

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES WOOLARD,

Plaintiff,

v.

THERAPEUTICSMD, INC., HUGH
O'DOWD, MARLAN D. WALKER, TOMMY
G. THOMPSON, PAUL M. BISARO,
COOPER C. COLLINS, KAREN L. LING,
JULES A. MUSING, GAIL NAUGHTON and
ANGUS C. RUSSELL.

Defendants.

Case No. 1:22-cv-05392

**COMPLAINT FOR VIOLATIONS OF
SECTIONS 14(d), 14(e) AND 20(a) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

JURY TRIAL DEMAND

COMPLAINT FOR VIOLATIONS OF THE FEDERAL SECURITIES LAWS

Plaintiff Charles Woolard (“Plaintiff”), by his undersigned attorneys, alleges as follows based (i) upon personal knowledge with respect to himself and his own acts, and (ii) upon information and belief as to all other matters based on the investigation conducted by his attorneys, which included, among other things, a review of relevant U.S. Securities and Exchange Commission (“SEC”) filings, and other publicly available information.

NATURE OF THE ACTION

1. This action is brought by Plaintiff against TherapeuticsMD, Inc. (“TXMD” or the “Company”) and the members of the Company’s board of directors (“Board”) for violations of (i) Sections 14(d), 14(e) and 20(a) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78n(d), § 78n(e) and § 78t(a), and (ii) 17 CFR § 240.14d-101. Plaintiff’s claims arise in connection with the Board’s recommendation that the stockholders of the Company (“TXMD Stockholders”) tender their shares to an affiliate of EW Healthcare Partners (“EWHP”), pursuant to the offer of EWHP’s affiliate to acquire all of the issued and outstanding shares of TXMD for

\$10.00 per share in cash via a tender offer (“Tender Offer”).

2. On May 31, 2022, TXMD and EWHP announced that they had entered into an agreement (“Merger Agreement”) providing for EWHP’s affiliate to purchase all of the outstanding shares of TXMD for \$10.00 per share in cash (“Merger Consideration”) via a Tender Offer.

3. On June 6, 2022, EWHP’s affiliate commenced the Tender Offer by filing a Tender Offer Statement on Schedule TO (“TO Statement”) with the Securities and Exchange Commission (“SEC”). The TO Statement provides that the Tender Offer expires one minute after 11:59 p.m., Eastern Time, on July 5, 2022 (“Expiration Date”), unless extended or earlier terminated in accordance with the Merger Agreement. Upon satisfaction of various conditions described in the TO Statement, and consummation of the Tender Offer, TXMD will survive as a wholly-owned subsidiary of EWHP’s affiliate under Nevada law (“Merger”).

4. On June 10, 2022, Defendants filed a materially false and misleading Schedule 14D-9 Solicitation/Recommendation Statement (“Recommendation Statement”) with the SEC recommending that TXMD Stockholders tender their shares to EWHP pursuant to the Tender Offer. The material misrepresentations and omissions in the Recommendation Statement render it false and misleading in violation of the above-referenced Exchange Act provisions.

5. It is imperative that such violations are promptly cured to enable TXMD Stockholders to make an informed decision concerning whether to tender their shares to EWHP before the Expiration Date. Therefore, Plaintiff seeks to enjoin Defendants from closing the Tender Offer and/or taking any steps to consummate the Merger, until such violations are cured. Alternatively, if the Tender is closed and the Merger is consummated, Plaintiff reserves the right to recover damages suffered by himself and similarly-situated investors as a result of such

violations.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the claims asserted herein for violations of Sections 14(d), 14(e) and 20(a) of the Exchange Act pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331 (federal question jurisdiction).

7. This Court has personal jurisdiction over each of the Defendants because each defendant has sufficient minimum contacts with the United States so as to make the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice. *See Moon Joo Yu v. Premiere Power LLC*, No. 14 CIV. 7588 KPF, 2015 WL 4629495, at *5 (S.D.N.Y. Aug. 4, 2015) (because Exchange Act provides for nationwide service of process, and Defendant resides within the United States, and conducts business within the United States, he should reasonably anticipate being haled into court in the United States, and Court’s exercise of personal jurisdiction over Defendant with respect to Plaintiffs’ securities fraud claim is proper); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *23 (S.D.N.Y. Oct. 20, 2015) (“[w]hen the jurisdictional issue flows from a federal statutory grant that authorizes suit under federal-question jurisdiction and nationwide service of process . . . Second Circuit has consistently held that the minimum-contacts test in such circumstances looks to contacts with the entire United States rather than with the forum state.”).

8. Venue is proper under 28 U.S.C. § 1391(b) because Defendants transact business in this District. In particular, TXMD’s common stock trades under the ticker “TXMD” on Nasdaq, which is headquartered in this District, and the false and misleading Recommendation Statement was filed with the SEC, which has a regional office in this District. *See Mariash v. Morrill*, 496 F.2d 1138, 1144 (2d Cir. 1974) (venue appropriate in the Southern District of New York where an

act or transaction constituting the alleged violation occurred in the Southern District of New York); *United States v. Svoboda*, 347 F.3d 471, 484 n.13 (2d Cir. 2003) (venue in tender offer fraud prosecution appropriate in District).

PARTIES

9. Plaintiff is, and has been at all relevant times, a continuous stockholder of TXMD stock.

10. Defendant TXMD is a Nevada corporation with its principal executive offices located at 951 Yamato Road, Suite 220, Boca Raton, Florida 33431.

11. Defendant Hugh O'Dowd ("O'Dowd") has served as the Company's President since August 3, 2021, the Company's Chief Executive Officer since December 14, 2021, and as a member of the Board since December 18, 2021.

12. Defendant Marlan D. Walker ("Walker") has served as General Counsel and Secretary of the Company at all relevant times. Walker signed the Recommendation Statement in his capacity as General Counsel and Secretary of TXMD.

13. Defendant Tommy G. Thompson has served as the Chairman of the Board at all relevant times.

14. Defendant Paul M. Bisaro has served as a member of the Board at all relevant times.

15. Defendant Cooper C. Collins has served as a member of the Board at all relevant times.

16. Defendant Karen L. Ling has served as a member of the Board at all relevant times.

17. Defendant Jules A. Musing has served as a member of the Board at all relevant times.

18. Defendant Gail Naughton has served as a member of the Board at all relevant times.

19. Defendant Angus C. Russell has served as a member of the Board at all relevant times.

20. Defendants identified in paragraphs 11 to 19 are collectively referred to herein as the “Individual Defendants,” and together with TXMD, collectively, the “Defendants.”

SUBSTANTIVE ALLEGATIONS

Company Background

21. TXMD is a women’s healthcare company with three FDA-approved products: (i) IMVEXXY®, a prescription medicine for the treatment of moderate-to-severe dyspareunia; (ii) ANNOVERA®, a ring-shaped, reversible contraceptive insert; and (iii) BIJUVA®, a prescription medicine for the treatment of moderate-to-severe vasomotor symptoms due to menopause. TXMD also previously operated a prescription drug service called vitaCare.

Background to the Merger

22. On April 24, 2019, the Company entered into a Financing Agreement with Sixth Street Specialty Lending, Inc. (“Sixth Street”), which provided a \$300 million first lien secured term loan credit facility to the Company.

23. On July 29, 2021, TXMD engaged Greenhill & Co., LLC (“Greenhill”) to advise the Company with respect to various strategic and business alternatives.

24. On September 15, 2021, TXMD received a deficiency letter from Nasdaq notifying the Company that it was out of compliance with the minimum bid price requirement of \$1.00 per share for continued listing of the Company’s Common Stock on Nasdaq. As discussed below, TXMD subsequently regained compliance by effecting a 1-to-50 reverse stock split (which had the effect of increasing the stock price by a multiple of 50, and reducing the number of shares outstanding by a multiple of 50).

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