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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 REPLY BRIEF

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PRELIMINARY STATEMENT

The present appeal presents two straightforward questions:

- Whether the totality of Plaintiff Ellis's well-pleaded allegations was sufficient to give rise to a reasonable inference that the Director Defendants were aware of and approved the September 29, 2014 statements filed by AbbVie with the SEC;[1] and
- Whether, in light of the foregoing inference, the allegations of the complaint are sufficient to establish that a majority of the Board faces a substantial likelihood of liability for failure to disclose that the Board was already reassessing its recommendation that AbbVie shareholders vote in favor of the merger with Shire, because such disclosure was necessary to correct the false and misleading information contained in the September 29, 2014 statements.

As exhaustively set forth in Plaintiff's opening brief, the Court of Chancery erred in failing to draw the required inference, particularly in light of the fact that the Court of Chancery *assumed as true* that the September 29, 2014 statements *were misleading* and that, at the time those statements were made, the Board *was already reassessing* its recommendation in favor of the merger.

[1] All capitalized terms not otherwise defined herein have the same meaning as set forth in Appellant's Opening Brief ("AOB"). Appellees' Answering Brief is cited as "AAB." Unless otherwise noted, all citations and quotation marks are omitted, and all emphasis is added.

In their answering brief, Defendants concede that the September 29, 2014 letters (1) did not address the Treasury's September 22, 2014 Notice and (2) did not disclose that the Board was already reassessing its recommendation in favor of the merger. Nonetheless, Defendants argue that the complaint contains insufficient allegations to give rise to a reasonable inference that the Board was aware of or approved the September 29, 2014 statements. Not so.

As an initial matter, in advancing this argument, Defendants impermissibly contradict and isolate the complaint's allegations. More importantly, Defendants' argument runs counter to common sense by suggesting that the Board in charge of overseeing *a multi-billion dollar transaction* was unaware of and failed to approve communications emanating *from the Board's own Chairman* (Gonzalez) pertaining to that transaction, which communications were both disseminated to AbbVie and Shire employees *and filed with the SEC*. Those communications were not some minor comments, but instead were made just *seven days* after the Treasury Notice and misleadingly represented that AbbVie was committed to following through with the merger and intended to continue the integration planning, which constituted a necessary step in the process of effectuating the merger.

Given the critical importance to AbbVie of the merger and its tax benefits, it is more than reasonable to infer that the Board closely monitored all communications emanating from the Company (particularly from the Board's own

Chairman) regarding the transaction, especially after the Treasury issued the September 22, 2014 Notice regarding government restrictions that could wholly eliminate the substantial tax benefits AbbVie sought to achieve through the merger. All told, the Court of Chancery erred in failing to draw a reasonable inference of Board knowledge and approval, which was amply supported by the totality of the complaint's well-pleaded allegations.

The Court should also reject Defendants' alternative argument that, even with a reasonable inference of Board knowledge, the complaint fails to adequately plead that the majority of the Board faces a substantial likelihood of liability. But the Court of Chancery's decision makes clear that the apparent lack of Board knowledge was the only obstacle precluding a finding of demand futility. Under settled precedent, the well-pleaded allegations of the complaint are more than sufficient to demonstrate that the majority of the Board faces a substantial likelihood of liability for failure to disclose material information. Contrary to Defendants' arguments, Plaintiff is *not* required to allege that the September 29, 2014 statements were issued by the Board. As long as the Director Defendants were aware of and approved the September 29, 2014 statements — which the Court of Chancery correctly assumed were misleading — they had a fiduciary duty to correct the misleading information contained therein. On the facts alleged, the Director Defendants face a substantial likelihood of liability for omitting from the

September 29, 2014 statements that the Board was already in the process of reassessing its recommendation in favor of the merger and by failing to disclose this information after the September 29, 2014 statements were issued.

Simply put, AbbVie could have chosen to remain quiet in response to the Treasury Notice, and not issue ***any*** statement about the merger until the Board had made an official decision. But it did not do so, and instead chose to speak on the subject, issuing two separate statements that were disseminated to both Abbvie and Shire employees ***and also filed with the SEC*** on September 29, 2014, in which AbbVie reaffirmed its commitment to the merger and the integration planning for the merger. *Once AbbVie chose to speak on the subject*, it had a duty to speak truthfully and not create a false and misleading impression by omitting the key fact that the Board *was already reassessing the merger* in light of the Treasury Notice. *See Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018).

For the foregoing reasons, and for the reasons set forth in Plaintiff's opening brief, the Court should reverse the Court of Chancery's opinion granting Defendants' Rule 23.1 motion to dismiss.

ARGUMENT

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

A. The Totality of the Complaint's Well-Pleaded Allegations Gives Rise to a Reasonable Inference that the Director Defendants Were Aware of and Approved the September 29, 2014 Statements

Plaintiff's opening brief set forth in exhaustive detail why the totality of the complaint's well-pleaded allegations is more than sufficient to give rise to a reasonable inference that the Director Defendants were aware of and approved the September 29, 2014 SEC filings. *See, e.g.*, AOB at 23–27. Arguing the contrary, Defendants impermissibly attempt to isolate and contradict Plaintiff's allegations.

As an initial matter, the Court should reject Defendants' approach of isolating Plaintiff's allegations. It is well-settled that in reviewing defendants' motion to dismiss for failure to plead demand futility, 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 v. Pincus*, 152 A.3d 124, 128 (Del. 2016) (requiring that all pleaded facts "be considered ***in full context***"); *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").

Defendants' attacks on the merits of the complaint's allegations fare no better. For example, Defendants suggest that "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." AAB at 18. According to Defendants, "[i]t 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." *Id.* at 19. But ***precisely because the merger at issue involved committing AbbVie to a $54 billion transaction***, it is reasonable to infer that the Board was aware of and approved the statements, particularly because one of the two statements was made by the Board's own Chairman (Defendant Gonzalez). Even if this is not ***the only*** inference that can be drawn from the allegations, it is nonetheless a ***reasonable one*** to which Plaintiff was entitled at this stage. *See Sandys*, 152 A.3d at 128; *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004); *see also Kahn v. Stern*, 183 A.3d 715, 2018 Del. LEXIS 114, at **1–2 (Del. 2018) (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***").

Equally unavailing is Defendants' argument that Plaintiff has failed to allege "that there was something particular about the September 29 letters that caused the board to review those two filings specifically." *See* AAB at 19–20. First, the complaint alleges that the September 29, 2014 letters were made just seven days after the Treasury Notice and at a time when the Board was already reassessing the

merger. A054–055 (¶¶ 111–112). Moreover, the complaint alleges in great detail that the issuance of the Notice was "a ***major announcement*** that rocked the corporate world" and "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.").

Furthermore, the complaint adequately alleges that the temporal proximity of the September 29, 2014 statements and the Board's official announcement on October 15, 2014 that it was withdrawing its recommendation in favor of the merger demonstrates the Board's knowledge and bad faith. *See* A056–057 (¶ 115); *see also* AOB at 14. The complaint also alleges that hedge funds were furious "and clearly expressed the view that AbbVie and its Board had breached their duty of candor by lying in the September 22, 2014 SEC filings and not promptly disclosing that the Board was reassessing the Merger." A057 (¶ 116).

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.

On these facts, Plaintiff is entitled to a reasonable inference that after the Notice was issued and after the Board had already convened to begin a discussion about the effect of the Notice on the merger, the Board would have been more scrupulous in monitoring the Company's public statements about the merger, including the statements merely a week later on September 29, 2014. *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 knowledge of a regulation which was in the company's 10-K); *In re 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).

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 communications from the Board's own

Chairman) after September 22, 2014 regarding the merger and the effect of the 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. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989) (imputing knowledge about import restrictions eliminating a significant source of income for the company).

Finally, Defendants' argument that "the September 29 letters did not say anything about the Treasury Notice" (AAB at 21) actually supports Plaintiff's allegations that the September 29, 2014 statements were misleading. Given that the September 22, 2014 Treasury Notice put in question the multi-billion dollar merger, it was incumbent on the Board to not approve any public statements that could suggest that the Company was proceeding with the merger as planned. ***By omitting any information about the Notice in the September 29, 2014 statements, the Company created a misleading impression that the Company did not consider the Notice to be a material event and was proceeding with the transaction as planned.*** The Court of Chancery reached this correct conclusion when it assumed that the September 29, 2014 statements were misleading. *See* AOB, Ex. A at 28 (assuming "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"); *accord* A034, 054–056 (¶¶ 58, 111–114); *Rubinstein v. Gonzalez*, 241 F. Supp. 3d 841, 854 (N.D. Ill. 2017) ("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.").[2] The Court of Chancery erred, however, by failing to draw a further and necessary reasonable inference that given their importance, the September 29, 2014 statements were reviewed and approved by the Board.

[2] Defendants' quotations from the September 29, 2014 statements (*see* AAB at 7–8) also amply demonstrate that those statements created the misleading impression that the merger between AbbVie and Shire was proceeding as planned, apparently unhindered by the issuance of the Notice on September 22, 2014, despite the fact that the Board was already in the process of reconsidering its recommendation in favor of the merger. *See also* AOB at 12–13, 20–22.

B. The Complaint More than Adequately Pleads that a Majority of the Board Faces a Substantial Likelihood of Liability

There is no merit to Defendants' alternative argument that even if Plaintiff was entitled to an inference of Board knowledge and approval, the complaint's allegations are "independently insufficient to establish that a majority of the directors face a substantial likelihood of liability." *See* AAB at 22. 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*, 180 A.3d at 1064. "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.*

Contrary to Defendants' arguments, the mere absence of the Director Defendants' signatures on the statements they had reviewed and approved is not dispositive of the Director Defendants' liability. 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). Here, in approving the September 29, 2014 statements, the Director Defendants owed a duty to the shareholders to speak "with complete candor." *See id.* That did not happen, however, because the September 29, 2014 statements did not disclose that the Board was already reassessing its recommendation in favor of the merger and because the omission of this material information created a misleading impression that AbbVie was proceeding with the merger as planned.

Accordingly, assuming that Plaintiff was entitled to a reasonable inference of Board knowledge and approval (*see supra* Part I.A), the allegations of the complaint are more than sufficient to demonstrate that the Director Defendants face a substantial likelihood of liability for breaching their duty of loyalty by: (1) omitting material information from the September 29, 2014 statements; and/or (2) failing to correct the misleading information in the September 29, 2014 statements. *See Appel*, 180 A.3d at 1064; *Malone v. Brincat*, 722 A.2d 5, 10 (1998).

Defendants assert that Plaintiff's allegations are insufficient because the Director Defendants did not owe any duty to the Shire shareholders. *See* AAB at 27. But this argument is a red herring. Plaintiff alleges that the Director Defendants breached their fiduciary duties *owed to the AbbVie shareholders* by disseminating false and misleading statements to the market that could — and, in fact, did — harm the Company. Moreover, there is no dispute that the misleading statements ***were filed with the SEC***. *See* A034–037, 055–056 (¶¶ 60–61, 113).

Furthermore, the complaint alleges that both the September 29, 2014 statements and subsequent disclosure that the Board was withdrawing its recommendation in favor of the merger had a substantial price impact on Shire's stock. *See* 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). Given the multi-billion dollar stake in the transaction, the Board knew or should have known that any adverse impact on Shire's stock could have a detrimental effect on the Company if it results in a lawsuit by Shire shareholders, which is precisely what happened.

Finally, there is no merit to Defendants' arguments that "Plaintiff alleged no facts supporting an inference that the board believed the letters were misleading" (AAB at 24) and that "Plaintiff did not plead with particularity that the directors decided to reconsider their support for the transaction before their October 14, 2014 announcement" (AAB at 27). As exhaustively set forth in Plaintiff's opening brief, the Court of Chancery correctly assumed as true that the September 29, 2014 statements were misleading and that, at the time of those statements, the Board was already reassessing its recommendation in favor of the merger. *See* AOB at 20–22; *see also* AOB, Ex. A at 28–29. Moreover, it is irrelevant whether the Board

already decided to reconsider its support for the merger at the time of the September 29, 2014 statements. Rather, the material information that was omitted and should have been disclosed is that at the time of the September 29, 2014 statements, the Board was ***already reassessing its recommendation*** in favor of the merger. *See* A034, 054 (¶¶ 58, 111); AOB, Ex. A at 28–29; *see also Appel*, 180 A.3d at 1060 (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").

All told, AbbVie could have chosen to remain quiet in response to the Treasury Notice, and not issue ***any*** statement about the merger until the Board had made an official decision. But it did not do so, and instead chose to speak on the subject, issuing two separate statements that were disseminated to both Abbvie and Shire employees ***and also filed with the SEC*** on September 29, 2014, in which AbbVie reaffirmed its commitment to the merger and the integration planning for the merger. *Once AbbVie chose to speak on the subject*, it had a duty to speak truthfully and not create a false and misleading impression by omitting the key fact that the Board *was already reassessing the merger* in light of the Treasury Notice. *See Appel*, 180 A.3d at 1064 ("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.").

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

Plaintiff's opening brief demonstrates why, if the Court reverses the Court of Chancery's dismissal based on demand futility, 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* AOB at 30–31; *see also McPadden v. Sidhu*, 964 A.2d 1262, 1270 (Del. Ch. 2008); *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007); *In re China Agritech, Inc.*, 2013 Del. Ch. LEXIS 132, at *70 (Del. Ch. May 21, 2013).

In their answering brief, Defendants state that they "did not argue in the Court of Chancery that the complaint failed to state a claim upon which relief could be granted." AAB at 3. Defendants further state that they "do not rely on that argument in support of affirmance in this Court." *Id.* As such, if the Court concludes that the Court of Chancery erred in dismissing this action on demand futility, the Court should find that Defendants have waived any right to file a Rule 12(b)(6) motion (*see* DEL. CH. CT. R. 12(g)) and should reverse and remand.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in Plaintiff's opening brief, the Court should reverse the Court of Chancery's opinion granting Defendants' Rule 23.1 motion to dismiss.

Dated: November 8, 2018

Respectfully submitted,

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