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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYLE ELLIS, derivatively on behalf of ABBVIE INC., Plaintiff-Appellant, vs. 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.	No. 412, 2018 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2017-0342-SG

APPELLEES' ANSWERING BRIEF

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Nature of Proceedings

This shareholder derivative action arises out of AbbVie Inc.'s 2014 agreement to acquire Shire plc, which was terminated after the U.S. Treasury Department announced it would change the tax rules regarding so-called "inversion transactions." Plaintiff seeks to pursue claims for damages on AbbVie's behalf against each individual who was on AbbVie's board of directors at the time the Shire transaction was terminated.

Plaintiff did not make a pre-suit demand on AbbVie's board, but instead argues that demand was excused because he alleged the directors face a substantial likelihood of personal liability for their actions in connection with the Shire transaction. First, he alleged the directors are liable for allegedly false statements made by AbbVie and its officers regarding the transaction. Second, he alleged the directors are liable for failing to disclose after the Treasury Department's announcement that the board would reconsider its support for the Shire transaction.

The Court of Chancery dismissed the case in its entirety, with prejudice, holding that Plaintiff failed to allege facts that satisfy Rule 23.1's heightened pleading standard for establishing demand futility. (Pl. Br. Ex. A) This Court should affirm that judgment. Plaintiff did not plead with particularity any facts establishing the board's involvement with or knowledge of the statements Plaintiff alleges were false or misleading, much less that the directors breached the duty of

loyalty in connection with those statements. Further, the board *did* disclose its intention to reconsider its support for the Shire transaction, only three weeks after the Treasury Department's announcement. Plaintiff did not allege any particularized facts suggesting the directors face liability for not disclosing their intention earlier. As a result, Plaintiff did not plead that a majority of the directors face a substantial likelihood of personal liability that would excuse demand.

Summary of Argument

1. **Denied.** The Court of Chancery correctly held that the complaint did not adequately plead facts supporting a reasonable inference that a majority of AbbVie's directors face a substantial likelihood of liability for breach of the duty of loyalty. No well-pled allegations of fact show the directors knowingly, intentionally, or in bad faith made, approved, or failed to correct any misstatement about the Shire transaction.

2. **Denied As Moot.** Defendants did not argue in the Court of Chancery that the complaint failed to state a claim upon which relief could be granted, and the Court of Chancery did not address that issue in its decision granting Defendants' motion to dismiss. Defendants do not rely on that argument in support of affirmance in this Court.

Statement of Facts[1]

A. The Proposed Shire Transaction

AbbVie is a biopharmaceutical company incorporated in Delaware. (A18 ¶ 21) Shire is a biopharmaceutical company incorporated in the Channel Island of Jersey under U.K. law. (A17-19 ¶¶ 20, 25) On July 18, 2014, Shire and AbbVie entered into an agreement for AbbVie to acquire Shire for $54 billion. (A26 ¶ 44) The agreement was conditioned on, among other things, approval by AbbVie's stockholders. (A27-28 ¶¶ 46-47) The agreement included a termination fee of $1.64 billion, payable by AbbVie to Shire, if AbbVie's board withdrew its support for the transaction before its stockholders voted on it. (*Id*. ¶ 46)

When AbbVie announced the agreement with Shire, it disclosed seven strategic rationales for the transaction, one of which was that the combined company would realize tax advantages from being incorporated outside the United States. (A28-29 ¶ 49) The other rationales included a larger and more diversified company, an expanded pipeline of development programs, and stronger financial capacity for future acquisitions. (*Id*.)

B. The Treasury Notice And Termination Of The Transaction

On September 22, 2014, the U.S. Treasury Department published a Notice announcing that it would take steps to eliminate certain tax advantages of inversion

[1] For purposes of this appeal, Defendants accept as true well-pled allegations of the complaint.

transactions. (A33 ¶ 56) The Notice described the intended new regulations in complex detail, discussing the impact of the new rules on many sections of the Internal Revenue Code. (B29-42)

On October 14, 2014, three weeks after the Notice's publication, AbbVie announced it had notified Shire "of its Board of Directors' intention to reconsider the recommendation made on July 18, 2014 that AbbVie stockholders adopt the merger agreement needed to complete the proposed Merger of AbbVie and Shire." (A38 ¶ 63) "Reconsideration" of the board's support, and notifying Shire of the intention to do so, was a formal step under the merger agreement between AbbVie and Shire, as AbbVie's October 14 statement explained. (*Id*. ("AbbVie must provide three business days' notice of any intention to consider a change in recommendation. Accordingly, AbbVie's Board plans to meet on October 20, 2014, unless Shire agrees to waive the notice.")) Thus, the board's decision to reconsider its support for the transaction was not just an announcement of a "reconsideration" in the lay sense of the word; it was an announcement that the AbbVie board was taking a formal step under the parties' contract to terminate the agreement to merge, which is precisely how Shire investors interpreted it. (*Id*. ¶ 64)

On October 15, 2014, AbbVie announced that Shire had waived the three-day notice requirement. (A55 ¶ 112) AbbVie further announced that its board had met that day and decided to withdraw its recommendation that AbbVie sharehold-

ers vote in favor of the transaction. (*Id.*)

On October 21, 2014, AbbVie announced it had agreed with Shire to terminate the parties' merger agreement, and that as a result AbbVie would pay Shire the $1.64 billion termination fee. (A38-40 ¶ 65) AbbVie explained that the Company had "conducted a thorough review of the September 22, 2014 notice to explore available options to preserve the transaction," but had concluded that the Notice "introduced an unacceptable level of risk and uncertainty given the magnitude of the proposed changes and the stated intention of the Department of Treasury to continue to revise tax principles to further impact such transactions." (*Id*.) As a result, "[t]he executive management team ultimately concluded that the transaction was no longer in the best interests of stockholders at the agreed upon valuation, and the Board fully supported that conclusion." (*Id*.) Because AbbVie reached an agreement with Shire to terminate the merger agreement, the proposed transaction was never put to a vote of AbbVie (or Shire) shareholders.

C. The September 29, 2014 Letters To Shire And AbbVie Employees

At the time the Treasury Notice was published, AbbVie and Shire were in the midst of planning for the integration of the two companies. Thus, during the same week as the Treasury Notice's publication, AbbVie and Shire employees held integration planning meetings in Chicago and Lexington, Massachusetts. (A66, A69) On September 29, 2014, as a follow up to those meetings, AbbVie CEO

Richard Gonzalez sent a letter to Shire employees, and an AbbVie Vice President, Chris Turek, sent a letter to AbbVie employees. (A34-37 ¶¶ 60-61) Both letters were filed with the SEC on Form 425 the same day. (*Id*.) Plaintiff characterizes the letters as "reassuring shareholders that the merger was still on track and that AbbVie was still committed to completing the merger." (Pl. Br. 2) However, the letters, which were attached to Plaintiff's complaint and so are properly considered in their entirety, are not consistent with Plaintiff's characterization. (A65-71)

Gonzalez's letter was addressed to Shire employees. (A66 ("Dear Shire Colleague")) Rather than discussing the Treasury Notice or the likelihood of the merger closing, the letter focused on the cultural fit between the two companies and the ongoing integration planning. It began by explaining that Gonzalez "had the wonderful opportunity last week to sit down and meet with many of you—both in Chicago for the Integration Team Planning Kickoff Meeting, and in Lexington, when I was able to visit your offices." (*Id*.) It indicated that Gonzalez left those integration meetings "more energized than ever about our two companies coming together, especially because I can already see many shared traits and values in the people at AbbVie and Shire." (*Id*.) After continuing in that vein, the letter closed by explaining that "[w]e have a very busy few months ahead as we work on integration planning. It's more important than ever to keep focused on our business priorities." (*Id*.)

The Gonzalez letter did not mention the Treasury Notice. It did not discuss the likelihood of the deal closing, either generally or in response to the announced changes to the tax rules specifically.

The Turek letter was addressed to AbbVie's employees. (A69) Like the Gonzalez letter, the Turek letter did not mention the Treasury Notice and did not discuss the likelihood of the Shire transaction closing. Rather, like the Gonzalez letter, the Turek letter focused on the integration planning activities the two companies had been conducting and the ways in which the companies were compatible. The letter first discussed the integration planning meeting that had been held the week before in Chicago. It explained that "[t]he key objectives of the meeting were to begin building relationships with one another and provide a common understanding of the integration planning strategy." (*Id*.) After further describing the meeting, the letter turned to Turek and Gonzalez's visit to Shire's offices a few days after the Chicago meeting, stating that "[f]ollowing these meetings, it's clear that we have many shared traits and vales as well as similar cultures." (*Id*.) "Both companies have a strong commitment to the patient and both integration planning teams are committed to successful preparation for Day One." (*Id*.)

D. Other Litigation Related To The Termination Of The Merger Agreement

Following the October 14, 2014 termination of the AbbVie-Shire merger agreement, two AbbVie shareholders filed actions to enforce demands to inspect

AbbVie's books and records regarding the transaction, alleging there was a credible basis to believe the directors might have breached their fiduciary duties. Both shareholders sought inspection to aid in filing derivative actions against the directors. The Court of Chancery heard both cases together, and declined to enforce the inspection demands, finding that the shareholders had not alleged a credible basis to believe the directors might have committed any actionable breach of fiduciary duty. *SEPTA v. AbbVie*, 2015 WL 1753033 (Del. Ch. Apr. 15, 2015). This Court affirmed that decision. 132 A.3d 1 (Del. 2016) (TABLE).

Following this Court's decision, another AbbVie shareholder, which had brought a derivative action alleging demand futility based on the same events, voluntarily dismissed its complaint, apparently recognizing that once this Court found no credible basis for concluding AbbVie's directors might have breached their fiduciary duties, it could not satisfy the more demanding standard for pleading demand futility. *See Plumbers & Steamfitters Local 60 Pension Plan v. Alpern*, 2016 WL 412705 (Del. Ch. Feb. 2, 2016) (Order).

Meanwhile, purchasers of *Shire* securities filed a securities fraud class action in federal court against AbbVie and its CEO. *Rubinstein v. Gonzalez*, No. 14-9465 (N.D. Ill.). The plaintiffs there alleged AbbVie and its CEO had made misstatements regarding the Shire transaction that had the effect of artificially inflating the price of Shire stock. The court dismissed most of the case, allowing the plaintiffs

to proceed on only a single allegation relating to the September 29, 2014 Gonzalez letter. *See Rubinstein v. Gonzalez*, 241 F. Supp. 3d 841 (N.D. Ill. 2017). Other cases brought by individual Shire investors making similar allegations to those in *Rubinstein* were filed in Illinois state court. (Pl. Br. 16)

No AbbVie director other than CEO Gonzalez is a defendant in *Rubinstein* or the Illinois state court actions. And although Plaintiff is correct that the *Rubinstein* court ruled the plaintiffs there had adequately pled scienter, the court held the plaintiffs had alleged only recklessness, not "the intent to deceive, manipulate, or defraud." *Rubinstein*, 241 F. Supp. 3d at 855. (This distinction is significant because, while alleging recklessness may suffice to state a claim under federal securities laws, "Delaware courts have held that recklessness by itself only amounts to gross negligence, which is not sufficient to demonstrate the state of mind necessary for finding a breach of the duty of loyalty." *Norfolk Cty. Ret. Sys. v. Jos. A Bank Clothiers*, 2009 WL 353746, *12 n.104 (Del. Ch. Feb. 12, 2009), *aff'd*, 977 A.2d 899 (Del. 2009) (TABLE).)

E. The Instant Action And The Court Of Chancery's Decision Dismissing It

On May 4, 2017, Plaintiff filed this stockholder derivative action against the directors who were on AbbVie's board in 2014. Plaintiff did not make a pre-suit demand on AbbVie's board. (A58 ¶ 123) Rather, he alleged demand was excused because all the director-defendants "face a substantial likelihood of liability for

making and approving the false and misleading statements set forth in this complaint" and because the directors "had an affirmative duty to promptly disclose their reconsideration of the merger, which they failed to do and thus also breached their duty of candor and loyalty." (A59 ¶ 124)

The Court of Chancery dismissed the action for failure to plead with particularity facts that would excuse demand. The court began with the premise that the § 102(b)(7) provision in AbbVie's corporate charter means that "Plaintiff here cannot establish demand futility based on his disclosure claims unless he 'plead[s] particularized factual allegations that support the inference that the disclosure violation[s] w[ere] made *in bad faith, knowingly, or intentionally*.'" (Pl. Br. Ex. A at 18, citing precedent) The court first applied this standard to Plaintiff's allegations that AbbVie made misstatements before the Treasury Notice about the benefits of the Shire transaction to AbbVie. (*Id*. at 19-22) Plaintiff does not pursue claims regarding those alleged misstatements on appeal.

The Court of Chancery then analyzed Plaintiff's allegations regarding the two letters sent by AbbVie officers to Shire employees and AbbVie employees on September 29, 2014. The court held that "[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." (Pl. Br. Ex. A at 26) To be sure, the court continued, Plaintiff made "the bald,

conclusory allegation that the two letters were 'reviewed and approved'" by the directors. (*Id*.) But such allegations were insufficient "because they failed to describe 'how the board was actually involved in creating or approving the statements." (*Id*. at 27, quoting *In re Citigroup S'holder Deriv. Litig*., 964 A.2d 106, 133 n.88 (Del. Ch. 2009))

The court rejected Plaintiff's argument that director knowledge could be inferred from allegations regarding the directors' role in negotiating the merger. That "is an unreasonable inference," the court held, "and the Complaint fails to allege any particularized facts suggesting that the AbbVie board was regularly reviewing public statements about the transaction." (Pl. Br. Ex. A at 28 n.108)

Additionally, the court explained that Plaintiff's allegations were insufficient even though the court assumed, for purposes of the motion to dismiss, "that the complained-of statements contained in the [September 29] letters, included in the Form 425s, were misleading, and created the untrue impression that the merger would certainly close." (Pl. Br. Ex. A at 28) Even making that assumption, the court ruled, Plaintiff's allegations did not plead with particularity a substantial likelihood of director liability because "it is not enough to allege that the misleading statements occurred on these directors' watch; nor is it enough to plead facts from which I may infer negligence, or even gross negligence, in the directors' failure to cure the misimpression caused by the statements." (*Id.* at 29) "Instead," the court

continued, “Plaintiff’s burden is to plead non-conclusory facts from which (drawing all plaintiff-friendly inferences) I may infer bad faith. This, the Plaintiff has not done.” (*Id*.)

Argument

The Court Of Chancery Correctly Concluded The Complaint Failed To Plead With Particularity That The Board Faces A Substantial Likelihood Of Liability For Breaching The Duty Of Loyalty.

A. Question Presented

Did the Court of Chancery correctly conclude that the complaint failed to allege with particularity that a majority of the board faces a substantial likelihood of liability for making, permitting, or failing to correct misstatements?

B. Scope of Review

This Court's review of the decision dismissing the complaint is *de novo* and plenary. *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

C. Merits of Argument

Because Plaintiff did not make a pre-suit demand on AbbVie's board, he cannot pursue this claim on AbbVie's behalf unless he has alleged with particularity facts sufficient to meet Delaware's strict standard for excusing demand. *See* Ct. Ch. R. 23.1. This Court articulated the standard for assessing whether demand is excused in *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), which held that a plaintiff must allege particularized facts that create a reasonable doubt that "the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand" had one been made. *Id.* at 934. Plaintiff argues such a reasonable doubt exists because the directors face a substantial likelihood of personal liability and so could not make an impartial decision.

Plaintiff does not dispute that the directors' potential liability is limited because AbbVie has adopted a § 102(b)(7) provision in its certificate of incorporation that exculpates its directors from liability for breaches of the duty of care. *See* 8 *Del. C.* § 102(b)(7); B48 Art. IX. When a company adopts such a provision, a stockholder can plead a likelihood of director liability only by alleging facts sufficient to establish a breach of the duty of loyalty. *See Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006). Doing so requires alleging "particularized facts that, if proven, would show that a majority of the defendants knowingly engaged in 'fraudulent' or 'illegal' conduct or breached 'in bad faith'" their fiduciary duties. *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008).

On appeal, Plaintiff pursues two theories why the directors face a substantial likelihood of liability: (1) for failing to correct the supposed misstatements in the September 29 letters issued by AbbVie officers (Pl. Br. 2, 18, 20); and (2) for failing to disclose the board would reconsider its support for the transaction after the Treasury Notice (*id*. at 3, 4, 31). However, in advancing these theories on appeal, Plaintiff presents only a single challenge to the Court of Chancery's decision dismissing the action. Specifically, Plaintiff argues the Court of Chancery should have inferred the directors were aware of the September 29 letters. (*Id.* at 23-29)

This Court should affirm the Court of Chancery's decision because the court was correct that Plaintiff did not plead with particularity facts supporting an infer-

ence that the board was aware of the September 29 letters. The Court also should affirm the decision because, even if Plaintiff had pled facts supporting an inference the directors were aware of the September 29 letters, Plaintiff did not plead with particularity facts demonstrating a substantial likelihood of director liability for breach of the duty of loyalty.[2]

1. Plaintiff Did Not Plead With Particularity Facts Permitting A Reasonable Inference That The Board Was Aware Of The September 29 Letters.

Plaintiff argues his allegations were "more than sufficient to give rise to a reasonable inference that the Director Defendants knew of the September 29, 2014 statements." (Pl. Br. 23-24) However, the allegations he identifies in support of this argument are wholly insufficient, as the Court of Chancery correctly held.

On a motion to dismiss, the Court must take well-pled facts as true, and "draw all *reasonable* inferences in the plaintiff's favor." *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004) (emphasis in original). "All reasonable inferences" does not mean every possible inference, but only those that "logically flow from particularized facts alleged." *Id.*; *see also White v. Panic*, 783 A.2d 543, 552-53 (Del. 2001) (refusing as "too tenuous" the inference that a board knew an officer

[2] For purposes of the analysis that follows, Defendants ignore Plaintiff's allegations that concern only Richard Gonzalez, who is a director and also AbbVie's CEO, because "Plaintiff's allegations about Gonzalez are irrelevant unless the Plaintiff is able to allege with particularity that a majority of the AbbVie board faces a substantial likelihood of liability." (Pl. Br. Ex. A at 15 n.66)

"had actually engaged in" misconduct from the board's approval of settlements of eight lawsuits alleging such misconduct). "[I]nferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *Beam*, 845 A.2d at 1048. The Court of Chancery properly applied this standard. (Pl. Br. Ex. A at 22 & n.89)

To start, what Plaintiff did *not* allege is significant. Plaintiff did not allege any of the directors signed the September 29 letters or the SEC filings through which they were disseminated publicly. (A66-67; A69-71) Plaintiff did not allege any board meeting at which the directors reviewed or approved the letters or SEC filings, in stark contrast to the detailed allegations of board meetings elsewhere in the complaint, where Plaintiff alleged the dates of the meetings and the topics the board discussed. (*E.g.*, A44-53 ¶¶ 76-108) Plaintiff did not allege any date or transmission method by which AbbVie management conveyed the letters or SEC filings to the directors, or any other facts about how or when the directors saw the letters, either before or after their public dissemination. *See Citigroup*, 964 A.2d at 133 n.88 (rejecting allegations of board involvement with alleged misstatements as not particularized because they failed to describe "how the board was actually involved in creating or approving the statements, factual details that [were] crucial to determining whether demand on the board of directors would have been excused as futile"). Finally, Plaintiff did not allege any facts that describe any board practice of reviewing all AbbVie's public statements, or all AbbVie's public statements

about the merger, such that it would be reasonable to infer the board reviewed the two letters at issue here.

Plaintiff did make the bald conclusory allegation that the directors "reviewed and approved" the letters, and Plaintiff restates that allegation on appeal in his brief's Statement of Facts. (A35-36 ¶¶ 60-61; Pl. Br. 12) However, Plaintiff's Argument section does not contest the Court of Chancery's holding that "that allegation is not particularized enough to meet the heightened pleading requirements of Rule 23.1." (Pl. Br. Ex. A at 26) Rather, he argues that *other* allegations in the complaint support an *inference* that the directors were aware of the letters.

Plaintiff first argues "the complaint devotes ten pages of well-pleaded allegations to detailing the Director Defendants' active participation in all key aspects of the merger negotiations." (Pl. Br. 24) Plaintiff argues the complaint alleged in detail board meetings at which the board considered and authorized the various offers AbbVie made to Shire, as well as that the board "exhaustively communicated with senior management, met with a financial advisor (J.P. Morgan), and reviewed legal considerations with legal advisors before approving each of the five proposals from AbbVie to Shire." (*Id*. at 24-25, internal footnotes omitted)

However, the directors' "active participation" in the negotiations for the merger does not support an inference they were involved with communications to Shire and AbbVie employees about the merger. The Court of Chancery correctly

rejected this premise, holding that "the Complaint fails to allege any particularized facts suggesting that the AbbVie board was regularly reviewing public statements about the transaction." (Pl. Br. Ex. A at 28 n.108) It does not "logically flow" from the board's involvement with the merger negotiations, which involved committing AbbVie to a $54 billion transaction, that the board was involved with statements made to employees of the two companies about the details of integrating the companies. *Beam*, 845 A.2d at 1048.

This is particularly true because AbbVie filed many statements regarding the merger on SEC Form 425 during the period in question. Because Shire was incorporated under U.K. law, the merger negotiations and agreement were subject to the U.K. Takeover Code. The Code requires more information to be filed publicly than U.S. regulations do. As a result, from June 2014, when AbbVie's pursuit of Shire was disclosed, to October 2014, when AbbVie and Shire agreed to terminate their merger agreement, the SEC's EDGAR database shows that AbbVie filed 38 Form 425s.[3] Plaintiff's particularized allegations provide no support for an inference that the AbbVie board monitored all these filings or that there was something

[3] *See* https://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001551152&type=425&dateb=20141101&owner=exclude&count=100. The EDGAR database, maintained by the SEC, is publicly available and the Court can therefore take judicial notice of it. *See DFC Global Corp. v. Muirfield Value Partners*, 172 A.3d 346, 351 n.7 (Del. 2017) ("We take judicial notice of DFC's public filings with the SEC.").

particular about the September 29 letters that caused the board to review those two filings specifically.[4]

Plaintiff's only other attempt to identify particularized allegations sufficient to support a reasonable inference the AbbVie board was aware of the September 29 letters is to argue he alleged the board was "involved in reassessing its recommendation in favor of the merger once the Treasury Department issued the Notice on September 22, 2014." (Pl. Br. 25) However, the only allegation Plaintiff actually identifies is that the board held a meeting "immediately" after the Treasury Notice to discuss "whether AbbVie should continue with the Merger." (*Id*., citing A54 ¶ 111 and A34 ¶ 58) This allegation does not logically lead to an inference that the board was aware of, reviewed, or approved the September 29 letters.

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[4] Plaintiff did not even plead that the directors approved or reviewed more significant statements made by AbbVie about the merger. For instance, Plaintiff alleged AbbVie announced the agreement to acquire Shire on July 18, 2014, and held a conference call on July 21, 2014 regarding the agreement. (Pl. Br. 10) But Plaintiff did not allege the directors approved the announcement or statements made by management during the call. (*Id*.; *see also* Pl. Br. Ex. A at 21-22) And although Plaintiff made the conclusory allegation that the directors "reviewed and approved" the August 21, 2014 preliminary proxy statement, he identifies no particularized allegations in the complaint that support that assertion. (*Id*. at 11) The Court of Chancery correctly rejected the bald assertion as insufficiently particularized and noted that, contrary to Plaintiff's assertion, AbbVie's directors did *not* sign the preliminary proxy statement. (Pl. Br. Ex. A at 22 n.90; B315 (showing signatures of the directors of AbbVie Private Limited, none of whom were on AbbVie's board))

As an initial matter, that the board was involved in assessing the potential effect of the Treasury Notice on the Shire transaction does not suggest board involvement with the Company's communications regarding the merger. The board's decision whether to proceed with a $54 billion merger is not the same thing as management's decision what to say about the merger.

This is particularly true because the September 29 letters did not say anything about the Treasury Notice. Rather, the letters were addressed to Shire and AbbVie employees and discussed integration-planning meetings management had held with employees of both companies and the compatibility of the two companies' cultures. *See supra* at 6-8. Neither letter mentioned the Treasury Notice or indicated the merger would proceed notwithstanding the Notice. To be sure, *after the fact*, investors alleged in lawsuits that the letters *implied* the merger would proceed, but Plaintiff pled no particularized facts suggesting any AbbVie director believed in advance of the letters' publication that they conveyed such information.

The decisions Plaintiff cites are inapposite. In each instance, the courts held it was reasonable (1) to infer director knowledge of certain facts because those facts were of critical importance to their company[5] or (2) to draw an inference that

[5] *Kandell v. Niv*, 2017 WL 4334149 (Del. Ch. Sept. 29, 2017) (inferring director knowledge of a government regulation that was disclosed in their company's SEC Form 10-K, which the directors signed and which concerned the company's "core business"); *In re AIG, Inc.*, 965 A.2d 763, 797 (Del. Ch. 2009) (finding it implau-

had nothing to do with director knowledge.[6] None of these decisions addressed when it is reasonable to infer director knowledge of statements made by their companies, or held a statement was so significant that it was reasonable to infer director knowledge of it.

2. Plaintiff Did Not Otherwise Plead Facts Sufficient To Establish A Majority Of The Board Faces A Substantial Likelihood Of Liability.

Not only were Plaintiff's allegations of fact not sufficient to support an inference that the board was aware of the September 29 letters, but Plaintiff's allegations were also independently insufficient to establish that a majority of the directors face a substantial likelihood of liability regardless. For the directors to be liable for disclosure violations, Plaintiff must allege "*the directors* deliberately misinform[ed] shareholders about the business of the corporation." *Citigroup*, 964 A.2d at 132 (emphasis added). To do that, Plaintiff must plead "specific factual allega-

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sible, on a Rule 12(b)(6) motion, that a director who was also an executive officer in charge of investments was unaware of investments worth hundreds of millions of dollars); *No. 84 Employer-Teamster Joint Council v. Am. West Hldg. Corp*., 320 F.3d 920, 943 n.21 (9th Cir. 2003) ("It is absurd to suggest that the Board of Directors would not discuss either the repurchasing authorization for millions of dollars worth of stock or the FAA investigations or negotiations, especially considering the fact that the FAA had indicated that it was considering penalties of up to $11 million."); *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989) (inferring, on a Rule 12(b)(6) motion, that directors knew of import restrictions that prohibited a significant part of their company's business).

[6] *Sandys v. Pincus*, 152 A.3d 124, 129 (Del. 2016) (inferring a lack of director impartiality because of the director co-owned a private plane with the controlling stockholder).

tions that reasonably suggest sufficient board involvement in the preparation of the disclosures that would allow [the court] to reasonably conclude that the director defendants face a substantial likelihood of personal liability." *Id*. at 134. Plaintiff does not even argue his allegations met this standard.

Rather, Plaintiff's brief on appeal suggests two other theories of liability: (1) failure to correct the supposed misstatements in the September 29 letters (Pl. Br. 2, 18, 20); and (2) failure to disclose the board was reconsidering its support for the transaction after the Treasury Notice (*id*. at 3, 4, 31). Plaintiff did not plead facts sufficient to support either theory.

a. Plaintiff's Allegations Did Not Establish A Substantial Likelihood Of Director Liability For Failure To Correct The September 29 Letters.

Although Plaintiff asserts that "[t]his appeal focuses on the Director Defendants' violation of their duty of candor by failing to correct the September 29, 2014 false and misleading statements" (Pl. Br. 18), Plaintiff's brief offers no argument explaining any duty the directors had to correct supposed misstatements made by others. Plaintiff does not cite a single Delaware decision holding directors liable for breach of the duty of loyalty for failing to correct statements they did not make or approve. Nor have Defendants found any such precedent. The Court of Chancery, in the *Citigroup* decision, dismissed a claim of board liability for alleged misstatements because the plaintiffs "d[id] not allege facts suggesting that the director

defendants prepared the financial statements or that they were directly responsible for the misstatements or omissions." *Citigroup*, 964 A.2d at 134.

Moreover, Plaintiff does not dispute that, even if such a claim were available, it would have to be premised on director bad faith, given the § 102(b)(7) provision in AbbVie's charter. But Plaintiff did not plead with particularity any facts supporting an inference that AbbVie's directors decided in bad faith not to correct the supposedly misleading September 29 letters.

First, as discussed above, Plaintiff did not plead with particularity that the directors were even aware of the September 29 letters. *See supra* at 15-21.

Second, Plaintiff alleged no facts supporting an inference that the board believed the letters were misleading. After all, the letters did not mention the Treasury Notice. Nor did they state the Shire transaction was certain to close notwithstanding the change to the tax rules—or even that the transaction was certain to close at all. Rather, the letters were integration communications addressed to Shire and AbbVie employees sent at a time when AbbVie was still contractually obligated to proceed with the transaction. Plaintiff alleged no facts showing that the board had any information suggesting the letters would mislead anyone about the merger's prospects, or any information after the publication of the letters' suggesting anyone actually was misled.

Third, to the extent the September 29 letters were misleading by allegedly implying the transaction would go forward notwithstanding the Treasury Notice, the board did "correct" them when it announced on October 14 that it had decided to reconsider its support for the Shire transaction. (A38 ¶ 63) Plaintiff pled no facts supporting a conclusion that the board decided before October 14 it was going to reconsider its support for the Shire transaction and then decided in bad faith not to disclose that fact. He therefore did not plead facts sufficient to establish that the board decided in bad faith not to correct known misstatements in the letters.

b. Plaintiff's Allegations Did Not Establish A Substantial Likelihood Of Director Liability For Failure To Disclose The Board Was Reassessing Its Support For The Transaction.

Plaintiff also argues the AbbVie board faces a substantial likelihood of liability for "failure to disclose the Board's reassessment of its recommendation in favor of the merger." (Pl. Br. 31) As an initial matter, Plaintiff offers no explanation how this theory of liability relates to his only challenge to the Court of Chancery's decision, which is that the court should have inferred director knowledge of the September 29 letters. This theory of liability does not concern the September 29 letters, so would not be affected by the outcome of Plaintiff's challenge to the Court of Chancery's decision.

Regardless, Plaintiff's theory runs directly into the fact that the board did announce it had decided to reconsider its support for the proposed transaction—on

October 14, 2014. (A38 ¶ 63) *If* the board had decided to reconsider its support for the transaction in advance of that announcement, it was under no obligation to disclose it: There is no requirement under Delaware law or federal law that directors immediately inform stockholders (or anyone else) that they are evaluating a change in circumstance or that the change may cause them to reconsider their previous position on a proposed transaction.

A board of directors has a duty of candor that requires it "to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). Here, AbbVie's board did not seek stockholder action: AbbVie and Shire mutually agreed to terminate the merger agreement before AbbVie's board solicited any shareholder vote in support of the proposed transaction. (A38-40 ¶ 65) Thus, Plaintiff has no argument that the AbbVie directors asked shareholders to vote on something with less than full information.

Even in the absence of a request for shareholder action, directors can breach this fiduciary duty by "deliberately misinforming shareholders about the business of the corporation." *Malone v. Brincat*, 722 A.2d 5, 14 (Del. 1998). However, *Malone* provides no support for a conclusion that the board here acted wrongfully.

First, *Malone* discusses the scope of directors' duty of candor when *the directors* communicate publicly with shareholders. *Malone*, 722 A.2d at 10

("Whenever *directors* communicate publicly or directly with shareholders….") (emphasis added). Yet Plaintiff's argument is not that the directors communicated with shareholders after the Treasury Notice, but that they are liable for *failing* to communicate. *Malone* does not address that situation.

Second, the duty of candor that *Malone* discusses is a duty to the company's shareholders. *Malone*, 722 A.2d at 10 ("Whenever 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.") (emphasis added). Yet the claim Plaintiff seeks to pursue here concerns communications that allegedly misled *Shire* shareholders, not AbbVie shareholders. (*E.g.*, Pl. Br. 1 ("The Board's failure to timely correct the false and misleading September 29, 2014 statements exposed AbbVie to lawsuits by *Shire's* shareholders.") (emphasis added)) Thus, the duty *Malone* articulates does not apply to Plaintiff's claim.

Third, Plaintiff's allegations are insufficient because Plaintiff did not plead with particularity that the directors decided to reconsider their support for the transaction before their October 14 announcement. "Reconsideration" of the board's support, and notifying Shire of the intention to do so, was a formal step under the merger agreement between AbbVie and Shire: "Under the Agreement, AbbVie must provide three business days' notice of any intention to consider a

change in recommendation." (A38 ¶ 63) Thus, the board's decision to reconsider its support for the transaction was not just an announcement of a "reconsideration" in the lay sense of the word; it was an announcement that the AbbVie board was taking a formal step under the parties' contract to terminate the agreement to merge, which is precisely how Shire investors interpreted it. (*Id.* ¶ 64)

The only allegations of fact that Plaintiff's brief identifies do not establish the board decided to reconsider its support for the merger before October 14. Plaintiff identifies his allegation that "[a]fter 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." (Pl. Br. 21, citing A34 ¶ 58) This is not a particularized allegation that the board decided before October 14 to reconsider its recommendation that shareholders vote for the transaction, for the allegation contains no information about when the board made its decision.

Plaintiff also points to his allegation that the Treasury 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 Notice. (Pl. Br. 21, citing A54 ¶ 111) However, although this may constitute an allegation that the board *began* to analyze the Notice shortly after it was issued, it is not a particularized allegation that the board made a decision to take the contractual step of reassessing its support for the transaction at that time. Given the poten-

tial impact of the Notice, the board had a fiduciary duty to make an informed assessment of that impact and whether it could cause the directors to reconsider their recommendation. *See, e.g.*, *In re Primedia S'holder Litig*, 67 A.3d 455, 491 (Del. Ch. 2013). Plaintiff cites no Delaware precedent holding that the directors were required to announce they were doing so or to give progress reports before making a decision. Nothing in the allegation suggests in any way that the board made a decision about the merger at the initial meeting held "immediately" after the Treasury Notice's publication. *See Citigroup*, 964 A.2d at 133 (rejecting a disclosure claim as insufficiently pled because the plaintiffs did not allege "when the Company was obligated to make disclosures").

Finally, Plaintiff identifies his allegation that by September 29, 2014, "AbbVie had already decided to back out of the Merger." (Pl. Br. 21, citing A13 ¶ 3) This is a bare conclusion, unsupported by any well-pled allegation of fact: Plaintiff did not allege who made the decision, when it was made, or how Plaintiff knows it was made by September 29. And Plaintiff did not allege any facts that contradict AbbVie's announcement that the board made the decision to withdraw its recommendation in favor of the Shire transaction on October 15, 2014. (A55 ¶ 112)

For the directors to face a substantial likelihood of liability for a failure to disclose information they were required to disclose, Plaintiff would have to allege

facts supporting an inference that the board acted in bad faith. *See, e.g.*, *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009). He alleged none. Indeed, on appeal, he does not even argue he alleged any reason to infer the board decided in bad faith to withhold that it had made a decision to reconsider its support for the transaction that it would announce only a few weeks later. Such a conclusion does not make sense regardless, and Plaintiff's complete lack of any attempt to argue his allegations support such an inference is fatal to his claim.

Conclusion

For the foregoing reasons, this Court should affirm the Court of Chancery's dismissal pursuant to Rule 23.1.

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