



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PADDY WOOD,)
)
 Plaintiff,)
)
 v.)
)
 CHARLES C. BAUM, RICHARD O. BERNDT,)
 EDDIE C. BROWN, MICHAEL L. FALCONE,)
 ROBERT S. HILLMAN, MARK K. JOSEPH,)
 BARBARA B. LUCAS, DOUGLAS A. MCGREGOR,)
 ARTHUR S. MEHLMAN and FRED N. PRATT, JR.)
)
 Defendants,)
)
 and)
)
 MUNICIPAL MORTGAGE & EQUITY, LLC,)
)
 Nominal Defendants.)

C.A. No. 2404-N

**DEFENDANTS' OPENING BRIEF IN SUPPORT
OF THEIR MOTION TO DISMISS THE DERIVATIVE COMPLAINT**

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
 Kenneth J. Nachbar (#2067)
 1201 N. Market Street
 P.O. Box 1347
 Wilmington, DE 19899-1347
 (302) 658-9200
 Attorneys for Defendants

OF COUNSEL:

CLIFFORD CHANCE US LLP
 James B. Weidner
 31 West 52nd Street
 New York, New York 10019
 (212) 878-8000

Jon R. Roellke
Jeffrey H. Drichta
2001 K Street, NW
Washington, DC 20008
(202) 912-5000

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PRELIMINARY STATEMENT

Plaintiff purports to bring a stockholder derivative complaint (“Complaint”) against Municipal Mortgage & Equity, LLC (“MMA”) and each of the ten members of its Board (“Director Defendants”). The Complaint should be dismissed in its entirety because it fails to plead with particularity sufficient facts to excuse Plaintiff’s failure to make a pre-suit demand as required under Delaware law.

MMA is a publicly-traded, limited liability company that, among other things, invests in tax-exempt bonds and other housing-related debt and equity investments. As best as can be discerned from the Complaint, Plaintiff appears to allege that the Director Defendants “fail[ed] to properly implement, administer and maintain adequate reporting controls” with respect to MMA’s financial reporting of: (a) the value of certain assets in its bond portfolio; and (b) the gain it realized on three alleged real estate bond transactions in which one or two of the Director Defendants allegedly had personal interests.¹ In addition, Plaintiff asserts that the Board improperly approved these three so-called “round trip” transactions that Plaintiff claims involved the acquisition, sale and then repurchase of properties identified in the Complaint.² She also challenges as improper the incentive compensation paid to Defendants Michael Falcone, MMA’s President and CEO, and Mark Joseph, MMA’s Chairman of the Board.³

Putting aside, solely for purposes of this Motion, that Plaintiff has fabricated from whole cloth much of what she pleads, her Complaint should be dismissed because she does not

¹ Compl. ¶ 18.

² *Id.* at ¶ 48.

³ *Id.* at ¶¶ 75, 99.

allege particularized facts sufficient to excuse her failure to make a pre-suit demand as required under Court of Chancery Rule 23.1 and bedrock Delaware case law. Instead, Plaintiff alleges in only conclusory and unsubstantiated terms that demand should be excused because: (a) Defendants Falcone and Joseph “have personal and financial interests in the actions challenged” and “every member of the Board and each office of the Company” is “dominated and controlled” by those two directors; (b) every member of the Board benefited from the challenged activities because they each allegedly received stock options as part of their compensation for serving on the Board; (c) the Board’s alleged approval of the purported transactions described in the Complaint is outside the bounds of the business judgment rule; and (d) each and every member of the Board is “subject to liability for breaching their fiduciary duties to MMA” and that such risk of liability “absolutely disqualifies them from passing on a shareholder’s demand.”⁴

These conclusory assertions -- and they are nothing more than that -- fall far short of the particularized facts necessary to meet the “stringent requirements” of pleading demand futility under Rule 23.1. To establish demand futility with respect to Board decisions, Delaware law requires that Plaintiff plead with particularity specific facts which, if proven, are sufficient to create a reasonable doubt that: (1) a majority of the Director Defendants could have acted in a disinterested and independent fashion when considering a demand by Plaintiff for corrective action; or (2) the challenged transactions were otherwise the product of a valid exercise of business judgment.⁵ No such facts appear anywhere in the Complaint that are sufficient to meet either of these two prongs of the *Aronson* test.

⁴ *Id.* at ¶¶ 80-87.

⁵ *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984).

Plaintiff has alleged no facts -- *none* -- that even suggest that a majority of the MMA Board was interested in the transactions at issue or otherwise lacked independence. Taking every allegation in the Complaint as true and giving Plaintiff the benefit of every reasonable inference that could be drawn from the facts alleged, at least seven of MMA's ten Board members are outside directors who are independent and disinterested with respect to the alleged transactions described in the Complaint. Indeed, with respect to no fewer than six of the Board's ten members (who alone constitute a majority), the *only* pertinent facts alleged are that they served on the Board, with some of them serving on the Board's Audit Committee.⁶

Implicitly recognizing the independence of the outside directors, Plaintiff makes a half-hearted attempt to claim that Defendants Falcone and Joseph (both of whom are alleged in non-specific and remote ways to be "interested" in at least some of the purported transactions)⁷ dominated and controlled each of the other eight Director Defendants.⁸ This conclusory allegation is plainly inadequate to excuse demand. Even assuming that Falcone and Joseph have some disqualifying interest (an assumption that is itself not supported by any well-pleaded facts), the Complaint does not allege *any* facts that, if true, would demonstrate such domination and control.

Nor is there anything in the Complaint that even remotely qualifies as being outside the bounds of the business judgment rule under the second prong of *Aronson*. Fundamentally, Plaintiff fails to establish, through well-pleaded allegations, that MMA actually undertook, or that the Board actually approved, the so-called "round-trip" transactions Plaintiff

⁶ *Id.* at ¶¶ 4, 6, 8, 10-12.

⁷ *Id.* at ¶¶ 41, 59, 65, 69, 75, 86.

⁸ *Id.* at ¶ 82.

has conjured up in her Complaint. Nor is there anything in the Complaint that, if proven, would establish that the incentive compensation for Defendants Falcone and Joseph was outside the bounds of customary compensation or unsupported by legitimate business objectives. And there are no particularized facts that, if proven, would demonstrate that the Defendant Directors were grossly negligent or that the Board authorized any action that no person of ordinary, sound business judgment could conclude was appropriate at the time it was authorized. Instead, the Complaint is replete with allegations that demonstrate that the independent and disinterested Board was, in fact, fully informed about the matters it considered and made reasonable judgments and decisions with respect to them.

Plaintiff's Complaint also fails as a matter of law to the extent it claims that the Board failed to fulfill its obligations to oversee MMA's affairs. This *Caremark*-type claim is "possibly the most difficult theory in corporation law in which a plaintiff might hope to win a judgment."⁹ To sufficiently plead demand futility for such a claim, Plaintiff must allege specific facts to establish that Defendants failed to act in good faith by systematically failing to exercise reasonable oversight. But much of what Plaintiff pleads serves only to confirm that the Board has and maintains policies and procedures that establish their good-faith discharge of their oversight responsibilities.

Lacking any specific facts that would meet her pleading burden, Plaintiff instead resorts to the familiar "incantation" that demand is excused because the directors would have to sue themselves, a "bootstrap argument that has been made to and dismissed by other courts,"¹⁰

⁹ *In re Caremark Int'l Inc. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

¹⁰ *Aronson*, 473 A.2d at 818.

most recently in the Delaware Supreme Court decision in *Stone v. Ritter*, 2006 WL 3169168 (Nov. 6, 2006).¹¹

Because Plaintiff does not, and cannot, plead particularized facts that create a reasonable doubt about whether the independent and disinterested Board acted in good faith in overseeing MMA's transactions and the financial reporting of them, as well as any compensation paid to Falcone and Joseph, this Court should dismiss this case for failure to make the requisite pre-suit demand under Court of Chancery Rule 23.1.

STATEMENT OF ALLEGED FACTS

As set forth below, Plaintiff's Complaint is more notable for what it fails to allege than for what it claims the Defendant Directors allegedly did or did not do in breach of their fiduciary duties. Many of the material omissions stem from the fact that the Complaint contains numerous inaccuracies and outright falsehoods, all of which are nonetheless assumed to be true solely for purposes of this Motion.

I. MMA AND ITS BOARD OF DIRECTORS.

Nominal Defendant MMA is a Delaware LLC with its principal place of business in Baltimore, Maryland. As described in the Complaint: "MMA provides debt and equity financing to various parties, invests in tax-exempt bonds and other housing-related debt and equity investments, and is a tax credit syndicator that acquires and transfers low-income housing tax credits."¹² MMA has a ten-member Board of Directors.¹³

¹¹ No. 93 (RJH), 2006 WL 3169168, at *3-4 (Del. Nov. 6, 2006).

¹² Compl. ¶ 2.

Plaintiff alleges the following -- *and only the following* -- specific facts about Defendants Baum, Brown, Hillman, Lucas, McGregor and Mehlman, who together comprise a majority of MMA's Board:

4. Defendant Charles C. Baum has served as a director since 1996. Mr. Baum serves on the Audit Committee of the Board of Directors.
6. Defendant Eddie C. Brown has been a director of the Company since 2003. Mr. Brown serves on the Audit Committee of the Board of Directors.
8. Robert S. Hillman has been a director of the Company since 1996. Mr. Hillman serves on the Audit Committee of the Board of Directors.
10. Barbara B. Lucas was named a director of the Company in July, 2005.
11. Douglas A McGregor has been a director of the Company since 1999.
12. Arthur S. Mehlman was appointed by the Board of Directors as a director of the Company effective November 1, 2004. Prior to his retirement in 2002, Mr. Mehlman served as a Partner at KPMG, LLP since 1972, in charge of KPMG's audit practice for the Baltimore/Washington region. Mr. Mehlman serves on the Audit Committee of the Board of Directors. The Company represents that Mr. Mehlman meets the Exchange Act definition of an Audit Committee expert.¹⁴

Plaintiff alleges that the seventh outside director, Defendant Fred N. Pratt, Jr., "has been a director of the Company since July 2003" and serves on the Board's Audit Committee. He is alleged to have been previously employed by a separate company, Lend Lease Corporation, prior to MMA's acquisition of a division of that company in 2003 in a transaction that is unrelated to any of the transactions described in the Complaint. Plaintiff claims that Pratt owns unspecified limited partnership and other interests in unidentified entities "related to

(. . . continued)

¹³ See generally *Id.* ¶¶ 3-13. Plaintiff also lists Robert J. Banks under a heading "Other Individual Defendants From Whom Relief Is Requested," but does not list Banks in the case caption, nor was he served. *Id.* ¶ 14.

¹⁴ *Id.* ¶¶ 4, 6, 8, 10-12.

[MMA's] affordable housing investment business.”¹⁵ The Complaint does not allege that any of those purported “interests” are in any way related to any of the transactions or activities at issue or that any such interests were of any significant monetary value to Pratt. Nor are there any facts alleged that would indicate how, if at all, Defendant Pratt’s alleged interests in such unidentified entities rendered him unable to impartially consider Plaintiff’s demand about the transactions and accounting practices alleged in the Complaint.

The only allegations in the Complaint with respect to the eighth outside director, Defendant Richard O. Berndt, is that he is the Managing Partner of Gallagher Evelius & Jones LLP (“GEJ”), a law firm which Plaintiff alleges provided \$4.9 million in legal services to MMA in 2005.¹⁶ The Complaint also asserts that MMA appointed GEJ partner Stephen Goldberg as the company’s general counsel in 2004.¹⁷ There are no allegations in the Complaint that tether any of the legal services allegedly provided by GEJ to any of the activities alleged in the Complaint. Nor are there any facts alleged that would indicate how, if at all, Defendant Berndt’s interests in his law firm rendered him unable to impartially consider Plaintiff’s demand about the transactions and accounting practices alleged in the Complaint.

None of these eight outside directors -- Baum, Brown, Hillman, Lucas, McGregor, Mehlman, Pratt, and Berndt -- is alleged to have served as an officer, employee or in any other role (except as a director) at MMA.

With respect to the two remaining directors, Defendants Joseph and Falcone, the Complaint asserts that: (a) Falcone serves as Chief Executive Officer and President of MMA and

¹⁵ *Id.* ¶ 13.

¹⁶ *Id.* ¶ 5.

¹⁷ *Id.*

Joseph serves as Chairman of the Board; (b) both directors receive base compensation and performance bonuses payable in cash and/or restricted stock and stock options; (c) both directors had some non-specific ownership interest in properties that allegedly served as collateral on bonds purchased and sold by MMA; (d) both directors own stock in MMA; and (e) Joseph, through some unspecified means, allegedly “controlled” certain entities that were borrowers on bonds that MMA bought and sold. The Complaint does not identify the nature or extent of the allegedly disqualifying “interests” or state any facts about whether such interests are material to either Joseph or Falcone. Nor does the Complaint explain how Joseph “controlled” the entities who were borrowers on bonds that MMA bought and sold or how, if at all, the interests of any such borrowers conflict with the interests of MMA with respect to the transactions alleged.

Plaintiff also alleges that Falcone and Joseph “dominate and control” all of the other Defendant Directors.¹⁸ The *entirety* of that allegation, however, is as follows: “[E]ach of the Director Defendants owes his or her position and loyalty to defendants Joseph and Falcone, primary beneficiaries of the improper conduct alleged herein, by reason of the control and domination by Joseph and Falcone over every member of the Board and every office [sic] of the Company.”¹⁹ The Complaint does not contain *any* particularized allegations of fact that, if true, would establish how Defendants Joseph and Falcone allegedly dominated and controlled each of the eight outside directors.

¹⁸ *Id.* ¶ 82.

¹⁹ *Id.*

II. THE TRANSACTIONS AND FINANCIAL REPORTING ALLEGED IN THE COMPLAINT.

Plaintiff characterizes her claims as “breaches of fiduciaries arising out of each of the defendant’s failure to properly implement, administer and maintain adequate reporting controls, practices and procedures, failure to ensure that MMA operated in compliance with all applicable federal and state laws, rules, and regulations and [their failure to ensure] that MMA not engage in any unsound or illegal business practices or engage in any transactions wasteful to the Company’s assets.”²⁰ The financial reporting that the Board allegedly failed to properly monitor and oversee involves two technical accounting statistics related to the reporting of: (a) the value of certain assets based on whether they are identified as “other than temporarily impaired”;²¹ and (b) the gain from the alleged sale of certain assets based on whether the transactions were “bona fide” transactions or whether MMA correctly accounted for the “impairments” previously taken against the assets involved.²²

A. “Other Than Temporarily Impaired.”

Plaintiff contends that MMA made incorrect statements in its 2005 Annual Report and its 2006 First Quarter 10-Q filing by failing to identify \$500 million of its \$1.4 billion bond portfolio as “other-than-temporarily impaired.”²³ According to the Complaint, because those assets had been in default for a sustained period of time, they should not have been identified as

²⁰ *Id.* ¶ 18.

²¹ *Id.* ¶¶ 29, 31, 42, 47.

²² *Id.* ¶¶ 48-52.

²³ *Id.* ¶ 41, 44-47.

only “temporarily impaired” under the definitions set forth in the amended Statement of Financial Accounting Standards (FAS) No. 115.²⁴

Plaintiff admits, however, that MMA considered in its financial accounting the very accounting directive (FAS 115) that the Complaint alleges the Company is obliged to follow.²⁵ As explained in the Complaint itself, the Company concluded that FAS 115 “had no material effect on [MMA’s] reported financial condition or results of operations.”²⁶ Plaintiff also acknowledges that MMA clearly explained its rationale for reaching this conclusion, observing in its Q1 2006 Quarterly Report that:

[The Company] performed reviews of the properties collateralizing each bond and concluded that it was probable that [MMA] will receive all amounts due. Because we have the ability and intent to hold these bonds or interests in bond securitizations until the expected recovery of fair value, which may be at maturity, [MMA does] not consider the bonds or interests in bond securitizations to be other-than-temporarily impaired at March 31, 2006.²⁷

The Complaint offers no particularized facts that contradict MMA’s well-grounded and reasonable accounting rationale. The Complaint, for example, contains no allegations about whether MMA has failed to “receive all amounts due” under any bond that Plaintiff claims was not properly designated as “other than temporarily impaired.” Nor does the Complaint offer any facts that contradict MMA’s good-faith belief that it “has the ability and

²⁴ *Id.* ¶¶ 29, 36, 41 and 44-45.

²⁵ *Id.* ¶ 43.

²⁶ *Id.* ¶ 44.

²⁷ *Id.* ¶ 45.

intent” to hold such assets “until the expected recovery of full value, which may be at maturity.”²⁸

Moreover, the few factual details that are proffered in the Complaint serve only to confirm that the MMA Board established and maintained adequate accounting controls, practices and procedures. The Complaint, for example, alleges that the Defendant Directors “verified the Company’s financial reports pursuant to the Sarbanes-Oxley Act of 2002,” an apparent reference to the publicly filed Sarbanes-Oxley certifications submitted by Falcone (as Chief Executive Officer) and non-defendant Melanie Lundquist (as the Company’s Chief Financial Officer).²⁹ These certifications confirm that the Company has established and maintained “disclosure controls and procedures . . . and internal control over financial reporting” designed “to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.”³⁰

The Complaint similarly confirms that the MMA Board has an Audit Committee, the principal duties of which are “monitoring the integrity of the financial reporting processes and systems of internal controls; monitoring the Company’s compliance with legal and regulatory requirements; monitoring the independence, qualifications, and performance of the

²⁸ *Id.* ¶ 45.

²⁹ *Id.* ¶ 31.

³⁰ Mun. Mortgage & Equity LLC, Annual Report (Form 10-K), at Exhibits 31.1, 31.2 (June 22, 2006). True and correct copies of these certifications is attached to this Brief as Exhibit A. Although Plaintiff had access to these publicly filed certifications when she filed her Complaint, she falsely alleges that they were made by “each of the defendants.” Compl. ¶ 31. Only the CEO and CFO executed the certifications as required under the statute.

Company's independent registered public accounting firm and internal audit function."³¹ Although the Complaint refers to this Audit Committee and the Sarbanes-Oxley certifications, it does not allege that the Committee (or any Board member) had any reason to question the validity of the Company's reporting of assets as "other than temporarily impaired." Indeed, the Complaint does not allege that any "red flags" about that accounting statistic were ever raised with, or made known to, any Director Defendant.

B. Financial Reporting Of "Impairments" In The "Round-Trip" Transactions.

The Complaint also challenges the way in which MMA reported the gains it made on what the Plaintiff characterizes as "round-trip" transactions.³² It is difficult to decipher from the Complaint what it is the Plaintiff claims occurred with respect to these alleged transactions. It appears, however, she claims that MMA developed these "illusory" transactions and overstated the return it earned on them when it sold, and then allegedly repurchased and offered for sale, certain assets without correctly accounting for the "impairments" that were taken against the assets prior to their sale.³³

The lack of clarity in these allegations may stem from Plaintiff's admission that she is not certain whether she has correctly identified the properties involved in these alleged transactions. Instead, she alleges -- "on information and belief" -- that these so-called "round-

³¹ Compl. ¶ 84.

³² *Id.* ¶ 48.

³³ *Id.* ¶¶ 48, 51-53.

trip” transactions occurred, even though she acknowledges that the identity of the specific properties involved is not clear from MMA’s financial statements.³⁴

It appears, based on the allegations in the Complaint, that Plaintiff made an unsuccessful attempt to cross-reference financial information about some of the properties identified in confidential Offering Materials relating to an MMA auction for some of its assets with the financial results reported on other, unrelated transactions that were disclosed in MMA’s publicly filed materials.³⁵ This, perhaps, explains why she alleges that MMA “sold” and then “repurchased” the properties she refers to as Stone Mountain, Lakeview, and Santa Fe Springs when, in fact, MMA never sold, or purported to sell, any of those properties as of the date of the Complaint.³⁶ It also may explain why all of the alleged accounting anomalies on which she

³⁴ *Id.* ¶ 49, notes 1 and 2.

³⁵ *See, e.g., Id.* ¶ 49. According to the Complaint, the confidential Offering Materials Plaintiff references were provided to “prospective bidders” pursuant to a Confidentiality Agreement, which prohibited the disclosure of information contained in the Offering Materials. *Id.* ¶34. Acknowledging the confidential nature of these Offering Materials, Plaintiff filed her Complaint under seal. Defendants since have filed a redacted version of the Complaint on the public record that redacts only the confidential information that should not be publicly disclosed. Plaintiff was not among the persons authorized to receive the Offering Materials and MMA is investigating how this confidentiality breach occurred.

³⁶ It appears that the property Plaintiff refers to as Stone Mountain in Paragraph 49 of the Complaint and on which gains were reported in the publicly filed financial statement as alleged in that paragraph was, in fact, a property known as Northpointe, which was sold to an unrelated third party for cash. MMA never sold the property referred to in the confidential Offering Materials as Stone Mountain, contrary to what Plaintiff purports to allege based on “information and belief.” Similarly, Plaintiff appears to confuse a property known as Lakeview Towers with a property known as Lakeview Gardens, mistakenly attributing to the former the gains that were publicly reported on the latter after it, too, was sold to a third party for cash. And the property she refers to as Santa Fe Springs was, in fact, a property known as Creekside, which also was sold to an unrelated third party for cash. In each case, the publicly filed financial statements correctly identify the gains that were earned when the Company sold the correctly identified properties. MMA, however, never sold nor purported to sell, the Stone Mountain, Lakeview Towers or Santa Fe Springs properties at the time the Complaint was filed; nor did the Company ever report any gains on any such fictitious sales.

bases her assessment of these “illusory” transactions are nonsensical -- that is, she has attributed to the MMA properties (Stone Mountain, Lakeview Towers and Santa Fe) described in the confidential Offering Materials the sales and “net gain” figures for completely unrelated properties (Northpointe, Lakeview Gardens and Creekside) that were reported in the Company’s publicly filed financial statements.³⁷

But, even if the Court accepts as true the incorrect assertion that MMA obtained, sold, and then repurchased the Stone Mountain, Lakeview Towers and Santa Fe properties, the Complaint does not allege particularized facts sufficient to excuse Plaintiff’s failure to make a pre-suit demand with respect to them. Plaintiff does not, for example, identify any particularized facts about when and how the Board considered the alleged transactions (an admittedly difficult task when no such transactions occurred). Nor does the Complaint contain any particularized facts about the alleged interests that Falcone and Joseph are purported to have in the underlying assets that collateralized the bonds allegedly involved in the purported transactions or any facts that would suggest that the Board did not take into account any such interests in reviewing the supposed transactions.

The Complaint also fails to set forth any specific facts concerning the procedures and processes through which the MMA Board was allegedly deficient in conducting its review and consideration of these transactions or how they were accounted for in the Company’s financial reporting. Like the paucity of allegations relating to FAS 115, the allegations about the Board’s oversight of “impairments” lack any detail about why or what the Board members

³⁷ Plaintiff, of course, may have learned of her basic misunderstanding of the disposition and current status of these properties had she made a pre-suit demand as required under Rule 23.1. She also could have, but did not, avail herself of her right to make a books and records demand for documents sufficient to show the current status of such properties.

actually did or did not do that allegedly breached their fiduciary duties. Plaintiff, for example, alleges no facts to suggest that the MMA Board reviewed or had knowledge of the allegedly improper accounting treatments of the impairments taken against the assets involved in the transactions. Moreover, Plaintiff fails to allege specific facts about any “regulatory or civil liability” that allegedly has resulted or will result from the “round-trip” transactions. Again, these omissions are understandable because the Plaintiff is claiming wrongdoing with respect to alleged transactions that never occurred.

Rather than alleging any specific oversight deficiencies concerning these alleged transactions, the Complaint affirmatively acknowledges that MMA’s “Operating Agreement required that each member of the Board actively review, authorize and affirm” MMA’s transactions and that the Board expressly affirmed that it “had complied with [MMA’s] Operating Agreement in connection with their duties to review and consider” those transactions.³⁸ And, although Plaintiff asserts that the MMA Board “reviewed, authorized and affirmed” these transactions, it does not set forth any particularized facts that establish that, in doing so, the Board was not fully informed or acting in good faith in the discharge of its oversight responsibilities.³⁹

Finally, the Complaint does not explain through any particularized facts why any of the alleged transactions -- even if they occurred and were approved by the Board -- were not properly accounted for in the Company’s financial statements. Indeed, even the Plaintiff concedes that it is “technically conceivable” that MMA had previously taken the impairments it

³⁸ Compl. ¶ 57.

³⁹ *Id.* ¶ 78.

had reported against those assets.⁴⁰ At most, the Complaint offers only the Plaintiff's speculation that the financial documentation she allegedly reviewed "indicate" that these transactions were not "bona fide" and "likely" were "related party transactions executed to inflate [MMA's] financial performance."⁴¹

C. Director Compensation.

Plaintiff also alleges that the Defendant Directors breached their fiduciary duties and committed corporate waste by unjustly enriching Defendants Falcone and Joseph with incentive-based bonuses.⁴² Plaintiff asserts that Falcone and Joseph earned these performance bonuses "as a result of the improper actions alleged herein."⁴³ Plaintiff does not allege, however, any facts that, if true, would explain how the performance bonuses related to the allegedly improper actions. Nor does Plaintiff allege any facts that, if true, would demonstrate that the performance-based compensation was more than the customary compensation senior executives receive at other publicly traded companies operating at a similar size or in the same industry.

⁴⁰ *Id.* ¶ 70.

⁴¹ *Id.* ¶¶ 60, 63, 66, 68, 70, 74.

⁴² *Id.* ¶ 18. Plaintiff alleges that Falcone owns 172,295 shares of MMA stock and receives \$425,000 in annual base salary with a five percent annual increase, as well as potential annual incentive compensation of \$120,000-\$467,500 and additional annual long-term compensation of restricted stock and stock options valued between \$235,000-\$385,000, depending on unspecified performance criteria. *Id.* at 7. Joseph allegedly owns 1,236,439 shares of MMA stock and earns a \$1 annual base salary, plus potential additional compensation of up to 50 percent of Falcone's total compensation. *Id.* at 9. He also allegedly is entitled to an additional \$3 million that is being paid over a three-year period for his "high-level of involvement in MMA's activities." *Id.*

⁴³ *Id.* ¶ 75.

The Complaint also fails to identify any of the circumstances under which the compensation for Falcone and Joseph was considered and approved.

III. PLAINTIFF'S CAUSES OF ACTION.

According to Plaintiff, the above-summarized conduct demonstrates that the Director Defendants: (1) breached their fiduciary duties; (2) grossly mismanaged MMA's assets and business affairs; and (3) wasted MMA's corporate assets. In particular, Plaintiff appears to allege that Defendants:

- (1) breached their fiduciary duties by: improperly overseeing the accounting of \$500 million in other-than-temporarily-impaired bonds in MMA's \$1.4 billion overall bond portfolio and the "round-trip" transactions, in violation of FAS 115, unspecified GAAP rules, federal and state laws and MMA company policies; approving MMA's decision to enter into interested-party transactions with entities owned or controlled by either Defendants Falcone or Joseph; and approving incentive-based executive compensation for Falcone and Joseph.
- (2) grossly mismanaged MMA's assets and business affairs by engaging in the same alleged misconduct that led to the breaches of fiduciary duty; and
- (3) wasted MMA's assets engaging in interested party transactions, approving incentive-based compensation to Falcone and Joseph and increasing MMA's exposure to financial penalties and loss of goodwill resulting from potential civil lawsuits and regulatory investigations.

In addition, Plaintiff alleges that Defendants Falcone and Joseph have been unjustly enriched at the expense of MMA by their incentive-based compensation and through their participation in interested transactions with MMA.

Finally, Plaintiff claims that MMA is entitled to contribution and indemnification from the Director Defendants for all claims that have or may in the future arise (including governmental investigations and liability arising from civil judgments) because of their alleged misconduct.

IV. PLAINTIFF'S DEMAND FUTILITY ALLEGATIONS.

Plaintiff alleges that the required pre-suit demand about these claims is excused because: (a) the Director Defendants “are . . . personally liable to the Company” because they “developed, implemented and approved the policies giving rise to the conduct complained of herein and directly reviewed and authorized the transactions discussed herein”; (b) the MMA Board is not disinterested and independent but is, instead, “dominated and controlled” by Defendants Falcone and Joseph; and (c) the alleged activities “are not subject to the protection of the business judgment rule and could not be ratified, approved, or condoned by disinterested and informed directors under any circumstances.”⁴⁴

In addition, Plaintiff alleges in conclusory and generic terms that the Director Defendants “received their own stock options as compensation, thereby personally benefiting from improper conduct alleged herein.”⁴⁵ The Complaint, however, does not set forth any specific facts about how the alleged transactions and activities resulted in some benefit to any Board member or whether any such benefit was material to the Board member; nor does it contain any particularized facts about whether any such benefit was shared equally with all MMA shareholders. Plaintiff also does not allege any of the circumstances under which any director compensation was established and approved, when any of the alleged stock options were awarded, their value when awarded, when they can be exercised (or whether they were exercised at all) or even whether any of the Director Defendants have realized any actual gain in acquiring and selling any MMA stock.

⁴⁴ *Id.* ¶ 81

⁴⁵ *Id.* ¶ 87.

Plaintiff also alleges that demand should be excused because a number of the directors serve on the Company's Audit Committee, and that Committee recently concluded that there are some aspects of MMA's financial reporting that need to be re-examined. Plaintiff asserts that the Audit Committee, in fulfilling its function, reported that "management has identified material weaknesses related to the financial reporting process, including the sufficiency of resources dedicated to the Company's accounting function."⁴⁶ Plaintiff, however, offers no specific facts in the Complaint that even suggest that these findings of the Audit Committee are in any way related to the transactions and assets at issue in the Complaint; nor are there any allegations that explain why the Board's willingness to examine -- through its Audit Committee -- MMA's financial reporting activities would render it futile for this Plaintiff to ask for such a review with respect to the accounting issues described in the Complaint. Instead, the Complaint makes the nonsensical contention that because the Audit Committee demonstrated its independence and vigilance in reporting some unrelated concerns about "the integrity of the financial statements of MMA," the Defendant directors "cannot be expected prosecute claims" arising from the accounting issues Plaintiff alleges.⁴⁷

⁴⁶ *Id.* ¶ 84.

⁴⁷ *Id.* ¶ 85.

ARGUMENT

The Complaint must be dismissed for failure to adequately plead demand futility under Court of Chancery Rule 23.1. The Complaint does not, and cannot, allege any facts sufficient to establish that the Board lacked independence or disinterest; nor does it allege any specific facts sufficient to overcome the presumption of the business judgment rule. To the extent it claims that the Board failed to discharge its oversight responsibilities, the Complaint falls under its own weight because it establishes that the Board had in place sufficient policies and procedures to ensure that it was fully informed in overseeing MMA's affairs. Nothing in the Complaint is sufficient to show, as it must in order to adequately plead demand futility, that the Board did not act in good faith by systematically and consciously failing to exercise reasonable oversight. For these reasons, demand cannot be excused and this Court should dismiss Plaintiff's Complaint with prejudice.

I. DELAWARE LAW REQUIRES PLAINTIFF TO FIRST DEMAND THAT THE DEFENDANT DIRECTORS TAKE THE REMEDIAL ACTION REQUESTED, OR ELSE SATISFY THE HEAVY BURDEN OF PLEADING WITH FACTUAL PARTICULARITY THAT DEMAND IS FUTILE.

Delaware law requires that "a plaintiff shareholder make a demand upon the corporation's current board to pursue derivative claims owned by the corporation before a shareholder is permitted to pursue legal action on the corporation's behalf."⁴⁸ "[T]he demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations,"⁴⁹ and it allows a "corporation the opportunity to address an alleged

⁴⁸ *Jacobs v. Yang*, 2004 WL 1728521, at *2 (Del. Ch. Aug. 2, 2004); *see* Del. Ch. Ct. R. 23.1.

⁴⁹ *Aronson*, 473 A.2d at 812.

wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur.”⁵⁰ For these reasons, pre-suit demand is a “bedrock principle” of Delaware standing law in corporate governance lawsuits.⁵¹

Plaintiff admits that she failed to make a demand of the MMA Board but claims that such a demand would have been futile.⁵² But to sufficiently plead demand futility under Delaware law, Plaintiff must allege with particularity specific facts which, if proven, would overcome the “powerful presumptions” of the business judgment rule that directors are independent and disinterested, and that they have acted in good faith based on an honest belief and informed basis that their actions were in the best interests of the company.⁵³ Accordingly, establishing demand futility is a heavy burden,⁵⁴ because “[a]llegations of demand futility under Rule 23.1 ‘must comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by Chancery Rule 8(a).’ ”⁵⁵

⁵⁰ *Spiegel v. Buntrock*, 571 A.2d 767, 773 (1990) (citations omitted); *Rattner v. Bidzos*, 2003 WL 22284323, at *7 (Del. Ch. Oct. 7, 2003) (“The hurdle of proving demand futility also serves an important policy function of promoting internal resolution, as opposed to litigation, of corporate disputes and grants the corporation a degree of control over any litigation brought for its benefit”) (citations omitted).

⁵¹ *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

⁵² Compl. ¶ 80.

⁵³ *Rales v. Blasband*, 634 A.2d 927, 933 (1993); *see Aronson*, 473 A.2d at 811, 818; *Levine*, 591 A.2d at 205.

⁵⁴ *Levine*, 591 A.2d at 211.

⁵⁵ *Stone*, 2006 WL 3169168, at *3 n.9, *quoting Brehm v. Eisner*, 746 A.2d at 254 (pleading demand futility cannot be “satisfied by conclusory statements or mere notice pleading. . . . What the pleader must set forth are particularized factual statements that are essential to the claim [of demand futility]”).

In addition, where demand futility is based on the notion that the directors may be personally liable for the alleged conduct, the basis for asserting such liability must also be alleged with factual particularity: “Since a plaintiff must plead with particularity reasons why demand should be excused, when a reason is that the directors are disabled by the risk of liability, the claim for relief against the directors must also be pled with particularity.”⁵⁶ And, where the company has expressly insulated the directors from liability for certain conduct (for example, under an exculpatory and indemnity provision set forth in the company’s articles of incorporation), “then a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts.”⁵⁷

The Delaware Supreme Court has articulated two, closely related tests for determining the sufficiency of demand futility allegations. The Supreme Court explained the “traditional” rule in *Aronson*, which applies when the directors are alleged to have approved or acquiesced in transactions or conduct that the plaintiff alleges is a breach of the directors’ fiduciary duties of loyalty and due care:

Our view is that in determining demand futility the Court of Chancery in the proper exercise of its discretion must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.⁵⁸

Where, however, the allegations do not attack a specific business judgment of the board but, instead, assert a “*Caremark*” claim that the directors “violated a duty to be active

⁵⁶ *In re Baxter Int’l, Inc. S’holders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995).

⁵⁷ *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003).

⁵⁸ *Aronson*, 473 A.2d at 814.

monitors of corporate performance” by failing to act when they otherwise should have done so, the test for determining whether demand should be excused is stated differently.⁵⁹ Where, as in a *Caremark* claim, “the subject of the derivative suit is not a business decision of the board,” then the court should apply the test set forth in *Rales*, which requires a court to “determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.”⁶⁰

Several Delaware cases illustrate how these demand futility tests have been applied in circumstances similar to those alleged here. The Chancery Court’s decision in *Guttman*⁶¹ is particularly instructive. The plaintiffs in that case alleged that the defendant directors “engaged in a variety of misconduct related to [the company’s] failure to accurately account for and disclose its financial results” and made statements that were “materially misleading because they were premised on improper accounting.”⁶² The complaint in *Guttman* set forth in detail the plaintiffs’ explanations about the alleged accounting irregularities and claimed that the director defendants knew that the company’s “improper accounting practices were propping up its stock price artificially and they thus reaped unfair profits by selling [their

⁵⁹ *Stone*, 2006 WL 3169168, at *4, quoting *Caremark*, 698 A.2d at 967; see also *Rales*, 634 A.2d at 933 (“The essential predicate for the *Aronson* test is the fact that a *decision* of the board of directors is being challenged in the derivative suit”).

⁶⁰ *Rales*, 634 A.2d. at 934.

⁶¹ 823 A.2d 492.

⁶² *Id.* at 494.

stock] to buyers who were in the dark about the reality of [the company's] (impliedly more troubled) financial status.”⁶³

Applying the principles established in both *Rales* and *Aronson*, the court dismissed the complaint for failure to plead demand futility with particularity. The court first rejected the plaintiffs’ assertion that each of the seven members of the company’s board was “interested” or lacked independence, noting the absence of any allegations sufficient to establish that five of the seven board members were “materially dependent” or “beholden” to either of the two other, allegedly conflicted directors.⁶⁴ The court then examined whether the impartiality of the five disinterested and independent directors was “compromised by the threat of personal liability.”⁶⁵ Reasoning that the complaint did not sufficiently set forth with particularity the predicates for personal director liability arising from the alleged failure to monitor the accounting irregularities, the court concluded that the “complaint fails to plead facts suggesting that a majority of the [company’s] board faces a sufficient threat of liability to compromise their ability to act impartially on a demand.”⁶⁶

The Delaware Supreme Court also recently addressed application of the *Rales* standard where, as here, a plaintiff asserts that demand should be excused because the defendant directors “face a substantial likelihood of liability” that renders them “personally interested in the outcome of the decision on whether to pursue the claims asserted in the complaint.”⁶⁷ The

⁶³ *Id.* at 496.

⁶⁴ *Id.* at 503.

⁶⁵ *Id.* at 503-07.

⁶⁶ *Id.* at 507.

⁶⁷ *Stone*, 2006 WL 3169168, at *3.

plaintiffs in *Stone* claimed that the defendant directors “utterly failed to implement any sort of statutorily required monitoring, reporting or information controls that would have enabled them to learn of problems requiring their attention.”⁶⁸ This alleged oversight failure, the plaintiffs claimed, resulted in the corporation paying \$50 million in civil penalties and fines arising from the failure of employees to file “Suspicious Activity Reports” as required by the federal Bank Secrecy Act.⁶⁹

The Supreme Court affirmed the Chancery Court’s dismissal of the complaint for failure to plead demand futility, explaining that there were no particularized factual allegations sufficient to establish that the directors could be personally liable because “only a sustained or systematic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists – will establish the lack of good faith that is a necessary condition to liability.”⁷⁰ “Such a test of liability – lack of good faith as evidenced by sustained or systematic failure of a director to exercise reasonable oversight – is quite high,” but such “a demanding test of liability in the oversight context is probably beneficial to corporate shareholders as a class.”⁷¹

Whether viewed under either the *Aronson* test (in light of the allegations that the defendants approved either the compensation paid to Falcone or Joseph or the alleged but clearly fictional “round-trip” transactions) or the *Rales* test (in light of the allegations that the defendants

⁶⁸ *Id.* at *1.

⁶⁹ *Id.*

⁷⁰ *Id.* at *9, quoting *Caremark*, 698 A.2d at 971.

⁷¹ *Id.* at *9.

failed to adequately exercise oversight of MMA's accounting practices or transactions), Plaintiff fails to meet the demand futility pleading requirements.

II. DEMAND WAS NOT FUTILE BECAUSE THE MMA BOARD IS INDEPENDENT AND DISINTERESTED.

A. The MMA Board Is Independent.

Plaintiff fails to allege sufficiently particularized facts that, if true, would support the allegation that a majority of the Board lacked independence or was interested in the challenged transactions and conduct. A director lacks "independence" if he or she makes decisions because of extraneous considerations or influences rather than on the corporate merits of the transaction.⁷² The *only* facts Plaintiff specifically alleges about six of the Board's eight outside directors -- Defendants Baum, Brown, Hillman, Lucas, McGregor and Mehlman (who alone represent a majority of the MMA Board) -- are that each served on the MMA Board and some also served on the Board's Audit Committee.⁷³ Plaintiff makes no other particularized factual assertion whatsoever with respect to these directors, much less any facts that, if true, would establish a lack of independence.

Plaintiff's allegations about the independence and disinterest of the two other outside directors -- Defendants Pratt and Berndt -- are also deficient. With respect to Pratt, the Complaint contains little more than an affirmation that he served on the Board's Audit Committee and the superfluous observation that he previously was employed by a company that

⁷² See *Aronson*, 473 A.2d at 816.

⁷³ Compl. ¶¶ 4, 6, 8, 10-12.

sold one of its divisions to MMA in an unrelated transaction in 2003.⁷⁴ Plaintiff further alleges that Defendant Pratt owns unspecified limited partnership and other interests in entities “related to [MMA’s] affordable housing investment business.”⁷⁵ The Complaint does not identify any such interests, nor state any facts from which the value of those interests could be determined or whether they are, in any way, material to Pratt. All that can be gleaned from the Complaint is that MMA acts as the asset manager for “these properties” and “Mr. Pratt will receive payments from his interests in these properties when they are sold.”⁷⁶ Most tellingly, Plaintiff fails to connect any of these alleged facts to the conduct or transactions giving rise to her claims.⁷⁷

Apparently recognizing this deficiency, Plaintiff alleges that each of the Director Defendants was “dominated and controlled” by Defendants Falcone and Joseph.⁷⁸ Plaintiff makes this allegation based on her apparent assumption that she has pleaded sufficient facts that, if proven, would establish that Joseph and Falcone each have some disqualifying interest in the

⁷⁴ Compl. ¶ 13 (alleging that “[MMA] acquired the tax credit division of Lend Lease in 2003. Mr. Pratt served Lend Lease in several capacities including Chief Executive Officer of Lend Lease Real Estate Investments (U.S.) from April 2001 through February 2003, shortly before its acquisition by MMA”).

⁷⁵ Compl. ¶ 13.

⁷⁶ *Id.*

⁷⁷ Not surprisingly, therefore, there is nothing in the Complaint that supports the Plaintiff’s conclusory assertion that “[t]he MMA Board of Directors reviewed, authorized and affirmed the transactions that gave rise to the sustained self-dealing by defendant[] . . . Pratt” Compl. ¶ 78. With respect to the eighth outside director, Defendant Berndt, the Complaint lacks sufficient particularized factual allegations that he was interested in any of the challenged transactions or otherwise lacks independence. While Plaintiff alleges that Berndt is managing partner of a law firm retained and paid several million dollars by MMA, Plaintiff fails to allege any specific facts about the nature of those services, who performs them or whether they have anything at all to do with any of the challenged transactions. Compl. ¶ 5.

⁷⁸ Compl. ¶ 82.

challenged transactions.⁷⁹ Even putting aside that this assumption lacks a well-pleaded factual foundation, the Complaint's allegations about these two directors dominating and controlling each of the other eight directors is plainly deficient under Delaware law.

The Complaint, in this respect, alleges only that "each of the Director Defendants owes his or her position and loyalty to defendants Joseph and Falcone, primary beneficiaries of the improper conduct alleged herein, by reason of the control and domination by Joseph and Falcone over every member of the Board and every office [sic] of the Company."⁸⁰ There is no other allegation in the Complaint -- conclusory, factual or otherwise -- to support this bald assertion.⁸¹ Delaware law is clear that a plaintiff asserting "domination and control of one or more directors must allege particularized facts manifesting 'a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.'"⁸² Courts have long recognized that "[t]he shorthand shibboleth of 'dominated and

⁷⁹ The Complaint describes in only conclusory and vague terms the conflicting personal interests that Falcone and Joseph are alleged to have in the Plaintiff's fictional "round trip" transactions. For example, with respect to two of the three "round-trip" transactions, the Complaint merely asserts that Joseph somehow "controlled" the borrower on the bonds owned by MMA. Compl. ¶¶ 65, 69. There is no allegation about how he controlled those entities; nor are there any allegations about the materiality of the allegedly conflicting interests these two directors are purported to have in these transactions.

⁸⁰ Compl. ¶ 82.

⁸¹ Even if Plaintiff had alleged sufficient facts to establish how Defendant Berndt's status as managing partner of a law firm that has received millions of dollars in revenue for services rendered to MMA allows Falcone and/or Joseph to dominate and control Berndt, fully seven other Director Defendants are beyond any such sphere of alleged control.

⁸² *Aronson*, 473 A.2d at 816 (citation omitted).

controlled directors' is insufficient" to survive a motion to dismiss without specific factual allegations which, if true, would support that assertion.⁸³

Here, Plaintiff alleges no such facts to support her "domination and control" theory. Plaintiff does not even assert that Falcone or Joseph nominated any of the outside directors; nor does she allege any facts to suggest that either Falcone or Joseph has the power to remove them.⁸⁴ Plaintiff also does not plead any mechanisms or relationships through which Falcone and Joseph could allegedly dominate or control a majority of MMA's Board. Plaintiff, therefore, has failed to allege any facts to rebut the business judgment presumption on the basis of a lack of director independence.⁸⁵

⁸³ *Id.*; see *In re J.P. Morgan Chase & Co. S'holders Litig.*, 906 A.2d 808, 821 (Del. Ch. 2005) ("Even in cases in which the CEO had a supermajority of voting power, courts have upheld outside directors' independence in the face of additional relationships").

⁸⁴ There is no allegation, for example, that Joseph and/or Falcone are majority or controlling shareholders. And, even if plaintiff could allege such facts (which she cannot), "proof of majority ownership does not strip the directors of the presumptions of independence." *In re Paxson Comm. Corp. S'holders Litig.*, 2001 WL 812028, at *9 (Del. Ch. Jul. 12, 2001); see *Aronson*, 473 A.2d at 816 ("it is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of the corporate election. That is the usual way a person becomes a corporate director").

⁸⁵ Notably, Delaware courts have dismissed complaints alleging "domination and control" notwithstanding factual allegations about means of control and director relationships far more extensive than the non-existent factual allegations contained in the present Complaint. See, e.g., *Beam ex rel. Martha Stewart Living Omnimedia Inc. v. Stewart*, 833 A.2d 961, 978 (Del. Ch. 2003) (allegation that controlling shareholder could fire a director was insufficient to establish "domination and control"); *In re J.P. Morgan*, 902 A.2d at 822 (allegation that director was a trustee of a museum that received charitable contributions made by company was insufficient to establish "domination and control"; similarly, allegation against three other directors that had significant ties to several large corporations which did business with J.P. Morgan was insufficient to establish "domination and control"). Here, the Court need not pause to assess the sufficiency of any such facts because none is pled. The Complaint is utterly devoid of *any* factual allegations that purportedly support the conclusory concept of domination and control.

B. The MMA Board Is Disinterested.

Similarly, Plaintiff has failed to plead with factual particularity that a majority of the MMA Board was interested in the challenged actions. A director is interested if he or she receives “a personal financial benefit from a transaction that is not equally shared by the stockholders.”⁸⁶ With respect to no fewer than six of the Board’s ten members -- Defendants Baum, Brown, Hillman, Lucas, McGregor and Mehlman -- the most that can be gleaned from the Complaint is Plaintiff’s generic assertion that all of Director Defendants “received their own stock options as compensation, thereby personally benefiting from improper conduct alleged herein.”⁸⁷ This conclusory assertion, however, is not supported by any well-pleaded facts that establish any connection whatsoever between the alleged director stock options and the transactions that Plaintiff describes in her Complaint. She does not even allege when the stock options were granted or under what terms and conditions. And there certainly are no facts alleged that would establish that any outside directors actually exercised any such options or sold any MMA stock under circumstances that even remotely would suggest a connection to the alleged transactions.

In addition, Delaware courts commend, not condemn (as Plaintiff would have it) stock compensation to otherwise disinterested and independent directors because it further aligns director interests with that of other shareholders.⁸⁸ Indeed, if stock option compensation alone

⁸⁶ *Rales*, 634 A.2d at 936; *see Aronson*, 473 A.2d at 812.

⁸⁷ Compl. ¶ 87.

⁸⁸ *Cf. McGowan v. Ferro*, 859 A.2d 1012, 1030 (Del. Ch. 2004) (“Delaware law is clear that substantial stockholdings in a company by directors creates powerful incentives to get the best deal in the sale of that company”) (citations omitted); *Orman v. Cullman*, 794 A.2d 5, 27 n.56 (Del. Ch. 2002) (same).

were sufficient to establish a disqualifying interest in any matter considered by a Board, then few, if any, Board decisions would be entitled to the business judgment rule presumption and many board members would be disabled from effectively overseeing their companies' affairs.

In *Guttman*, the court considered a similar contention about director self-interest and rejected it as an improper “attempt to extend concepts designed to fit classic self-dealing transactions into another context that is quite different.”⁸⁹ The plaintiffs in *Guttman* claimed that each of the board’s seven members was “interested” for purposes of considering a demand because they each allegedly benefited from trading in the company’s stock at a time when they knew, or should have known, that the company’s financial disclosures were misleading and artificially inflated the company’s stock price.⁹⁰ In rejecting this assertion, the court considered it “unwise to formulate a common law rule that makes a director ‘interested’ whenever a derivative plaintiff cursorily alleges that [the director] made sales of company stock in the market at a time when he possessed material, non-public information.”⁹¹ Instead, the court explained, any finding of “interest” sufficient to excuse demand based on alleged interests in company stock must be based on particularized factual allegations that go beyond the “wholly conclusory” allegation that the directors benefited by the purported affect of alleged accounting irregularities on the value of their stock.⁹²

Here, of course, Plaintiff does not even plead that any stock sales occurred, much less any sales based on inside information about alleged accounting irregularities. The

⁸⁹ 823 A.2d at 502.

⁹⁰ *Id.* at 494, 502.

⁹¹ *Id.* at 502.

⁹² *Id.* at 503-04.

Complaint does not even explain how, when or under what circumstances any particular director had notice or knowledge that the alleged accounting practices were improper or had any material impact on the Company's financial disclosures. Moreover, Plaintiff does not allege that any of the outside directors' personal interests in their stock options established in any way a financial interest in the challenged transactions that was in any way different from all other MMA shareholders.⁹³

Finally, Plaintiff does not allege, as she must in order to defeat this Motion, that the stock options represented anything other than ordinary and customary compensation that is granted to directors in return for the board services they perform. Nor does Plaintiff allege that the compensation these outside directors received was "material" to their respective interests:

[I]t is not enough to establish the interest of a director by alleging that he received *any* benefit not equally shared by the stockholders. Such benefit must be alleged to be *material* to that director. Materiality means that the alleged benefit was significant enough 'in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest.'⁹⁴

Here, because Plaintiff has alleged no facts about the number or value of the stock options the outside directors allegedly received or their individual economic circumstances, there is no way

⁹³ While Plaintiff alleges that the "MMA Board of Directors reviewed, authorized and affirmed the transactions that gave rise to the sustained self-dealing by defendants . . . Pratt and Banks" (Compl. ¶ 78), the Complaint is bereft of any factual allegations which, if true, would sustain the charge that Pratt and Banks engaged in self-interested transactions. Banks, of course, is not even named as a Defendant in this case.

⁹⁴ *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002).

to perform the required materiality analysis (even if Plaintiff had alleged materiality, which she did not).⁹⁵

Plaintiff, therefore, has failed to allege any facts to rebut the business judgment presumption on the basis of director self-interest and demand cannot be excused under the first prong of the *Aronson* test.

III. THE COMPLAINT FAILS TO ALLEGE PARTICULARIZED FACTS SUFFICIENT TO SHOW THAT THE BOARD MADE A DECISION NOT PROTECTED BY THE BUSINESS JUDGMENT RULE.

Plaintiff also has failed to allege any particularized facts that, if true, would rebut the bedrock presumption that “the challenged transaction[s] otherwise the product of a valid exercise of business judgment.”⁹⁶ Under this second prong of the *Aronson* test, Plaintiff “must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision.”⁹⁷

Plaintiff carries a “substantial burden” of rebutting the business judgment presumption because “the second prong of the *Aronson* test is ‘directed to *extreme* cases in

⁹⁵ Similarly lacking in particularized facts is the conclusory assertion that “defendants have caused the Company to continually raise additional capital by issuing debt and equity” in order to “maintain its dividend and ability to make loans” for the personal benefit of the Director Defendants. (Compl. ¶ 73.) As made plain by the very financial statements on which Plaintiff relies, MMA funds its dividends through income, not debt or equity. In any event, dividend payments are, of course, made to all shareholders on equal terms.

⁹⁶ *Aronson*, 473 A.2d at 814; *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 286 (Del. Ch. 2003) (citing *Aronson* and concluding that “plaintiffs must allege particularized facts that raise doubt about whether the challenged transaction is entitled to the protection of the business judgment rule”).

⁹⁷ *In re Walt Disney*, 825 A.2d at 286.

which, despite the appearance of independence and disinterest, a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review.’⁹⁸ This “substantial burden” to overcome the business judgment presumption requires Plaintiff to plead particularized facts establishing that the Director Defendants acted with gross negligence.⁹⁹ Gross negligence requires a showing that the Director Defendants completely failed to inform themselves, were recklessly indifferent or deliberately disregarded MMA’s shareholders or undertook actions wholly “without the bounds of reason.”¹⁰⁰ Absent any such “particularized allegations to the contrary, the directors are presumed to have acted on an informed basis and in the honest belief that their decisions were in furtherance of the best interests of the corporation and its shareholders.”¹⁰¹

Here, Plaintiff alleges fiduciary breaches arising from the MMA Board’s alleged approval of (a) the alleged “round-trip” transactions involving entities allegedly controlled or owned by Falcone or Joseph; and (b) the performance-based compensation for Falcone and Joseph.¹⁰² Plaintiff, however, does not allege any particularized, well-pleaded facts sufficient to show that any member of the MMA Board acted recklessly or in deliberate disregard of MMA’s shareholders with respect to either the challenged compensation or the fictitious “round-trip” transactions described in the Complaint.

⁹⁸ *Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *7 (Mar. 17, 2006) (citations omitted) (emphasis added).

⁹⁹ *Grobow v. Perot*, 539 A.2d 180, 190 (Del. 1988) (citation omitted), *overruled on other grounds*, *Brehm*, 746 A.2d 244.

¹⁰⁰ *Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *12 (Apr. 5, 1990) (quotation omitted).

¹⁰¹ *Highland Legacy*, 2006 WL 741939, at *7.

¹⁰² Compl. ¶¶ 18, 78, 87.

As a threshold matter, the Complaint does not and cannot allege any particularized facts that, if proven, would show when, how, or under what circumstances the Board even considered the so-called “round-trip” transactions, much less approved them. This omission is unsurprising, because the alleged transactions -- which Plaintiff pleads based only on “information and belief” -- did not actually occur. Where, as here, “there is no conscious decision by the directors to act or refrain from acting, the business judgment rule has no application” because the absence of board action “makes it impossible to perform the essential inquiry contemplated by *Aronson* – whether the directors have acted in conformity with the business judgment rule in approving the challenged transaction.”¹⁰³ For that reason alone, Plaintiff does not and cannot plead any facts showing that Board took any specific action concerning the alleged “round-trip” transactions and she cannot, therefore, rely on the second prong of *Aronson* to excuse demand with respect to them.¹⁰⁴

Moreover, to the extent the Complaint makes any references at all to specific actions undertaken by the Board, it does not allege any particularized facts that the outside directors acted recklessly or in bad faith with respect to the alleged “round-trip” transactions. To the contrary, the only specific facts alleged in the Complaint about what the Board actually did in connection with these fictitious transactions merely confirm that the Board was vigilant about, and consistently well aware of, its obligations to fully assess and consider any transactions for which its approval is required under the Company’s Operating Agreement. Although the Complaint contains no particularized facts about that alleged approval process as it relates to the

¹⁰³ *Rales*, 634 A.2d at 933.

¹⁰⁴ Plaintiff alleges in conclusory terms that the Board approved these transactions but she does not, and cannot, identify any particularized facts about when, how and under what circumstances that alleged approval supposedly occurred.

transactions Plaintiff alleges, it does confirm that MMA's Board generally complies with its obligation to "actively review, authorize, and affirm the transactions discussed herein."¹⁰⁵

In addition, the Complaint fails to allege any facts sufficient to establish that the outside directors knew or had any reason to know that fictitious transactions involved "related parties." The Complaint only contends in conclusory terms that Defendants Falcone and Joseph owned some unspecified "indirect" and "direct" minority interests in one of the properties that served as collateral on one of the bonds maintained by MMA in its portfolio.¹⁰⁶ Beyond these vague assertions, Plaintiff claims only that Joseph -- in some way that the Complaint is unable to identify -- "controlled" the borrowers on one of the bonds when MMA obtained it in a transaction that occurred in 2001,¹⁰⁷ and that an unidentified "Joseph-controlled entity was the original borrower" on a bond that originated in 2000.¹⁰⁸

These tentative and specious allegations fall far short of the particularized facts Plaintiff must plead to support her assertion that the alleged transactions were outside the business judgment protections because they were "for the defendant's personal enrichment" and served only "to maintain control over the assets that would personally benefit each of them."¹⁰⁹ Indeed, there is nothing in the Complaint that supports the assertion that, even if these transactions occurred (which they did not), the Board was grossly negligent or acted in bad faith with respect to them.

¹⁰⁵ Compl. ¶ 57.

¹⁰⁶ *Id.* ¶ 59.

¹⁰⁷ *Id.* ¶ 59.

¹⁰⁸ *Id.* ¶ 69.

¹⁰⁹ *Id.* ¶¶ 48, 54.

The Complaint also does not make any allegations (factual or legal, specific or conclusory) suggesting that any of the outside directors failed to adequately inform themselves when deciding to approve the performance-based compensation program for Defendants Falcone and Joseph or the transactions between MMA and entities allegedly partially or fully owned or controlled by Falcone and/or Joseph. Nor has Plaintiff alleged any particularized facts suggesting that a majority of the MMA Board members “personally acted without honesty and good faith” in approving the performance-based compensation.¹¹⁰ Delaware law is clear that, absent such allegations, a plaintiff cannot be excused from making a pre-suit demand under the second prong of *Aronson*.¹¹¹

Therefore, as in *J.P. Morgan Chase*, because of “the absence of particularized factual allegations calling into question the directors’ good faith, honesty, or lack of adequate information,” the MMA Board’s alleged decisions to approve the performance-based compensation and the allegedly interested-party transactions are “entitled to the protection of the business judgment rule.”¹¹²

¹¹⁰ *In re J.P. Morgan Chase*, 906 A.2d at 824.

¹¹¹ *Brehm*, 746 A.2d at 261-62 (refusing to excuse pre-suit demand because directors’ decision to approve extremely large severance package was “fully protected” by business judgment rule where Directors acted in good faith); *Highland Legacy*, 2006 WL 741939, at *7 (declining to excuse demand under the second prong of *Aronson* because the complaint did not allege sufficient facts showing “that the directors failed to adequately inform themselves” concerning allegedly excessive compensation paid to two financial advisors); *J.P. Morgan Chase*, 906 A.2d at 824 (declining to excuse demand because “[n]othing in the complaint indicates that the JPMC Board was not adequately informed” about the merger negotiations); *Litt v. Wycoff*, 2003 WL 1794724, at *10 (Mar. 28, 2003) (refusing to excuse pre-suit demand because Plaintiff had failed in challenging incentive-based compensation to make “particularized allegations about ‘comparable compensation at comparable institutions’ or that the [executive compensation] ‘was disproportionate to the services rendered’ ”).

¹¹² 906 A.2d at 825.

These same claims also fail under a corporate waste analysis. Plaintiff has not alleged particularized facts that, if true, would be sufficient to establish that the MMA Board acted “on terms that no person of ordinary, sound business judgment could conclude represents a fair exchange.”¹¹³ This “extreme test is rarely satisfied, because if a reasonable person could conclude the board’s action made business sense, the inquiry ends and the complaint will be dismissed.”¹¹⁴ As this Court has observed, the correct corporate waste standard requires Plaintiff to allege “particularized facts showing that the corporation, in essence, gave away assets for no consideration.”¹¹⁵

Here, Plaintiff has not alleged any facts to suggest that the MMA Board “gave away corporate assets for no consideration” with respect to either the performance-based compensation or the alleged interested-party transactions. Plaintiff’s claims, therefore, must be dismissed under the second prong of *Aronson* because pre-suit demand cannot be excused.

IV. PLAINTIFF FAILS TO PLEAD SUFFICIENT FACTS TO EXCUSE DEMAND RELATED TO HER *CAREMARK* OVERSIGHT CLAIM.

Plaintiff’s *Caremark* oversight claims also must be dismissed for failure to sufficiently plead demand futility. Plaintiff appears to claim that the MMA Board failed to properly oversee: (a) the accounting of certain assets in MMA’s bond portfolio as “other-than-temporarily impaired” under FAS 115; (b) the gains Plaintiff alleges that MMA reported on the

¹¹³ *Green v. Phillips*, 1996 WL 342093, at *5 (June 19, 1996), quoting *Steiner v. Meyerson*, 1995 WL 441999, at *1 (July 19, 1995).

¹¹⁴ *Green*, 1996 WL 342096, at *5.

¹¹⁵ *Highland Legacy*, 2006 WL 741939, at *7 n.76, quoting *Green*, 1996 WL 342096, at *5.

alleged sale of three assets and the “impairments” MMA took on those assets; and (c) the so-called “round-trip” transactions that Plaintiff mistakenly asserts took place.

Plaintiff’s assertion of demand futility in connection with these oversight claims requires her to plead particularized facts sufficient to show that the MMA Board could not have “properly exercised its independent and disinterested business judgment in responding to a demand.”¹¹⁶ Here, Plaintiff primarily attempts to meet this burden by asserting, in only general, conclusory terms, that the Director Defendants “cannot be expected to prosecute claims against themselves if plaintiff demanded that they do so” because their “substantial risk of liability renders futile any demand”¹¹⁷

Where, as here, a plaintiff is relying on the threat of personal liability to excuse demand on a *Caremark* oversight claim, she must plead particularized facts showing “a failure to act in good faith [that] requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the duty of care (i.e., gross negligence).”¹¹⁸ As the Delaware Supreme Court recently explained, the plaintiff must plead with particularity the following “necessary conditions predicate” for such liability:

(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of

¹¹⁶ *Rales*, 634 A.2d at 934.

¹¹⁷ Compl. ¶ 83. *Compare Stone*, 2006 WL 3169168, at *3 (“The plaintiffs attempt to satisfy the *Rales* test in this proceeding by asserting that the incumbent defendant directors ‘face a substantial likelihood of liability’ that renders them ‘personally interested in the outcome of the decision on whether to pursue the claims asserted in the complaint,’ and are therefore not disinterested or independent”).

¹¹⁸ *Stone*, 2006 WL 3169168, at *5.

liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.¹¹⁹

Plaintiff does not, and cannot, meet this pleading burden. *First*, she does not and cannot plead with any factual particularity that the Defendant Directors failed to implement accounting reporting systems or controls. The Complaint, in fact, is replete with specific factual allegations demonstrating that MMA and/or the Defendant Directors established and maintained such systems and controls:

- MMA has an Audit Committee whose principal duties include: “monitoring the integrity of the financial reporting processes and systems of internal controls; monitoring the Company’s compliance with legal and regulatory requirements; monitoring the independence, qualifications, and performance of the Company’s independent registered public accounting firm and internal audit function.”¹²⁰
- MMA considers and applies the accounting directive concerning other-than-temporarily impaired assets (FAS 115) in its financial statements.¹²¹
- MMA evaluated and determined that a November 2005 amendment to FAS 115 “had no material effect on [MMA’s] reported financial condition or results of operations.”¹²²
- MMA performed reviews of the properties collateralizing each bond in its portfolio.¹²³
- MMA has an Audit Committee that has reviewed with MMA’s management “material weaknesses related to the financial reporting process, including the sufficiency of resources dedicated to the Company’s accounting function.”¹²⁴

Far from establishing a predicate for demand futility, these allegations and admissions confirm that the Board has established and maintained reporting systems and controls and been fully aware of its oversight responsibilities. Thus, Plaintiff has failed to allege

¹¹⁹ *Id.* at *6.

¹²⁰ Compl. ¶ 84.

¹²¹ *Id.* ¶ 44.

¹²² *Id.* ¶ 44.

¹²³ *Id.* ¶ 45.

¹²⁴ *Id.* ¶ 84.

particularized facts to support the conclusion that the Director Defendants are “guilty of a sustained failure to exercise their oversight function.”¹²⁵ To the contrary, Plaintiff’s admissions quoted above refute any such allegation.

Second, Plaintiff has not pled with factual particularity that the Defendant Directors *consciously* failed to monitor or oversee MMA’s operations and accounting practices. The law, in this regard, is clear: A director may not be liable for an alleged failure to prevent wrong doing unless he or she “ignores obvious danger signs.”¹²⁶ “[A]bsent grounds to suspect deception, neither corporate boards nor senior officers can be charged with wrongdoing simply for assuming the integrity of employees and the honesty of their dealing on the company’s behalf.”¹²⁷ Thus, “[i]n ‘the absence of red flags, good faith in the context of oversight must be measured by the directors’ actions ‘to assure a reasonable information and reporting system exists’ and not by second-guessing after the occurrence of employee conduct that results in an unintended adverse outcome.”¹²⁸

The Chancery Court’s decision in *Rattner* is particularly instructive on this point. The plaintiff in that case, like Plaintiff here, *alleged* that director defendants breached their fiduciary duties “by inadequately maintaining accounting controls and utilizing improper accounting and audit practices.”¹²⁹ The complaint in *Rattner* was strikingly similar to this Complaint in all material respects. As described by the Court:

¹²⁵ *Caremark*, 698 A.2d at 971.

¹²⁶ *Baxter*, 654 A.2d at 1270-71.

¹²⁷ *Caremark*, 698 A.2d at 969.

¹²⁸ *Stone*, 2006 WL 3169168 at *9, *quoting*, *Caremark* at 967-68, 971.

¹²⁹ *Rattner*, 2003 WL 22284323, at *1.

The Amended Complaint sets forth vast tracts of quoted materials from public sources, detailing wrongdoings in the form of alleged misstatements. The Amended Complaint also summarizes numerous SEC rules and regulations, and FASB and GAAP standards. However, conspicuously absent from any of the Amended Complaint's allegations are particularized facts regarding the Company's internal financial controls during the Relevant Period, notably the actions and practices of [the company's] audit committee. The Amended Complaint also is similarly wanting of any facts regarding the Board's involvement in the preparation of the financial statements and the release of financial information to the market.¹³⁰

Here, as well, the Complaint also offers no particularized facts concerning the processes through which the Board was allegedly involved in the financial reporting and transactions at issues. It does not, for example, contain any facts describing the process through which MMA accounting personnel determined that certain assets should be considered only temporarily impaired; no facts about whether MMA has (or does not have) an outside accountant, an internal accounting department, or an outside auditor; no facts about the nature of the work performed by MMA's Audit Committee or whether any of that work involved this particular accounting statistic; no facts about who, if anyone, advised the Audit Committee and whether any member of the Committee specifically discussed and approved the "other-than-temporarily impaired" treatment of the assets described in the Complaint. Nor does the Complaint offer any particularized facts about MMA's financial controls (other than admitting that such controls exist); about how and who at MMA analyzed and prepared the financial statements related to the value of MMA's bond portfolio and the gains reported on particular transactions; or about the extent to which the

¹³⁰ *Id.* at *12.

Director Defendants were personally involved in preparing and disseminating the financial information at issue.¹³¹

Instead, the only cognizable inference that can be drawn from reading the Complaint is that MMA has an Audit Committee on which Baum, Brown, Hillman, Mehlman and Pratt serve.¹³² This allegation is plainly insufficient to overcome this Motion. Here, as in *Rattner*, Plaintiff's Complaint:

is quick to prattle off numerous alleged infractions of laws, rules and principles, [but] never notes the accounting procedures employed by the Company or the Board's involvement in [the Company's] financial recording and reporting systems. The only information one can snare from the Amended Complaint is that there exists a body of rules regarding the accuracy of recording and reporting financial information which may have been violated. . . . Therefore, I am unable to conclude that a majority of the Board faces a substantial likelihood of liability for failing to oversee [the Company's] compliance with required accounting and disclosure standards.¹³³

In addition, like the plaintiff in *Guttman*, Plaintiff here does not allege any "reasons why particular defendants should have been on notice of the accounting irregularities that are alleged."¹³⁴ The Complaint appears to suggest that the Board should have recognized that the value of certain assets should have been reported differently based on the bids received

¹³¹ *Id.* at *13; *Guttman*, 823 A.2d at 498 (dismissing complaint that lacked particularized facts concerning "the status of the company's financial controls during the Contested Period, including whether the company had an audit committee during that period, how often and how long it met, who advised the committee, and whether the committee discussed and approved any of the allegedly improper accounting practices" and was "devoid of any pleading regarding the full board's involvement in the preparation and approval of the company's financial statements").

¹³² Compl. ¶¶ 4, 6, 8, 12, 13

¹³³ *Rattner*, 2003 WL 22284323, at *13; *Guttman*, 823 A.2d at 498.

¹³⁴ *Guttman*, 823 A.2d at 498.

on those assets as the result of an auction.¹³⁵ It also suggests that the Board should have realized that if some of the capitalization rates reported by Moody's Investor Service had been used, then the assets offered in that auction would have been valued differently than what was reported in the Company's financial statements.¹³⁶ There is nothing in the Complaint, however, that suggests that MMA ignored or did not consider either the results of the auction or the Moody's capitalization rates when it developed and disclosed its financial statements. Nor is there anything in the Complaint that explains why such considerations would lead to different or more reliable financial reporting of these assets, let alone any facts that suggest that such considerations were "red flags" brought to the attention of the Board.

Third, Plaintiff is unable to credibly allege any "serious threat" of potential personal liability to excuse demand where, as here, MMA has expressly exculpated and indemnified its Board against any liability for the conduct alleged in the Complaint. As the Delaware Supreme court recently noted in *Stone*, critical to a "personal liability" demand-excused argument is whether the directors are indemnified against, or otherwise exculpated from, any alleged liability by reason of the company's formation documents.¹³⁷ This is because a director who is exculpated from or indemnified against potential liability can impartially respond to a demand without being compromised by a "serious threat" of liability.

Here, the Director Defendants are *expressly* immunized under MMA's Amended and Restated Certificate of Formation and Operating Agreement "for any act or omission

¹³⁵ Compl. ¶ 37.

¹³⁶ Compl. ¶¶ 38-40.

¹³⁷ 2006 WL 3169168, at *4 (demand excuse based upon personal liability depends upon whether alleged conduct can be exculpated under certificate of incorporation).

performed or omitted by him or her, or for any decision, except in the case of fraudulent or illegal conduct”¹³⁸ No such liability is threatened here. Indeed, although Plaintiff pleads in conclusory terms that the Director Defendants “actively condoned and facilitated a campaign of deceit upon the shareholders of the Company,”¹³⁹ she does not allege any particularized facts to support any such claim. Indeed, as set forth above, the Complaint lacks any detail about what role, if any, each Director Defendant had in negotiating, consummating or approving the alleged transactions or in making the determination about how to report the value of certain assets or gains in the Company’s portfolio. Nor are there any particularized factual allegations which, if proven, would support a reasonable inference that the Defendant Directors consciously engaged in any fraudulent or illegal conduct. Plaintiff, instead, only summarily alleges that MMA -- not its Board members -- issued financial statements that contained allegedly incorrect information about the gains the Company reported concerning Plaintiff’s fictitious transactions. Such cursory allegations are plainly insufficient to plead around the application of MMA’s exculpatory and indemnity provision for the Director Defendants.

¹³⁸ *Amended And Restated Certificate of Formation and Operating Agreement of Municipal Mortgage and Equity, L.L.C.*, Article 8.1 (dated May 9, 2002). A true and correct copy of this Operating Agreement, which is expressly incorporated by reference in Paragraph 57 of the Complaint, is attached to this Brief as Exhibit B. This exculpation and indemnification provision is modeled on the “broad statutory authority” that Section 18-108 of the Limited Liability Company Act (“LLCA”) provides to limited liability companies like MMA. *Morgan v. Grace*, Civ. A. No. 20430 (SPL), 2003 WL 22461916, at *3 (Del. Ch. Oct. 29, 2003). As this Court has noted, “[t]he LLCA explicitly authorizes limited liability companies to indemnify [directors] ‘ . . . from and against any and all claims and demands whatsoever.’ ” *Id.* at *2 n.15. The permissible scope of any such exculpation, therefore, is substantially broader than that allowed under the 102(b)(7) exculpation. *Id.*; see *Stone*, 2006 WL 3169168, at *4.

¹³⁹ Compl. ¶ 87.

Finally, Plaintiffs' assertion that the directors cannot impartially consider a demand because they confront potential liability cannot be reconciled with the Plaintiffs' utter failure to plead with any particularity the alleged harm that she claims may, someday, befall MMA by reason of the accounting practices and transactions alleged in the Complaint. Without any plausible theory of actual harm to the Company, it is inconceivable that the Director Defendants would be concerned about their potential liability in responding to a demand. Plaintiff's Complaint, in this regard, lacks even the rote allegations of harm that typify a *Caremark* claim: That the alleged failed oversight led to actual -- not speculative -- criminal or civil/regulatory investigations, guilty pleas, fines or other civil liabilities. Indeed, because Plaintiff cannot plead any such actual harm to the Company, she instead offers only her speculation that the alleged conduct "*will have caused* the Company to expend substantial sums to respond to investigations and inquiries, federal securities suits and public concerns" or "*will have caused* MMA to incur substantial losses as a result of harm to its public reputation, increased regulatory scrutiny and *potentially* significant financial penalties."¹⁴⁰ Such "conclusory and cryptic allegations" are "insufficient to satisfy the demand excusal requirements of Court of Chancery Rule 23.1" because they "leave[] far too much to the imagination."¹⁴¹

¹⁴⁰ Compl. ¶ 79 (emphasis added).

¹⁴¹ *Rattner*, 2003 WL 22284323, at *14. Notably, even where plaintiffs allege that actual harm and damages have occurred by reason of substantial government investigations or other civil or criminal liabilities, Delaware courts routinely dismiss *Caremark* oversight claims for failure to plead demand futility because the plaintiff is confusing a "bad outcome with bad faith." *Stone*, 2006 WL 3169168, at *9 ("The lacuna in plaintiffs' argument is a failure to recognize that the directors' good faith exercise of oversight responsibility may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability."); *see also*, *David B. Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, at *3, *5 (Feb. 13, 2006) (complaint dismissed despite numerous civil suits and investigations and fines by the SEC, New York State, and New York City); *Rattner*, 2003 WL 22284323, at *13 (complaint dismissed despite regulatory
(continued . . .)

In sum, based on both what is alleged and what is not, Plaintiff does not, and cannot, meet her stringent burden of pleading *particularized* facts sufficient to excuse pre-suit demand. Her Complaint should be dismissed accordingly.

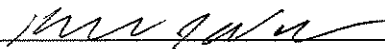
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investigations and several securities fraud class-action lawsuits); *Beam*, 833 A.2d at 975-76 (complaint dismissed despite criminal indictment and SEC investigations); *In re Citigroup S'holders Litig.*, 2003 WL 21384599, at *2 (June 5, 2003) (complaint dismissed despite company's alleged involvement in the collapse of Enron); *Guttman*, 823 A.2d at 498 (complaint dismissed despite SEC investigation into alleged misconduct).

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to grant this motion with prejudice concerning all claims of the Complaint.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP



Kenneth J. Nachbar (#2067)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Defendants

OF COUNSEL:

CLIFFORD CHANCE US LLP
James B. Weidner
31 West 52nd Street
New York, New York 10019
(212) 878-8000

Jon R. Roellke
Jeffrey H. Drichta
2001 K Street, NW
Washington, DC 20008
(202) 912-5000

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