appeals from that judgment.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that Plaintiff failed to properly plead demand futility. Plaintiff's complaint contains well-pleaded allegations that, viewed as a whole, give rise to a reasonable inference that the Director Defendants were aware of the September 29, 2014 statements and were aware that those statements were false and misleading.[2] Indeed, the Court of Chancery presumed that the September 29, 2014 statements were false and misleading *and* that the Board *at that time* was already reassessing its recommendation in favor of the merger. Given these assumptions, which are well-supported, Plaintiff's complaint adequately alleges that the Director Defendants face a substantial likelihood of liability for failing to disclose material information regarding the Board's reassessment of its recommendation in favor of the merger. Concluding the contrary, the Court of Chancery erred by failing to draw all reasonable inferences in Plaintiff's favor and to consider the totality of Plaintiff's well-pleaded allegations concerning the Director Defendants' involvement in the merger negotiations and reassessment of the merger.

[2] The "Director Defendants" are: Richard A. Gonzalez (AbbVie's CEO and Chairman of the Board), Robert J. Alpern, Roxanne S. Austin, William H.L. Burnside, Edward M. Liddy, Edward J. Rapp, Glenn F. Tilton, and Frederick H. Waddell, all of whom were directors at the time this action was commenced. A015–017, 058 (¶¶ 11–17, 19, 122). Defendant Roy S. Roberts was a director at the time of the proposed merger in 2014, but was not on the Board when this action was commenced. A017 (¶ 18). The Director Defendants and Roberts are collectively referred to as the "Individual Defendants" and, with AbbVie, the "Defendants."

2. Plaintiff alleges with particularity that Defendants breached their fiduciary duty of loyalty by failing to promptly disclose the Board's reassessment of the proposed merger. Although Defendants moved to dismiss the complaint under Court of Chancery Rule 12(b)(6) ("Rule 12(b)(6)) for failure to state a claim, the Court of Chancery did not reach this question. If this Court concludes that the complaint adequately pleads demand futility, that conclusion would *ipso facto* establish that Plaintiff adequately states a non-exculpatory claim for breach of fiduciary duty of loyalty against Defendants based on failure to disclose.

STATEMENT OF FACTS

I. The Company

A Delaware corporation headquartered in Illinois, AbbVie became an independent, publicly-traded company in January 2013, when it was spun off from Abbott Laboratories. A015 (¶ 10). By the summer of 2014, AbbVie had grown into an international biopharmaceutical conglomerate with $86 billion market capitalization, employing 25,000 employees worldwide and generating annual sales revenues of over $19 billion. A018–019 (¶ 23).

At the time when this action was commenced, AbbVie's Board consisted of nine directors: Defendants Gonzalez, Alpern, Austin, Burnside, Liddy, Rapp, Tilton, and Waddell, as well as non-party Brett J. Hart. A058 (¶ 122).

II. The Proposed Inversion

In February 2014, AbbVie's Board and management began discussing a merger with Shire, a Jersey corporation headquartered in Ireland. A019, 045 (¶¶ 25, 78). Shire is a leading global specialty biopharmaceutical company that focuses on developing and marketing innovative specialty medicines. A019 (¶ 25).

Designed to generate tax savings for AbbVie, the proposed "inversion" contemplated that AbbVie would merge with and into Shire, with AbbVie as the surviving entity — the "New AbbVie." A012–013 (¶ 2). Specifically, AbbVie was to form a wholly-owned subsidiary under the laws of Jersey (a Crown

Dependency of the United Kingdom), acquire Shire for mixed consideration of cash and New AbbVie stock, and convert AbbVie common stock into New AbbVie stock. *Id.* (¶ 2 & n.6). At the end of the transaction, AbbVie and Shire would each be indirect, wholly-owned subsidiaries of New AbbVie — effectively expatriating AbbVie, which would ultimately be reincorporated in Ireland. *Id.*

Between May and July 2014, the Board — over multiple meetings and calls — authorized four merger proposals (cash plus New AbbVie shares in exchange for Shire stock), each of which Shire rejected. A019–051 (¶¶ 28–100). Between July 12 and July 18, 2014, the Board authorized a fifth merger proposal, which Shire accepted ("Proposed Inversion"). A051–052 (¶¶ 101–104).

On July 18, 2014, when AbbVie and Shire reached an agreement on the terms of the Proposed Inversion, it was valued at approximately $54 billion. A026, 040 (¶¶ 44, 66). Under the agreement, AbbVie was to pay Shire a termination fee of $1.64 billion if the Board withdrew its recommendation to AbbVie shareholders to approve the Proposed Inversion. A027–028 (¶ 46). On the other hand, if AbbVie shareholders were to vote down the proposed merger, AbbVie would be obligated to pay Shire no more than $545 million. A028 (¶ 47).

The announcement of the Proposed Inversion caused the price of Shire stock to rise, due to the market's expectation that Shire stockholders would receive a premium in the merger. A014 (¶ 5). Following news of the Proposed Inversion,

Shire's stock price in the United States rose to a high of $264.98 per share. *Id*.

III. The Board's Active Participation in the Merger Negotiations

The complaint alleges in great detail that all Director Defendants personally participated in all key aspects of the merger negotiations. *See* A044–053 (¶¶ 76, 78–82, 87, 90, 94–95, 97, 101, 103, 107–08). Specifically, at Board meetings and calls on April 30, May 9, May 28, June 17–19, July 12, July 13, and July 17, 2014, the Director Defendants reviewed and authorized *each* of the five merger proposals submitted by AbbVie. A046–053 (¶¶ 82, 87, 90, 94, 101, 103, 107–108).

A. The Board's Authorization to Initiate Merger Discussions

On February 20, 2014, the Board met with AbbVie's management to discuss a potential strategic transaction with Shire. A045 (¶ 78). In March 2014, the Board received from J.P. Morgan's representatives an updated review that took into account Shire's 2013 results. *Id.* (¶ 79). The review also included an overview of structural and strategic considerations relating to AbbVie pursuing a potential transaction with Shire. *Id*. Also in March 2014, the Board reviewed legal considerations in connection with a potential merger with Shire. A045–046 (¶ 80). On April 7, 2014, the Board retained J.P. Morgan as its financial advisor in connection with the evaluation of a potential merger with Shire. A046 (¶ 81).

On April 30, 2014, the Board held a special meeting, during which AbbVie's management presented to the Board the tax, legal, financial, and other

considerations in connection with a potential merger with Shire. *Id.* (¶ 82). The Board authorized AbbVie management to contact Shire and make a non-binding, preliminary proposal regarding a potential strategic transaction. *Id.*

B. The Board's Review and Approval of the Initial Four Proposals

Plaintiff alleges in great detail the Board's intimate involvement in the merger negotiations. Following the Board's authorization, on May 2, 2014, Gonzalez reached out to Shire's chairman, Susan Kilsby, to set up a meeting to discuss a potential merger. *Id.* Prior to the meeting, Gonzalez sought and obtained the Board's approval of a merger proposal, which valued Shire shares at £39.50. A046–047 (¶¶ 84–85). Gonzalez and Kilsby discussed a potential merger, as well as AbbVie's first proposal, during and after the May 5, 2014 meeting. *See id.* By letter dated May 9, 2014, Shire rejected AbbVie's first proposal. A047 (¶ 86).

Following Shire's rejection, the Board convened a meeting that same day (May 9, 2014). *Id.* (¶ 87). After discussing the proposed merger with AbbVie's management, legal advisors, and J.P. Morgan, the Board authorized Gonzalez to make a second, higher proposal to Shire — valuing Shire shares at £40.97. *Id.* (¶¶ 87–88). On May 13, 2014, Gonzalez conveyed the second proposal to Kilsby. A047 (¶ 88). Shire rejected the proposal on May 20, 2014. A048 (¶ 89).

Within a week of Shire's rejection, on May 28, 2014, the Board held a special meeting. *Id.* (¶ 90). After discussing the proposed merger with AbbVie's

management, legal advisors, and J.P. Morgan, the Board authorized Gonzalez to make a third proposal to Shire — valuing Shire shares at £46.26. *Id.* (¶¶ 90–91). On May 30, 2014, Gonzalez conveyed the third proposal to Kilsby. *Id.* (¶ 91). Gonzalez then met with Kilsby to further discuss the potential transaction. A048–049 (¶¶ 92–93). On June 16, 2014, Shire rejected the proposal. A049 (¶ 93).

The Board held a meeting over the next three days (June 17–19) to discuss the proposed merger and other matters. *Id.* (¶ 94). The Board authorized Gonzalez to make a fourth proposal to Shire — valuing Shire shares at £51.15. A049–50 (¶¶ 94–95). AbbVie conveyed the fourth proposal to Shire on July 8, 2014. *Id.* (¶ 95). In response, Kilsby requested a meeting for July 10, 2014 between key executives of Shire and AbbVie, to share certain confidential information that would enable AbbVie to identify additional value in Shire shares. A050 (¶ 96). A day before the meeting, on July 9, 2014, the Board held a conference call to discuss the developments relating to the proposed merger. *Id.* (¶ 97).

C. The Board's Review and Approval of the Fifth and Final Proposal

Following the July 10, 2014 meeting between the key executives of AbbVie and Shire, Gonzalez sought and obtained the Board's approval of a fifth proposal — valuing Shire shares at £52.25. A051 (¶ 101). On July 12, 2014, Gonzalez conveyed the fifth proposal to Kilsby. The next day, on July 13, 2014, Gonzalez had further discussions with Kilsby regarding the proposed merger. *Id.* (¶ 102).

On July 13, 2014, the Board authorized a revised proposal valuing Shire stock at £53.20, which AbbVie immediately conveyed to Shire. A052 (¶ 104).

The following day, on July 14, 2014, Shire announced that, subject to satisfactory resolution of the other terms, its board would be willing to recommend the revised fifth proposal to its shareholders for approval. *Id.* (¶ 105).

On July 17, 2014, while these discussions were ongoing, the Board held a special meeting to consider the Proposed Inversion. A053 (¶ 107). After receiving various presentations and considering the proposed terms, the Board resolved that the merger was in the best interests of AbbVie's stockholders. *Id.* (¶ 108).

On July 18, 2014, AbbVie and Shire executed the relevant agreements and issued a joint announcement regarding the proposed merger. A026 (¶ 44).

IV. AbbVie Touts the Benefits of the Proposed Inversion

For several months after the signing of the merger agreements, AbbVie, in statements approved by the Director Defendants, consistently downplayed the importance of the tax benefits as a rationale for the Proposed Inversion.

For example, in its July 18, 2014 announcement, AbbVie stated *seven* reasons for the proposed merger, including diversification of products and enhancement of share value. A028–029 (¶ 49). Achieving "a competitive tax structure" was listed as only *one* of the reasons. *Id.* Similarly, during a July 21, 2014 conference call, Gonzalez stated that "***[t]ax is clearly a benefit***," but "***not the***

primary rationale" for the merger. A029 (¶ 50). Gonzalez further stated that the proposed merger presented an "***excellent strategic fit***" and had "***compelling financial impact well beyond the tax impact***." A030 (¶ 51). In sum, according to Gonzalez, the tax impact was merely an "***additional benefit***," and AbbVie would not be pursuing the Proposed Inversion if "***it was just for the tax impact***." *Id*.

In an August 21, 2014 proxy statement, which was reviewed and approved by the Director Defendants and signed by Gonzalez, AbbVie continued to list the tax impact as merely *one* of *ten* rationales for the merger. A030–032 (¶ 52).

V. The Government's Efforts to Curb Corporate Inversions

In 2014, the United States government began the process of trying to limit the use of inversion as a vehicle for companies to obtain tax benefits. To that end, in July 2014, the Treasury Department requested Congress to pass retroactive legislation that would halt United States companies from engaging in inversion transactions. A025 (¶ 40). Then, on August 5, 2014, the Treasury Department announced it was "reviewing a broad range of authorities for possible administrative actions to limit inversions as well as approaches that could meaningfully reduce the tax benefits after inversions took place." A033 (¶ 55).

Finally, on September 22, 2014, the Treasury Department and the Internal Revenue Service issued a notice ("Notice") announcing their intent to issue regulatory guidance under various sections of the Internal Revenue Code to

eliminate certain tax advantages of merger-based inversions. *Id.* (¶ 56). According to the Treasury Department, "the Notice eliminates certain techniques inverted companies currently use to access the overseas earnings of foreign subsidiaries of the U.S. company that inverts without paying U.S. tax. Today's actions apply to deals closed today or after today." *Id.*

VI. Following the Notice, Gonzalez and AbbVie Continue to Reassure the Shareholders that AbbVie Is Committed to the Proposed Merger

On September 29, 2014 — seven days after the Treasury Department issued the Notice — AbbVie filed with the SEC two letters on Forms 425, reassuring the market that AbbVie was committed to following through with the merger and continuing the integration planning. A034–037, 065–071 (¶¶ 60–61; Exs. 1 & 2). The Forms 425 were reviewed by the Individual Defendants. A036 (¶ 61).

One letter, authored by Defendant Gonzalez and addressed to Shire employees, touted the "shared traits and values" between AbbVie and Shire. A034 (¶ 60). In the letter, Gonzalez stated that he was "***more energized than ever*** about [the] two companies coming together," and promised "***a very busy few months ahead***" in "work[ing] on ***integration planning***." A034, 065–067 (¶ 60; Ex. 1).

Another letter, from AbbVie's V.P. of Enterprise Strategies to AbbVie employees, similarly falsely represented AbbVie's commitment to pursuing the proposed merger by emphasizing the need for effective integration:

> Last week AbbVie and Shire colleagues attended a joint integration planning meeting, ***as we aim for a fourth-quarter close.***
>
> The meeting was an opportunity for AbbVie and Shire counterparts to meet in person and learn more about each other's organizations ***in preparation for a successful Day One***. The key objectives of the meeting were to begin building relationships with one another and provide a common understanding of ***the integration planning strategy***. Our focus right now is on high-priority items and Day One must-haves. ***Post-close, we will concentrate on remaining requirements in a coordinated manner until we are fully integrated.***
>
> … These plans are the foundation to support ***all areas of integration planning needs and opportunities going forward.*** Teams will finalize Day One plans by mid-October ***so that we may begin implementing key tasks in order to ensure business continuity on Day One.***
>
> … ***both integration planning teams are committed to successful preparation for Day One.***

A036–037, 068–071 (¶ 61; Ex. 2).

Following these filings and AbbVie's statements that it intended to continue with the merger, Shire's stock traded as high as $263.24 per share. A037 (¶ 62).

VII. The Board Meets to Reconsider the Proposed Merger at the Same Time that Gonzalez and AbbVie Reassure Shareholders that AbbVie Is Committed to Following Through with the Merger

Unbeknownst to the public, immediately after the Treasury Department issued the Notice on September 22, 2014, AbbVie's Board convened an emergency discussion to reassess its recommendation to AbbVie shareholders to vote in favor of the proposed merger. A034, 054 (¶¶ 58, 111); *see also* A013 (¶ 3) (alleging that by September 29, 2014, "AbbVie had already decided to back out of the Merger").

The complaint includes multiple well-pleaded allegations giving rise to a reasonable inference that, at the time Gonzalez and AbbVie made their statements on September 29, 2014, the Board had already started meeting to reassess its recommendation in favor of the proposed merger, including the following:

- The Notice was "a major announcement that rocked the corporate world" and, due to AbbVie's signed merger agreement, would have immediately caused the Board to convene an emergency meeting to reassess whether the proposed merger was still beneficial to AbbVie in light of the elimination of anticipated tax benefits. A054 (¶ 111).

- In its October 15, 2014 press release announcing the termination of the proposed merger, AbbVie conceded that "AbbVie and its Board of Directors made this determination ***following a detailed consideration*** of the impact of the U.S. Department of Treasury's unilateral changes to the tax rules, ***as issued on September 22, 2014***." A054–55 (¶ 112).

- The temporal proximity between (1) the September 29, 2014 statements by Gonzalez and AbbVie, (2) the October 14, 2014 announcement that AbbVie was reconsidering the merger, and (3) the October 15, 2014 announcement that AbbVie was terminating the proposed merger reasonably suggests that the Board's reassessment commenced long before October 14, 2014 and that, at the time of the September 29, 2014 statements, the Board was already reassessing its recommendation in favor of the merger. A056–057 (¶ 115).

- The Board's swift action was consistent with its active, direct participation ***at every key stage of the merger negotiations*** up to that point. *See, e.g.*, A044–054 (¶¶ 75–110).

VIII. The Board Terminates the Proposed Merger

On October 14, 2014, AbbVie issued a press release announcing that it had notified Shire of the Board's "intention to reconsider the recommendation" in favor of the proposed merger. A038 (¶ 63). The press release noted that unless Shire

waived the required 3-day notice, "AbbVie's Board plans to meet on October 20, 2014" to reassess its recommendation in favor of the merger. *Id.*

The very next day, on October 15, 2014, with Shire having waived the 3-day notice, AbbVie issued a press release announcing that the Board "withdraws its recommendation" in favor of the proposed merger. A054–055 (¶ 112). The press release provided that "AbbVie and its Board of Directors made this determination ***following a detailed consideration of the impact of the U.S. Department of Treasury's unilateral changes to the tax rules***, as issued on September 22, 2014." *Id.* Among other things, the press release confirmed that the elimination of the "***longstanding tax principles***" was the primary reason for the Board's determination to withdraw from the proposed merger because it "***introduced an unacceptable level of uncertainty to the transaction***" and "***fundamentally changed the implied value of Shire to AbbVie in a significant manner***." *Id.*

On October 21, 2014, AbbVie further announced that, as the result of the Notice, Shire and AbbVie agreed to terminate the merger, and that AbbVie would be required to pay Shire a $1.64 billion termination fee. A038–040 (¶ 65).

IX. The Related Proceedings Alleging Fraud

AbbVie's announcement caused Shire's stock price to plummet by ***30%*** from a closing price of ***$244.57*** on October 14, 2014 to ***$170.49*** on October 15, 2014. A038 (¶ 64). In response to massive losses suffered by Shire investors, a

securities-fraud class action was commenced against AbbVie and Gonzalez in the United States District Court for the Northern District of Illinois: *Rubinstein v. Gonzalez*, No. 14 C 9465 (N.D. Ill.) ("Securities Class Action"). On March 10, 2017, the court denied the defendants' motion to dismiss the complaint in that action. *See Rubinstein v. Gonzalez*, 241 F. Supp. 3d 841 (N.D. Ill. 2017).

Testing the complaint under the stringent pleading standard of the Private Securities Litigation Reform Act of 1995, the court held that plaintiffs sufficiently alleged falsity and scienter with regard to AbbVie's September 29, 2014 SEC filing. *Id*. at 854–55. According to the court, the complaint's allegations supported a reasonable inference that "***AbbVie's omission of the fact that it was reconsidering the merger rendered misleading Gonzalez's [September 29, 2014] statement about the continued planning for the transaction***." *Id.* at 854.

Various hedge funds that invested in Shire also commenced actions against AbbVie in Illinois state court alleging fraud: *Elliott Associates, L.P. v. AbbVie, Inc.*, No. 16 L 6279 (Ill. Cir. Ct.); and *ODS Capital LLC v. AbbVie, Inc.*, No. 2017 CH 8448 (Ill. Cir. Ct.). By order dated January 6, 2017, the court denied AbbVie's motion to dismiss the complaint in the *Elliott* action, holding that plaintiffs had sufficiently alleged fraud with particularity. Both actions remain pending.

ARGUMENT

I. The Court of Chancery Erred in Determining that the Complaint Failed to Adequately Plead Demand Futility

A. Question Presented

Whether the complaint's well-pleaded allegations create a reasonable doubt that the Board of Directors at the time the complaint was filed could have properly exercised independent and disinterested judgment in response to a demand. This issue was preserved for appeal. *See* A076–112.

B. Standard of Review

This Court's review of the Court of Chancery's grant of a motion to dismiss under Rule 23.1 is *de novo* and plenary. *See Sandys v. Pincus*, 152 A.3d 124, 128 (Del. 2016); *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000). The Court must accept all well-pleaded allegations as true and draw all reasonable inferences in the plaintiff's favor. *See Sandys*, 152 A.3d at 128; *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). To allege demand futility, the plaintiff need not "plead facts that rule out any possibility other than bad faith"; rather, the complaint need only "plead[] facts that support ***a rational inference of bad faith***." *Kahn v. Stern*, 183 A.3d 715, 2018 Del. LEXIS 114, at **1–2 (Del. 2018); *see also Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 258–60 (Del. 2017) (plaintiff need only plead facts supporting an inference of interests adverse to the company's).

C. Merits of Argument

This appeal focuses on the Director Defendants' violation of their duty of candor by failing to correct the September 29, 2014 false and misleading statements. The Court of Chancery analyzed the allegations of demand futility under the *Rales v. Blasband* test, which requires the showing of a "reasonable doubt" that the Board "could have properly exercised its independent and disinterested business judgment in responding to a demand." 634 A.2d 927, 934 (Del. 1993). Demand is excused if Plaintiff's particularized allegations create a reasonable doubt as to whether a majority of the Board faces "a substantial likelihood" of personal liability for breaching the duty of loyalty. *Id.* at 936.

1. Directors' Duty of Disclosure

In the context of the Board's duty to disclose, this Court has held that "[w]henever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty." *Malone v. Brincat*, 722 A.2d 5, 10 (1998). In this regard, "the *sine qua non* of directors' fiduciary duty to shareholders is honesty." *Id.*

As this Court recently reaffirmed, "when a board chooses to disclose a course of events or to discuss a specific subject, it has long been understood that it cannot do so in a materially misleading way, by disclosing only part of the story,

and leaving the reader with a distorted impression." *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018). "Disclosures ***must*** provide a balanced, truthful account of all matters they disclose." *Id.* "Partial disclosure, in which some material facts are not disclosed or are presented in an ambiguous, incomplete, or misleading manner, is not sufficient to meet a fiduciary's disclosure obligations." *Id.* Information is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Id.* at 1060.

To adequately plead demand futility, Plaintiff must plead "particularized allegations that support the inference that the disclosure violation[s] w[ere] made in bad faith, ***knowingly*** or intentionally." *See In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 132 (Del. Ch. 2009). As the Court of Chancery stated in *In re INFOUSA, Inc. Shareholders Litigation*, "[w]hen a Delaware corporation communicates with its shareholders, even in the absence of a request for shareholder action, shareholders are entitled to honest communication from directors, given with complete candor and in good faith." 953 A.2d 963, 990 (Del. Ch. 2007). "Communications that depart from this expectation, ***particularly where it can be shown that the directors involved issued their communication with the knowledge that it was deceptive or incomplete***, violate the fiduciary duties that protect shareholders" and "are sufficient to subject directors to liability." *Id.*

2. Court of Chancery's Decision

This appeal focuses solely on the two statements filed by AbbVie with the SEC on Forms 425 on September 29, 2014, and the Board's failure to timely correct the false and misleading information contained therein. *See* A108–111; Ex. A at 23–29. Most issues are ***not*** in dispute.

a. The Court of Chancery Correctly Assumed that the September 29, 2014 Statements Were Misleading

The Court of Chancery assumed for purposes of the motion to dismiss "that the complained-of-statements contained in the Gonzales and Turek letters, including in the Form 425s, ***were misleading***, and ***created the untrue impression*** that the merger would certainly close." Ex. A at 28. According to the Court of Chancery, "[t]hose statements ***should have been accompanied*** by a statement that the board was reassessing the merger, in light of tax consequences, to avoid being misleading." *Id.* at 28–29. This assumption is consistent with the federal court's conclusion that "AbbVie's omission of the fact that it was reconsidering the merger rendered misleading Gonzalez's [September 29, 2014] statement about the continued planning for the transaction." *Rubinstein*, 241 F. Supp. 3d at 854. It is also supported by well-pleaded allegations of the complaint, which are more than sufficient to give rise to a reasonable inference that the September 29, 2014 statements were false and misleading for failure to disclose the Board's reassessment of the merger. *See, e.g.*, A034, 054–056 (¶¶ 58, 111–114).

b. The Court of Chancery Correctly Assumed that the Board Was Already Reassessing the Merger

The Court of Chancery also assumed as true — as it was required to do at this stage — that *at the time* the September 29, 2014 statements were filed with the SEC, AbbVie's Board *was already reassessing* its recommendation in favor of the proposed merger. *See, e.g.*, Ex. A at 28–29 ("Those statements should have been accompanied by a statement ***that the board was reassessing the merger***, in light of tax consequences, to avoid being misleading."); *id.* at 29 ("All I can glean from the Complaint is that the Gonzalez and Turek letters issued ***at a time when the Director Defendants were in fact re-evaluating the merger***, and that the letters created the incorrect impression that the merger would surely close.").

This assumption also finds ample support in the complaint's well-pleaded allegations. *See, e.g.*, A034 (¶ 58) ("After the Treasury Notice was issued, AbbVie's Board decided to reassess the Merger and its recommendation that AbbVie shareholders vote in favor of the Merger."); A054 (¶ 111) (the September 22, 2014 Notice "***immediately caused AbbVie's Board to convene an emergency discussion about the effect of the Notice and whether AbbVie should continue with the Merger*** in light of the elimination of the main benefit of the Merger — the anticipated tax savings of the inversion."); *see also* A013 (¶ 3) (alleging that by September 29, 2014, "AbbVie had already decided to back out of the Merger").

Additional facts support the inference that by September 29, 2014, the Board was already reassessing its recommendation in favor of the merger. For example, on October 14, 2014, AbbVie announced that its Board was reconsidering the recommendation. A038 (¶ 63). ***The very next day***, on October 15, 2014, AbbVie announced that it was withdrawing from the merger. A054–055 (¶ 122). In announcing the withdrawal, the Company conceded that "AbbVie and its Board of Directors made this determination ***following a detailed consideration*** of the impact of the U.S. Department of Treasury's unilateral changes to the tax rules, as issued on September 22, 2014." *Id.* A reasonable inference from these facts is that the "detailed consideration" by the Board took place over a much longer period of time than just one day (from October 14, 2014 to October 15, 2014).

c. The Court of Chancery Concluded that Plaintiff Failed to Adequately Plead the Director Defendants' Knowledge of the September 29, 2014 Statements

Despite the foregoing assumptions, the Court of Chancery concluded that Plaintiff failed to adequately plead demand futility because "[t]he Complaint fails to plead any particularized facts supporting a reasonable inference that the Director Defendants ***knew*** about the September 29 letters — much less that they signed off on them." Ex. A at 26. According to the Court of Chancery, the complaint included only "the bold, conclusory allegation that the two letters were 'reviewed and approved by the … Defendants.'" *Id.* (citing ¶¶ 60–61 of the complaint). In

the Court of Chancery's view, Plaintiff's allegations were "not particularized enough to meet the heightened pleading requirements of Rule 23.1" because they "fail to provide any detail concerning the Director Defendants' purported involvement with the September 29 letters." Ex. A at 26–27.

Based on the foregoing, the Court of Chancery concluded that Plaintiff failed to adequately allege bad faith or knowledge on the part of the Director Defendants and, thus, failed to adequately allege demand futility. *Id.* at 25–29.

3. The Court of Chancery Erred by Failing to Draw a Reasonable Inference from the Totality of the Complaint's Well-Pleaded Allegations that the Director Defendants Were Aware of the September 29, 2014 Statements

It is well-settled that in reviewing defendants' motion to dismiss for failure to plead demand futility, the court assumes as true all well-pleaded allegations and draws all inferences from those particularized facts in favor of the plaintiff. *See, e.g.*, *Sandys*, 152 A.3d at 128; *Beam*, 845 A.2d at 1048. Notably, the court does ***not*** review the complaint's allegations in isolation; rather, Delaware law requires that the court view the allegations ***as a whole***. *See, e.g.*, *Sandys*, 152 A.3d at 128 (requiring that all pleaded facts "be considered ***in full context***") (quoting *Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015)); *see also Harris v. Carter*, 582 A.2d 222, 229 (Del. Ch. 1990) ("the question is whether ***the accumulation of all factors*** creates the reasonable doubt"). Here, when all of the complaint's well-pleaded allegations are considered as a whole, they are more than

sufficient to give rise to a reasonable inference that the Director Defendants knew of the September 29, 2014 statements, thereby giving rise to a duty to disclose.

Specifically, the Court of Chancery erred in suggesting that Plaintiff's allegation of the Director Defendants' knowledge was premised on only "bold, conclusory allegation[s]." *See, e.g.*, Ex. A at 26–27. On the contrary, Plaintiff's allegations of knowledge are supported by numerous well-pleaded allegations in the complaint that "exhaustively describe[] the negotiations leading up to the merger," which the Court of Chancery impermissibly chose to ignore. *See id.* at 5.

For example, the complaint devotes ***ten pages*** of well-pleaded allegations to detailing the Director Defendants' active participation in ***all*** key aspects of the merger negotiations. *See* A044–053 (¶¶ 76, 78–82, 87, 90, 94–95, 97, 101, 103, 107–08). Among other things, the complaint alleges how — over Board meetings and calls on April 30, May 9, May 28, June 17–19, July 12, July 13, and July 17, 2014 — the Director Defendants reviewed and authorized *each* of the five merger proposals. A046–053 (¶¶ 82, 87, 90, 94, 101, 103, 107–108).

Given the fact that the proposed merger was valued at ***$54 billion***, the Board understandably took its responsibilities seriously. To that end, the Director Defendants exhaustively communicated with senior management,[3] met with a

[3] *See, e.g.*, A045–A051, 053 (¶¶ 78, 82, 84, 87, 90, 92, 94–95, 101, 107).

financial advisor (J.P. Morgan),[4] and reviewed legal considerations with legal advisors[5] before approving each of the five proposals from AbbVie to Shire.

The complaint further alleges that the Board was equally involved in reassessing its recommendation in favor of the merger once the Treasury Department issued the Notice on September 22, 2014. For example, the complaint alleges that the issuance of the Notice was "a major announcement that rocked the corporate world" and that "it immediately caused AbbVie's Board to convene an emergency discussion about the effect of the Notice and whether AbbVie should continue with the Merger." A054 (¶ 111); *see also* A034 (¶ 58) ("After the Treasury Notice was issued, AbbVie's Board decided to reassess the Merger and its recommendation that AbbVie shareholders vote in favor of the Merger.").

Given these allegations, it is reasonable to infer that the Board would have stayed abreast of the developments regarding the Notice — which could (and, in fact, did) jeopardize the multi-billion dollar merger with Shire — including any and all statements that the Company was releasing to shareholders on the subject. *See, e.g.*, *Sandys*, 152 A.3d at 129 (reversing the Court of Chancery for failing to draw all reasonable inferences in plaintiff's favor); *Kandell v. Niv*, 2017 Del. Ch. LEXIS 640, at **51–53 (Del. Ch. Sept. 29, 2017) (inferring that the directors had

[4] *See, e.g.*, A045–049, 053 (¶¶ 79, 82, 87, 90, 94, 107).

[5] *See, e.g.*, A045–049, 053 (¶¶ 80–82, 87, 90, 94, 107).

knowledge of a regulation which was in the company's 10-K); *Am. Int'l Grp., Inc. v. Greenberg*, 965 A.2d 763, 797–98 (Del. Ch. 2009) (holding that it would be "implausible" that the director who was also a Vice Chairman of Investments and Financial Services was not aware of investments totaling $19 million and $170 million and also inferring that a company would not have engaged in very large sales of reinsurance without the knowledge of the director who was also a Senior Vice Chairman of General Insurance and, partly on that basis, inferring that the two directors had knowledge of the alleged wrongdoing).[6]

Indeed, given the critical importance to AbbVie of the merger and expected tax benefits (*see* AA038, 054–055 (¶¶ 63, 111–112)), "[i]t is absurd to suggest" that the Board would not have closely monitored all communications emanating from the Company (particularly, the CEO) after September 22, 2014 regarding government restrictions that could wholly eliminate the substantial tax benefits the Company sought to achieve through the merger. *See No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Grp.*, 320 F.3d 920, 942–43 & n.21 (9th Cir. 2003) ("[i]t is absurd to suggest that the Board of Directors would not discuss" the critical issues involving the company's core product); *Cosmas v.*

[6] *See also Rosenbloom v. Pyott*, 765 F.3d 1137, 1152–54, 1156 (9th Cir. 2014) ("In demand futility cases, courts have repeatedly emphasized that it is especially plausible to infer board interest in and knowledge of developments relating to a product that is critical to a company's success or is otherwise of special importance to it.") (drawing an inference of board knowledge based on allegations that the board closely monitored the sales of its main drug).

Hassett, 886 F.2d 8, 13 (2d Cir. 1989) (imputing knowledge about import restrictions eliminating a significant source of income for the company).

In addition, given the substantial price impact an inadvertent statement could have on the Company's stock and on Shire's stock, it is reasonable to assume the Board carefully vetted any Company statements after the issuance of the Notice. *See, e.g.*, A014 (¶ 5) (news of the proposed merger caused Shire's stock to reach an all-time high price of $264.98 per ADR share); A037 (¶ 62) (following the Company's September 29, 2014 statements, Shire securities traded as high as $263.24 per share); A038 (¶ 64) (AbbVie's announcement on October 14, 2014 that it was reconsidering its recommendation in favor of the merger caused the price of Shire's stock to plummet from $244.57 to $170.49 per share in one day).

In this regard, *Citigroup*, relied upon by the Court of Chancery (*see* Ex. A at 26–27), is inapposite. As an initial matter, in *Citigroup*, the court found that plaintiffs failed to allege that there were any actual misstatements or omissions. 964 A.2d at 133–34. Here, in contrast, the Court of Chancery correctly assumed that AbbVie's September 29, 2014 statements were misleading. *See* Ex. A at 28–29; *accord Rubinstein*, 241 F. Supp. 3d at 854; A034, 054–056 (¶¶ 58, 111–114).

Notably, in *Citigroup*, the plaintiffs merely alleged in a conclusory manner that the director defendants "caused or allowed" Citigroup to issue a press release, without providing any particularized facts suggesting that the board was involved

in the preparation of the disclosures or "that the director defendants had knowledge that any disclosures or omissions were false or misleading." 964 A.2d at 133–35 & n.88. Indeed, in *Citigroup*, the plaintiffs attempted to establish knowledge by making "broad group allegations" and relying on "nothing more than indications of worsening economic conditions." *Id.* at 134–35. Here, on the other hand, the complaint's allegation that the Director Defendants were aware of the September 29, 2014 statements is supported by particularized allegations regarding the Board's active involvement in all key aspects of the merger negotiations. *See, e.g.*, A044–053 (¶¶ 76, 78–82, 87, 90, 94–95, 97, 101, 103, 107–08).

* * *

In sum, the Court of Chancery failed to draw all reasonable inferences from the totality of Plaintiff's well-pleaded allegations, as it was required to do at the pleading stage; instead, the Court of Chancery ignored the bulk of Plaintiff's well-pleaded allegations (*see* Ex. A at 5) and then found the allegations of demand futility to be lacking on the basis of remaining allegations. This was error. As demonstrated above, the complaint's well-pleaded allegations, viewed as a whole, support a reasonable inference that the Director Defendants knew of the September 29, 2014 statements. Combined with the complaint's allegations that the September 29, 2014 statements were misleading because they failed to disclose that at that time the Board was already reassessing its recommendation in favor of

the merger, the complaint more than adequately alleges that the Director Defendants face a substantial likelihood of liability for failure to correct the September 29, 2014 statements. Thus, the complaint more than adequately alleges demand futility. The Court of Chancery's contrary decision should be reversed.

II. The Complaint Adequately Pleads a Non-Exculpatory Claim for Breach of Fiduciary Duty of Loyalty Against Defendants

A. Question Presented

Whether Plaintiff adequately alleges a claim for breach of fiduciary duty against the Individual Defendants for failure to promptly correct the September 29, 2014 statements by disclosing that the Board was reassessing its recommendation in favor of the merger. This issue was preserved for appeal. A076–112.

B. Standard of Review

Whether the complaint states a claim is a question of law that this Court reviews *de novo*, accepting all well-pleaded allegations as true and drawing all reasonable inferences in plaintiff's favor. *Pfeffer v. Redstone*, 965 A.2d 676, 683 (Del. 2009); *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996).

C. Merits of Argument

"Because the standard under Rule 12(b)(6) is less stringent than that under Rule 23.1, a complaint that survives a motion to dismiss pursuant to Rule 23.1 will also survive a 12(b)(6) motion to dismiss, assuming that it otherwise contains sufficient facts to state a cognizable claim." *McPadden v. Sidhu*, 964 A.2d 1262, 1270 (Del. Ch. 2008); *accord In re China Agritech, Inc.*, 2013 Del. Ch. LEXIS 132, at *70 (Del. Ch. May 21, 2013) ("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."); *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007) ("where plaintiff

alleges particularized facts sufficient to prove demand futility under the second prong of *Aronson*, that plaintiff *a fortiori* rebuts the business judgment rule for the purpose of surviving a motion to dismiss pursuant to Rule 12(b)(6)").

Here, the Director Defendants moved to dismiss Plaintiff's only cause of action for breach of fiduciary duty for failure to state a claim. The Director Defendants, however, failed to include any substantive argument beyond their argument that Plaintiff did not adequately allege demand futility. *See* A082 n.3. Accordingly, for reasons similar to those establishing that a majority of the directors face a substantial likelihood of personal liability, thus excusing demand, the Court should also find that the complaint states a non-exculpatory claim for breach of fiduciary duty for failure to disclose the Board's reassessment of its recommendation in favor of the merger. *See, e.g.*, *China Agritech*, 2013 Del. Ch. LEXIS 132, at *70 (holding that "[b]ecause [the directors] face a substantial threat of liability on the plaintiffs' claims for purposes of Rule 23.1, it follows that the [c]omplaint states a claim against these directors for purposes of Rule 12(b)(6)").

CONCLUSION

For all the foregoing reasons, the Court should reverse the Court of Chancery's opinion granting Defendants' motion to dismiss.

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Respectfully submitted,

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