EFiled: Jan 28 2009 4:08PM EST
Transaction ID 23510815
Case No. 3338-CC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CITIGROUP INC. SHAREHOLDER DERIVATIVE LITIGATION	CONSOLIDATED C.A. NO. 3338-CC

DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS OR STAY THIS ACTION OR, IN THE ALTERNATIVE, TO DISMISS THE CONSOLIDATED SECOND AMENDED DERIVATIVE COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs offer no reason to force Citigroup—the nominal plaintiff in both this action and the parallel federal derivative action—to litigate the same claims against the same defendants in two different forums. Such duplicative litigation would waste judicial and Company resources during difficult financial times, and would benefit no one. Because: (1) the federal derivative action pending in the Southern District of New York is in the same procedural posture as this action, (2) the federal derivative complaint includes, in addition to the claims brought here, claims that can only be adjudicated in federal court, and (3) the federal derivative action is being coordinated with other federal actions arising from the same operative facts; this action should be stayed or dismissed in favor of the federal derivative action in New York

In the alternative, the complaint should be dismissed under Court of Chancery Rule 23.1 for failure to make a pre-suit demand upon Citigroup's Board of Directors. Plaintiffs seek to usurp the Board's authority to make litigation decisions regarding Citigroup's subprime-related writedowns. Plaintiffs argue that a demand would have been futile because the Directors face a "substantial likelihood of liability" for ignoring purported "red flags" of corporate misconduct. However, none of plaintiffs' purported "red flags"—public reports of a general market downturn—was specifically about Citigroup, much less suggestive of wrongdoing within the Company in connection with its subprime-related investments. Moreover, plaintiffs provide no persuasive reason why writedowns and losses that are not unique to Citigroup would result in a "substantial likelihood of personal liability" for the Directors under the very demanding Delaware legal standard applied to failure-of-oversight claims. Because plaintiffs fail to justify the substitution of their own judgment for the judgment of the Board, the complaint should be dismissed pursuant to Rule 23.1.

In the alternative, the complaint should be dismissed under Court of Chancery Rule 12(b)(6) for failure to plead adequately claims for breach of fiduciary duty, waste and mismanagement.

ARGUMENT

I. THIS ACTION SHOULD BE STAYED OR DISMISSED IN FAVOR OF THE FEDERAL DERIVATIVE ACTION.

A. Defendants Are Not Estopped from Seeking a Stay or Dismissal in Favor of the Federal Action.

Plaintiffs assert that defendants are estopped from seeking a stay or dismissal of this action in favor of the parallel federal action because defendants "consented" to litigate in Delaware by not moving for a stay when they filed their original motion to dismiss the First Consolidated Amended Complaint in April 2008. (Opp. Mem. at 1, 23.) Plaintiffs offer no valid support for this legal theory, because there is none.[1]

Defendants' original motion to dismiss (filed in April 2008) became moot when plaintiffs chose to withdraw the Consolidated Amended Derivative Complaint rather than to respond to defendants' motion. Since that time, substantial developments have occurred in the federal derivative action pending in the Southern District of New York that favor a stay or dismissal of this action: lead plaintiff and lead counsel were appointed (in August 2008) after extensive briefing and oral argument, a scheduling order was entered (in November 2008), a consolidated

[1] Plaintiffs' citation to 1 David A. Drexler, Lewis Black, Jr., A. Gilchrist Sparks III, *Delaware Corporation Law and Practice* § 11-1[a], at 11-7 (2008) (Opp. Mem. at 23, Trans. ID 23177618) is unavailing. The fact that Delaware corporations may "sue or be sued"—the concept addressed on page 11-7 of the Drexler treatise—has nothing to do with the notion that defendants have somehow consented to litigate this case in Delaware. § 11-1[a] of the text does not have a page 11-7, and neither § 11-1[a] nor page 11-7 discusses estoppel.

complaint was filed that is substantively similar to the complaint in this action, and defendants have briefed a motion to dismiss.

To state a claim for estoppel, plaintiffs must show that they detrimentally relied on defendants' conduct. *See VonFeldt v. Stifel Fin. Corp.*, 1999 WL 413393, at *4 (Del. Ch. June 11, 1999) (granting estoppel where defendant led plaintiff and court to believe that it would not raise a certain defense, actively blocked discovery relevant to that defense on the grounds that it was irrelevant, and raised the defense only after trial was complete). Plaintiffs do not even attempt to meet this burden. Nor can they. Plaintiffs did not change their position in response to defendants' original motion to dismiss; they neither responded to the motion nor prosecuted their claim vigorously. Having taken considerable time to prepare and file their Consolidated Second Amended Derivative Complaint, plaintiffs cannot reasonably argue that defendants are bound to the state of affairs at the time of the original complaint, and their claim of estoppel fails.

B. A Stay or Dismissal of This Action is Warranted on *Forum Non Conveniens* Grounds.

This Court should exercise its discretion to stay or dismiss this action, in favor of the parallel federal derivative action, in order to eliminate duplicative proceedings and prevent waste of judicial and financial resources. *See In re Bear Stearns Cos. S'holder Litig.*, 2008 WL 959992, at *7 (Del. Ch. Apr. 9, 2008) ("Duplicative proceedings are disfavored because they waste judicial and financial resources, and because the competing proceedings create the appearance of an unseemly race to decide with a potential for inconsistent rulings.").[2] Even in

[2] The standard for a stay is much lower than the standard for dismissal. "[W]here two lawsuits are simultaneously filed—one in a Delaware state court and the other in a different forum—the Delaware court should decide a motion to stay the Delaware action as a discretionary matter, without giving deference to either party's choice of forum." *HFTP Invs., L.L.C.* v. *ARIAD Pharm., Inc.*, 752 A.2d 115, 122 (Del. Ch. 1999). The court is simply to focus upon

(footnote continued)

AIG Inc. Consolidated Derivative Litig., C.A. No. 759-VCS (Del. Ch. May 31, 2005) (Transcript), a case plaintiffs cite as a precedent for maintaining two derivative actions in different forums (Opp. Mem. at 27–28), Vice Chancellor Strine expressed frustration with the inefficiency of having two cases proceeding in parallel, and asked the plaintiffs to coordinate and decide among themselves where the action should proceed: "frankly, if you're all truly trying to do what's best for AIG as opposed to what's best for your individual law firms, you might be able to forge a division of responsibility for everyone." (Ex. 14 at 79.)[3]

Here, plaintiffs argue that this action should proceed in parallel to the federal derivative action because: (1) the two actions are "fundamentally different" (Opp. Mem. at 33–36), (2) this action is "procedurally further advanced" (Opp. Mem. at 37), and (3) this action involves "novel issues of Delaware law" (Opp. Mem. at 26–31). All of these assertions are demonstrably false.

First, there can be no reasonable dispute that this action and the federal derivative action arise from the same operative facts—the events that preceded Citigroup's substantial writedowns in late 2007 on subprime-related assets. The complaints speak for themselves:

> "This action is brought . . . to recover for the Company its losses arising from its exposure to the subprime lending market, an exposure to which defendants—Citigroup's senior management and Board of Directors—improvidently subjected the Company." (Second Consolidated Amended Complaint in Delaware, ¶ 1.)

(footnote continued)

"which forum would be the more easy, expeditious, and inexpensive in which to litigate" without imposing a "special or heightened burden of persuasion." *Id.* (internal quotation omitted).

[3] Citations in the form of "¶ __" refer to paragraphs in the Consolidated Second Amended Derivative Complaint (the "Complaint") (Trans. ID 21126257). Citations in the form of "Ex. __" refer to exhibits attached to the Declaration of John D. Hendershot in Support of Defendants' Motion to Dismiss or Stay this Action or, in the Alternative, to Dismiss the Consolidated Second Amended Derivative Complaint (Trans. ID 22759883).

> "This shareholders' derivative action is brought in the right of, and for the benefit of nominal defendant Citigroup . . . against its former Chief Executive Officer . . . its officers and former officers . . as well as members and former members of the Board of Directors . . . all of who authorized, or through abdication of duty permitted, and failed to disclose, the Company's subjection of itself to vast exposure in its subprime portfolio at expense of Citigroup and its shareholders." (Verified Consolidated Derivative Action Complaint in S.D.N.Y., Ex. 35 ¶ 1.)

Contrary to plaintiffs' arguments (Opp. Mem. at 33–34), the New York complaint includes a *Caremark* claim (Ex. 35 ¶¶ 3, 45, 48–83, 88–95, 107–10, 116–22, 141–42) and alleges, among other things, failure of oversight by the ARM Committee (*id.* ¶¶ 50,119–22), failure of Defendants to detect, prevent or halt risks associated with the Company's exposure to the subprime crisis (*id.* ¶¶ 2–3, 45, 48–66, 107–10, 118–22, 141–42), failure of Defendants to monitor Citigroup's financial reporting (*id.* ¶¶ 3, 48, 67–70, 72–81, 88–95, 107–10, 118–22, 141–42), and reckless conduct by Defendants (*id.* ¶¶ 48–66, 107, 118–22).[4] The inclusion in this action of (irrelevant) allegations concerning Enron and reference to a letter from the CtW Investment Group to defendant Mulcahy does not change the fact that it "substantially involves the same issues" as the New York action and arises from "a common nucleus of operative facts." *Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *4 (Del. Ch. Apr. 12, 1994) (stating that "claims arising from a common nucleus of operative facts ought to be brought in the same court at the same time whenever possible," and that " an absolute identity of issues" is not required); *see also Issen & Settler v. GCS Enters., Inc.*, 1981 WL 15131 (Del. Ch. Dec. 7, 1981) (stating that "an absolute identify of issues" is not a prerequisite for a stay).

[4] Although defendants have also moved for dismissal of the derivative complaint in the Southern District of New York, the situation is nothing like the "very unusual situation" in *Biondi v. Scrushy*, 820 A.2d 1148 (Del. Ch. 2003), (Opp. Mem. at 33), where the parallel complaint was so "hastily-filed and cursorily pled" that a full and fair hearing could not be had in that forum. *Biondi*, 820 A.2d at 1150.

Second, plaintiffs' assertion that the Delaware action is "procedurally further advanced" than the federal action is simply false. (Opp. Mem. at 37.) Amended complaints in both actions were filed in late 2008, and motions to dismiss are being briefed in both actions. There was also extensive briefing, oral argument, and a carefully reasoned ruling on lead plaintiff motions in the New York action. Thus, plaintiffs' reliance on *In re Topps Co. S'holders Litig.*, 924 A.2d 951 (Del. Ch. 2007), is misplaced. There, the Delaware case was consolidated, a motion to expedite was accepted, and a hearing on a preliminary injunction was scheduled—all before any development in the New York court. *Id.* at 953, 956.

Third, contrary to plaintiffs' suggestion, the complaint does not raise a novel legal question under Delaware law about the "appropriate oversight owed by a financial expert." (Opp. Mem. at 29).[5] That question is, in fact, well-settled; there is no heightened standard of care for directors with special expertise.[6] *See Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *7 n.54 (Del. Ch. Feb. 22, 2006) (rejecting the argument that directors with special expertise should be held to a higher standard of care solely because of their status as an expert); *see also In re Coca-Cola Enters., Inc. Deriv. Litig.*, 478 F. Supp. 2d 1369, 1379 (N.D. Ga. 2007) (applying *Caremark* standard despite defendants' alleged special

[5] The application of Delaware law "is not conclusive in a *forum non conveniens* analysis." *In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at *3 (Del Ch. May 20, 1993). As discussed in defendants' opening brief, the federal court in New York has proven itself fully capable of applying Delaware law. (Def. Mem. at 19, Trans. ID 22765280).

[6] This action is therefore different from the situation in *Ryan v. Gifford*, 918 A.2d 341, 350 (Del. Ch. 2007) and *In re Topps*, 924 A.2d 951, which involved questions of first impression.

expertise), *aff'd sub nom. Staehr v. Alm*, 269 F. App'x 888 (11th Cir. 2008); *Egelhof v. Szulik*, 2006 WL 663410, at *10 (N.C. Super. Ct. Mar. 13, 2006) (same).[7]

Nor is a parallel Delaware action warranted simply because this action raises corporate governance issues relating to the recent market collapse. (Opp. Mem. at 30–31.) Many courts outside of Delaware are handling derivative actions involving corporate governance issues arising from the market crisis.[8] Plaintiffs do not, and cannot, dispute that the federal district court in New York is competent to adjudicate corporate governance issues. Indeed, the case on which plaintiffs rely in their brief, *County of York Employees Ret. Plan v. Merrill Lynch & Co., Inc.*, 2008 WL 4824053 (Del. Ch. Oct. 28, 2008) (Opp. Mem. at 30), acknowledges that "both the federal court and the state court in New York are quite capable of interpreting and applying Delaware law to the claims asserted by the Plaintiff." *Id.* at *3 n.16. Ultimately, the *Merrill Lynch* court ruled that "the balance" of considerations in that case "tend[ed] slightly to favor Delaware" because, in addition to the presence of corporate governance questions under Delaware law, the "full panoply of claims directly challenging the Merger" were more fully brought in Delaware and there was a motion to expedite the Delaware proceedings. *Id.* at *4.

[7] *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, (Del. Ch. May 3, 2004), cited by plaintiffs (Opp. Mem. at 29), does not hold otherwise. That case merely involves the straightforward application of Section 102(b)(7) of the Delaware General Corporation Law to a director who was also a financial expert. *See id.* at *40.

[8] *See, e.g., La. Mun. Police Employees Ret. Sys. v. Thain*, No. 08 Civ. 7618 (PKC) (S.D.N.Y., filed Aug. 28, 2008); *In re Morgan Stanley & Co., Inc. Auction Rate Secs. Deriv. Litig.*, No. 08 Civ. 7587 (AKH) (S.D.N.Y., filed Aug. 27, 2008); *La. Mun. Police Employees Ret. Sys. v. Pandit*, No. 08 Civ. 7389 (LTS) (S.D.N.Y., filed Aug. 20, 2008); *Lerach v. Raskind*, No. 08 Civ. 0163 (SO) (N.D. Ohio, filed Jan. 18, 2008); *Slater* v. *Killinger*, No. 08 Civ. 0005 (MJP) (W.D. Wa., filed Jan. 3, 2008); *Cohen v. Bear Stearns Cos., Inc.*, No. 08 Civ. 10453 (RWS) (S.D.N.Y., filed Nov. 19, 2007); *Arthur v. O'Neal*, No. 07 Civ. 9696 (JSR) (S.D.N.Y., filed Nov. 1, 2007).

Here, the more comprehensive action was filed in New York and the cases are in the same procedural posture.

Plaintiffs ignore the only critical difference between the federal derivative action and this one—the federal derivative action includes allegations of securities fraud that can only be adjudicated by a federal court. (Ex. 35 at ¶¶ 129–138.) Thus, the only way to avoid the inefficiencies, wasted resources and potential conflicts inherent in parallel proceedings is to stay or dismiss this action in favor of the more comprehensive federal derivative action. In contrast, plaintiffs have identified no affirmative benefit to Citigroup from litigating in two forums.

New York is also the more appropriate forum in which to proceed. Plaintiffs do not dispute that New York is the center of gravity for the events at issue in the derivative actions. All, or substantially all, of the documents and witnesses are in New York, and any discovery can be coordinated with the securities and ERISA actions pending in New York. *See Bear Stearns*, 2008 WL 959992, at *8 n.34 (finding that the location of evidence in New York weighs in favor of a stay); *Texas Instruments Inc. v. Cyrix Corp.*, 1994 WL 96983, at *5 n.6 (Del. Ch. Mar. 22, 1994) (rejecting "the suggestion that deposition testimony would be an adequate substitute for live trial testimony"); *In re Chambers,* 1993 WL 179335, at *6 (finding that depositions and written interrogatories are "poor substitutes and certainly not equivalents of live testimony").

For all of the above reasons, this Court should stay or dismiss this action in favor of the parallel federal derivative action.

II. PLAINTIFFS FAIL TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF LIABILITY THAT WOULD RENDER DEMAND FUTILE.

Plaintiffs do not dispute that, in order to meet the heightened pleading requirements for demand futility, they must allege particularized facts creating a reasonable doubt that the Board could have exercised its independent and disinterested business judgment in responding to a

demand. *Rales v. Blasband*, 634 A.2d 927, 933–34 (Del. 1993). Nor do they dispute that an overwhelming majority of the November 2007 Directors (twelve out of thirteen) are outside directors, and thus presumptively disinterested and independent.

Plaintiffs' principal demand futility theory is that a majority of the Board faces a "substantial likelihood of liability" for failure to oversee management (a "*Caremark* claim"[9]). (Opp. Mem. 38, 40, 53.) It is well-established that a failure-of-oversight claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark*, 698 A.2d at 967.[10] To raise an inference of breach of fiduciary duty based on this theory, Plaintiffs must plead that the Board's actions were so egregious they can be explained *only* by bad faith. *See Desimone v. Barrows*, 924 A.2d 908, 935 (Del. Ch. 2007) (finding that, to sufficiently plead failure-of-oversight liability, a plaintiff must show "that the directors acted with the state of mind traditionally used to define the mindset of a disloyal director"); *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 972 (Del. Ch. 2007).

Here, plaintiffs' burden is underscored by the provision in Citigroup's charter exculpating Board members from personal liability for breaches of their fiduciary duty of care. (Ex. 40 at 13.) As the Delaware Supreme Court recently held, where (as here) a plaintiff seeks to show that

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

[10] Plaintiffs selectively quote from *In re Baxter Int'l, Inc. Shareholders Litigation*, 654 A.2d 1268, 1270 (Del. Ch. 1995) to support this argument. However, *In re Baxter* adopts the stringent pleading standard set forth in *Caremark*. "The court could not conclude that there is a substantial likelihood of liability from the face of a complaint unless the claim is pled with sufficient particularity to permit the court to reasonably reach the required conclusion." *In re Baxter*, 654 A.2d at 1270. Plaintiffs fail to mention that the "required conclusion" is the "rare case where the circumstances are so egregious that there is a substantial likelihood of liability." *Id*. at 1271.

demand is excused because directors have a substantial likelihood of liability, it must meet a high standard:

> Where directors are contractually or otherwise exculpated from liability for certain conduct, '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.' Where, as here, directors are exculpated from liability except for claims based on 'fraudulent,' 'illegal' or 'bad faith' conduct, a plaintiff must also plead particularized facts that demonstrate that the directors acted with scienter, *i.e.*, that they had 'actual or constructive knowledge' that their conduct was legally improper.

Wood v. Baum, 953 A.2d 136, 141 (Del. 2008) (emphasis in original, citations omitted). Because the exculpatory clause in Citigroup's charter permits liability only for "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law" (Def. Mem. at 35), plaintiffs must plead particularized facts showing bad faith, intentional misconduct or a knowing violation of law.

Plaintiffs fail to meet this exacting standard, and their brief does nothing more than repeat the illogical assertions in the complaint—that developments from 2005 through 2007 *in the market at large*, coupled with Citigroup's involvement with Enron (which had nothing to do with Citigroup's investment in allegedly risky assets), somehow put the November 2007 Directors on notice of specific wrongdoing at Citigroup with respect to its investments in allegedly risky CDOs and SIVs.

A. <u>Plaintiffs Concede That the Board Had Oversight Mechanisms In Place.</u>

As plaintiffs concede, the *Caremark* claim must be dismissed unless the complaint alleges with particularity "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." (Opp. Mem. at 39, quoting *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 372 (Del. 2006); *Caremark*, 698 A.2d at 971).

Far from alleging that the directors "utterly failed to implement any reporting or information system or controls," plaintiffs *concede* that "Citigroup had supervisory mechanisms in place." (Opp. Mem. at 42 n.36; Def. Mem. at 25–26.) Indeed, plaintiffs allege that the Board took measures to *strengthen* Citigroup's oversight mechanisms. (Opp. Mem. at 48–49 (noting that in 2003 Citigroup announced "*new* risk-management procedures [that] were *designed to prevent*" wrongdoing, "including improved review and approval of complex structured finance transactions and new guidelines for the use of special purpose vehicles" (emphasis added)).)

Plaintiffs nevertheless argue that they have met their burden by alleging "that such mechanisms were inadequate and improper." (Opp. Mem. at 44; *see also id.* at 8.) But the paragraphs in the complaint to which plaintiffs cite (¶¶ 45–54, 60–61, 73–74) allege nothing of the sort. Rather, they consist of: (1) allegations about Citigroup's relationships with Enron, Dynegy and WorldCom in the 1990s through 2002, that had nothing to do with investments in allegedly risky assets (¶¶ 45–54, 60–61) , and (2) the multi-page laundry list in the complaint of public reports on the gradual evolution, between 2005 and 2007, of the real estate market downturn (¶¶ 73–74). These allegations say nothing about how Citigroup's reporting and control mechanisms were "inadequate" with respect to the Company's subprime-related assets, much less that directors *knew* that such inadequacies existed and *consciously ignored* such inadequacies. *See Desimone*, 924 A.2d at 940 ("[A] plaintiff must plead the existence of facts suggesting that the board knew that internal controls were inadequate . . . ."); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 147 (Del. Ch. 2004) (dismissing the complaint, in relevant part, where allegations did not indicate that defendants "consciously ignored" specific warnings of illicit activities).

In any event, Directors are not held strictly liable for all problems that arise within a corporation, and they are not expected to institute *foolproof* reporting and control systems. *See Stone*, 911 A.2d at 373 (noting that "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, or both"). *Caremark* requires only that directors "assur[e] themselves that information and reporting systems exist in the organization that are *reasonably designed* to provide to senior management and to the board itself timely, accurate information . . . ." *Caremark*, 698 A.2d at 970; *see also David B. Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, at *5 (Del. Ch. Feb. 13, 2006) ("[T]he one thing that is emphatically not a *Caremark* claim is the bald allegation that directors bear liability where a concededly well-constituted oversight mechanism, having received no specific indications of misconduct, failed to discover fraud."), *aff'd,* 911 A.2d 802 (Del. 2006) (TABLE).[11]

B. Plaintiffs Fail to Raise an Inference of Liability Due to Alleged Violations of FASB Accounting Standards.

The conclusory allegation that Citigroup violated FASB Accounting Standards because the ARM Committee "failed to ensure that the CDOs, SIVs and VIEs were properly accounted for" (Opp. Mem. at 43; *see also id.* at 53–55) does not rescue plaintiffs' pleading. Although the complaint is "quick to prattle off numerous alleged infractions of laws, rules and principles," plaintiffs never discuss "the accounting procedures employed by the Company or the Board's involvement in [the Company's] financial recording and reporting systems." *Rattner v. Bidzos*,

[11] The only case cited by plaintiffs in which a failure of oversight was found to be pleaded properly is *Kohls v. Duthie*, 791 A.2d 772 (Del. Ch. 2000). (Opp. Mem. at 43.) In *Kohls*, the directors in question were alleged to have failed to meet to consider an opportunity to repurchase the company's shares, and allowed the CEO to usurp the opportunity for his own personal gain. *Id*. at 776–77, 782–83. Those facts bear no resemblance to the allegations here.

2003 WL 22284323, at *13 (Del. Ch. Sept. 30, 2003); *see also Guttman v. Huang*, 823 A.2d 492, 498 (Del. Ch. 2003) (dismissing complaint that was "devoid of any pleading regarding the full board's involvement in the preparation and approval of the company's financial statements" and of "particularized allegations of fact demonstrating that the outside directors had actual or constructive notice of the accounting improprieties").

Nor does the mere allegation that a majority of the Directors were on the Audit Committee and have expertise in financial matters help Plaintiffs meet their burden. *See Jones ex rel. CSK Auto Corp. v. Jenkins*, 503 F. Supp. 2d 1325, 1337 (D. Ariz. 2007); *see also id.* ("[T]he fact that the Audit Committee reviewed [the company's] financial statements does not show that its members knew about prior errors in those statements or consciously disregarded the risk that [the company's] accounting procedures may have created such errors. *Any argument that they did is especially weak where outside directors are involved.*") (citation omitted) (emphasis added); *Alden*, 2006 WL 456786, at *7 n.54 (rejecting the argument that directors with special expertise should be held to a higher standard of care). Moreover, plaintiffs fail to address the fact, discussed in defendants' opening brief (Def. Mem. at 34), that directors of Delaware corporations are "fully protected" when they rely in good faith on the reports of officers or experts, like accountants. 8 *Del. C.* § 141(e); *see also Brehm v. Eisner*, 746 A.2d 244, 261 (Del. 2000).

Ultimately, nothing in the complaint suggests the November 2007 Directors acted other than in the good faith belief that reasonable information and reporting systems existed at Citigroup. Plaintiffs' hindsight accusations that "[i]t is *now* obvious that Citigroup's oversight mechanisms and reported risk reforms were either inadequate or consciously ignored" are inadequate to plead a *Caremark* claim. (Opp. Mem. at 8 (emphasis added).) *See Desimone*, 924

A.2d at 940 (rejecting plaintiffs' "conclusory allegation that because illegal behavior occurred" regarding backdating of the company's accounts, "internal controls must have been deficient, and the board must have known so" as insufficient to plead directors' bad faith under *Caremark*); *In re Sonus Networks, Inc, S'holder Deriv. Litig.*, 499 F.3d 47, 70 (1st Cir. 2007) ("The fact that failures of internal controls led to the restatement of financials with worse results than originally reported is not enough under Delaware law to establish demand futility."); *In re ITT Corp. Deriv. Litig.*, 2008 WL 5061796, at *9 (S.D.N.Y. Nov. 25, 2008) ("The magnitude and duration of illegal activities or the size of the resulting penalties . . . do not establish either deficient controls or a sustained and systematic conscious failure of oversight.").

C. Plaintiffs' Allegations of "Red Flags" Do Not Constitute an Adequate Pleading of a Failure of Oversight.

Plaintiffs continue to argue that the November 2007 Directors ignored various "red flags," *i.e.*, "reports warning of the impending bursting of the housing bubble." (Opp. Mem. at 6.) Plaintiffs' own characterizations make clear that these purported "red flags" are simply public documents discussing troubles in the housing market: testimony from "leading economists" about "the economic ramifications of the housing bubble" (*id.* at 7), published reports on "weakening real estate trends" (*id.*), "the steady decline of the housing market" (*id.* at 46), "ris[ing] foreclosure rates" (*id.*) and bankruptcy filings by "several large subprime lenders" (*id.*). (*See also* ¶¶ 76, 80, 81, 92, 98.) Moreover, plaintiffs cherry pick the reports they cite to give the misimpression that the world was expecting a catastrophic market meltdown as early as 2005. (¶¶ 73–74.) In reality, regulators and market participants alike failed to predict the

magnitude of the credit crisis that devastated the financial markets in late 2007.[12] (Def. Mem. at 13–14.)

The fatal flaw of the complaint is plaintiffs' failure to plead "particularized facts suggesting that the Board was presented with 'red flags' alerting it to potential misconduct" at Citigroup. *Shaev*, 2006 WL 391931, at *3. The mere existence of adverse economic developments is insufficient to show that directors were aware of *wrongdoing occurring within the company*. *See In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 873, 879–80 (D. Md. 2005) (finding that, despite "copious coverage" of mutual fund late trading and market timing practices in the industry, derivative plaintiff must nonetheless allege that "trustees knew that widespread late trading and market timing activities were occurring within the [company]").[13] The

[12] Plaintiffs ask the Court to ignore the public documents referenced in and attached to defendants' motion to dismiss on the grounds that they are prejudicial to plaintiffs and inappropriate to consider on a motion to dismiss. (Opp. Mem. at 40 n.33; Adams Aff. ¶¶ 5–6.) Neither is true. The Court may take judicial notice of (1) matters not reasonably subject to dispute and (2) documents not relied upon for the truth of their contents. *See* D.R.E. 201; *Vanderbilt Income & Growth Assocs., LLC v. Arvida/JMB Managers, Inc.,* 691 A.2d 609, 613 (Del. 1996). The public documents at issue are cited solely to establish the course of public events as the credit crisis unfolded in 2007. Plaintiffs—whose complaint is based on "a review of . . . news reports, analyst reports, press releases and other publicly available documents"—do not dispute these events. Nonetheless, they suggest that, if the Court considers these documents on this motion, plaintiffs should be allowed broad merits discovery regarding Citigroup's governance and controls, CDO structures, subprime exposures, regulatory investigations, and other issues. (Adams Aff. ¶ 6.) These discovery requests have nothing to do with the public documents cited by defendants (none of which relates to Citigroup specifically) and plainly constitute an improper attempt to obtain discovery to supplement their demand futility allegations. *See Kaufman v. Belmont*, 479 A.2d 282, 289 (Del. Ch. 1984) (holding that plaintiff is not entitled to supplement his demand futility allegations with materials outside the four corners of the complaint). For this same reason, plaintiffs' reliance in their brief on a November 2008 news article (Opp. Mem. at 9–10) is also inappropriate.

[13] Plaintiffs' attempt to distinguish *In re Mut. Funds Inv. Litig.* on the ground that the alleged red flags in that action "did not implicate the financial viability and potential existence of the company" has no basis in the law. (Opp. Mem. at 47.) Plaintiffs point to no opinion by any

(footnote continued)

allegation that the November 2007 Directors, like the rest of the country, were aware of a downturn in the general subprime mortgage market[14] is unremarkable and does not show that the Directors "consciously and in bad faith ignored" wrongdoing at Citigroup. *See Wood*, 953 A.2d at 143 (rejecting plaintiff's argument that "the Board knowingly ignored 'red flags,'" where "there were no cognizable 'red flags' from which it could be inferred that defendants knew that" the relevant accounting violation was occurring).

Nor do plaintiffs' allegations regarding "Red Flags Present Within the Company" (Opp. Mem. at 47) fare any better. Instead of enumerating specific allegations of wrongdoing at Citigroup and how evidence of such wrongdoing came to the Board's attention, plaintiffs simply state that "[t]he Director Defendants should have been *especially sensitive to the red flags in the marketplace* in light of the Company's prior involvement in the Enron Corporation debacle and other financial scandals earlier in the decade." (*Id.* (emphasis added).) However, the "financial scandals" cited have nothing to do with Citigroup's investment in subprime-related assets and plaintiffs fail to tie Enron events to any aspect of Citigroup's writedowns in late 2007. Merely

(footnote continued)

court for the proposition that director liability depends upon the size of potential market dislocation.

[14] *See, e.g.*, Opp. Mem. at 39 ("[T]he Director Defendants were aware of or should have been aware of the many red flags *concerning the subprime mortgage crisis* . . . .") (emphasis added); *id.* at 42 ("Despite their responsibilities and qualifications, the ARM Committee members either did not make a good faith attempt to follow the procedures put in place or failed to assure that adequate and proper corporate information and reporting systems existed that would enable them to be fully informed *regarding Citigroup's risk to the subprime mortgage market*.") (emphasis added); *id.* at 44 ("[T]he Director Defendants were faced with many red flags alerting them to the risks *in the subprime mortgage market* . . . .") (emphasis added); *id.* at 46 ("The Complaint sets forth in detail the numerous red flags *concerning the subprime mortgage crisis* . . . .") (emphasis added).

invoking an unrelated controversy from the past decade does not satisfy plaintiffs' heightened pleading requirements. *See Stone v. Ritter*, 2006 WL 302558, at *2 (Del. Ch. Jan. 26, 2006) (noting that plaintiffs must point to facts "either showing how the [alleged] scheme, or any other problems *at AmSouth*, waved a 'red-flag' in the face of the board") (emphasis added); *see also ITT*, 2008 WL 5061796, at *8 (to establish failure-of-oversight liability under Delaware law, plaintiffs must plead "allegations regarding whether or when the information regarding [specific red flags] or the relevant misconduct was actually presented to the individual Directors and what actions, if any, they took in response").

Notably, plaintiffs do not even detail what alleged wrongdoing occurred at Citigroup with respect to its subprime-related assets. Plaintiffs simply complain that Citigroup (like nearly every other bank on Wall Street) suffered substantial losses in late 2007 from write-downs of subprime-related assets (Opp. Mem. at 14) and that Citigroup took on too much risk and subprime exposure (*id.* at 4–6). However, as discussed in defendants' opening brief, the mere fact that a company takes on risk or experiences losses does not evidence misconduct. *See, e.g.*, *Wilson v. Tully*, 676 N.Y.S.2d 531, 537–38 (N.Y. App. Div. 1998) (finding that a substantial likelihood of liability was not established based on allegations that directors failed to prevent company from assuming excessive risk); *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996) ("The business outcome of an investment project that is unaffected by director self-interest or bad faith cannot itself be an occasion for director liability."); (Def. Mem. at 31).

Plaintiffs' citation to *McCall v. Scott*, 239 F.3d 808 (6th Cir. 2001) actually highlights the inadequacies of their complaint. (Opp. Mem. at 47.) Unlike here, the plaintiffs in *McCall* alleged numerous specific instances of widespread, prevalent wrongdoing throughout the company and the mechanisms by which the wrongdoing came to the Board's attention. *McCall*,

239 F.3d at 819–24 (noting allegations of numerous financial irregularities in reports brought to the board's attention). The Sixth Circuit in *McCall* did *not*, as plaintiffs assert, hold that alleged prior, *unrelated* wrongdoing would make directors "sensitive to similar circumstances." (Opp. Mem. at 48.) Unlike plaintiffs' irrelevant allegations about Enron, the prior "experience" referenced in *McCall* was an investigation and settlement for the *same type* of questionable billing practices before the Sixth Circuit. *See McCall*, 239 F.3d at 821.

Because plaintiffs fail to plead any "red flags" of specific wrongdoing at Citigroup—let alone "red flags" concerning specifically Citigroup's CDO or SIV businesses—that were brought to the attention of the Board yet ignored, the complaint fails to plead a substantial likelihood of liability for failure of oversight on the part of the November 2007 Directors, and the complaint should be dismissed under Rule 23.1.

D. Plaintiffs' Waste Claims Do Not Adequately Plead Demand Futility.

Plaintiffs continue to allege that the November 2007 Directors face a substantial likelihood of liability for corporate waste based on: (1) the Letter Agreement with Defendant Prince, (2) Citigroup's buyback of its own stock, (3) Citigroup's purchase of loans from Accredited Home Lenders and Ameriquest Mortgage Company, and (4) Citigroup's investment in SIVs.

As a preliminary matter, plaintiffs fail to plead that Citigroup's purchase of loans or its investment in SIVs was the result of board action. Therefore, the November 2007 Directors cannot possibly face a substantial likelihood of liability for corporate waste with respect to those activities. *See Highland Legacy Ltd. v. Singer*, 2006 WL 741939 (Del. Ch. Mar. 17, 2006) ("To excuse demand on the grounds of waste, the complaint must allege particularized facts sufficient to create a reasonable doubt that the board authorized action on the corporation's behalf on terms

that no person of ordinary, sound business judgment could conclude represents a fair exchange."); *Green v. Phillips*, 1996 WL 342093, at *5 (Del. Ch. June 19, 1996) (same).[15]

With respect to the Letter Agreement with Mr. Prince and Citigroup's stock repurchases, plaintiffs must—but fail to—allege particularized facts creating a reasonable doubt that those decisions were "the product of a valid exercise of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984).[16] Nothing in the complaint or the opposition brief supports the inference that the "the board *irrationally squandered* corporate assets" on transactions that "served *no corporate purpose* or where the corporation received *no consideration at all*." *White v. Panic,* 783 A.2d 543, 553–55 (Del. 2001) (emphasis added) (citation and internal quotation marks omitted).[17]

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[15] Plaintiffs incorrectly assert that defendants do not contest demand futility with respect to board inaction concerning subprime loan purchases or investments in SIVs. (Opp. Mem. 56, n.45, 46.) These claims should be dismissed for failure to plead demand futility under the first prong of *Aronson*. (Def. Mem. at 39 n.23.)

[16] Plaintiffs do not contest the independence of a majority of the directors, do not allege that any director had a personal interest in any transaction, and do not allege that a majority of the relevant directors lacked independence with respect to the transactions. (Opp. Mem. 56.) Thus, "only the second prong of *Aronson* is implicated." (*Id.*)

[17] *See also, e.g.*, *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 748–749 (Del. Ch. 2005) ("Corporate waste is very rarely found in Delaware courts because the applicable test imposes such an onerous burden upon a plaintiff . . . In other words, waste is a rare, 'unconscionable case[ ] where directors irrationally squander or give away corporate assets.'" (quoting *Brehm v. Eisner,* 746 A.2d 244, 263 (Del. 2000))); *Ash v. McCall*, 2000 WL 1370341, at *7 (Del. Ch. Sept. 15, 2000) ("To excuse demand on grounds of corporate waste, . . . plaintiffs must show that the [transaction] in question either served no corporate purpose or was so completely bereft of consideration that it effectively constituted a gift.").

1. **Plaintiffs Fail to Establish Reasonable Doubt as to Whether the November 4 Letter Agreement Was a Valid Exercise of Business Judgment.**

Rather than analyze the various conditions of the Letter Agreement with Mr. Prince or provide allegations about the process by which the Board came to approve the agreement, plaintiffs' opposition brief merely recounts the substantial writedowns Citigroup took in late 2007 and states, in conclusory fashion, that the Letter Agreement with Mr. Prince constituted an "utter lack of any business judgment" on the part of the Board. (Opp. Mem. at 57–58.) Noticeably absent from the opposition brief is any response to defendants' point that Citigroup received substantial consideration under the Letter Agreement, including strict non-compete, non-solicitation and non-disparagement clauses, a general release of potential legal claims and Prince's resignation approximately two months prior to his Retirement Date. (Def. Mem. at 41.) These covenants are fatal to plaintiffs' attempt to plead an exchange "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 362 (Del. Ch. 1998).

Plaintiffs' citations to opinions of this Court for the proposition that "[a]llegations like the ones" in the complaint "have repeatedly excused demand in connection with allegations of waste" are inaccurate. (Opp. Mem. at 59). In *California Public Employees' Retirement System v. Coulter*, 2002 WL 31888343, at *15 (Del. Ch. Dec. 18, 2002), the court *dismissed* the waste claim because plaintiffs failed to plead facts from which the court could infer that "no benefit accrued to the company" from the challenged transaction. The other decision cited by plaintiffs, *Emerald Partners v. Berlin*, only serves to illustrate the deficiencies in plaintiffs' pleadings. 1993 WL 545409 (Del. Ch. Dec. 23, 1993). The plaintiffs in that case specifically alleged that the defendant directors approved a pledge of corporate assets to secure a personal loan while receiving *no consideration* in exchange. *Id.* at *6–7.

2. Plaintiffs Fail to Establish Reasonable Doubt as to Whether the Stock Repurchase Program Was a Valid Exercise of Business Judgment.

Plaintiffs' allegations regarding Citigroup stock repurchases likewise fail to show transactions "so completely bereft of consideration that [they] effectively constituted . . . gift[s]." *Ash*, 2000 WL 1370341, at *7. Plaintiffs argue illogically that events occurring *after* the buybacks—Citigroup's declining stock price beginning in the *second quarter* of 2007 (Opp. Mem. at 60) and the Company's "expanding losses" that came in the *fourth quarter* of 2007 (*id.* at 61)—should have prompted the Board to halt the share repurchase program in the *first quarter* of 2007. The argument is nonsensical.

Plaintiffs also argue that the Board is liable for waste because it authorized repurchases of Company stock in the first quarter of 2007 (when the average price per share was $53.37), and then halted the stock repurchase program in the fourth quarter of 2007 (when Citigroup's stock price had declined to $46 per share). (Opp. Mem. 60.) Yet plaintiffs have not alleged that Citigroup actually repurchased any stock after the first quarter of 2007. (*Id.*) Thus, the formal announcement in October 2007 that the repurchase program would end, and the price of Citigroup stock at that time, are irrelevant to plaintiffs' corporate waste claim. The claim fails because plaintiffs do not allege facts showing that the purchase of Citigroup stock in the first quarter of 2007 was so devoid of value that it could not be a valid exercise of business judgment.

III. THE COMPLAINT DOES NOT IMPLICATE EXCEPTIONS TO THE EXCULPATORY PROVISION IN CITIGROUP'S CHARTER.[18]

Plaintiffs assert that the complaint "alleges conduct by defendants that falls squarely within the Court's definition of directorial failure to act in good faith, constituting a breach of the

[18] Nominal Defendant Citigroup Inc. does not join this argument.

non-exculpable, non-indemnifiable duty of loyalty." (Opp. Mem. at 62.) Yet plaintiffs fail to identify a single specific factual allegation that calls into question the good faith of any of the November 2007 Directors. Nor have plaintiffs pleaded a breach of the duty of loyalty—a conflict between duty to the company and self-interest. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) ("Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director . . . and not shared by the stockholders generally.") (citation omitted).

Delaware courts have repeatedly held that when directors enjoy the benefit of a Section 102(b)(7) exculpatory provision, only particularized factual allegations of *intentional bad faith conduct* will survive a motion to dismiss. *See Ryan v. Lyondell Chem. Co.*, 2008 WL 4174038, at *2 (Del. Ch. Aug. 29, 2008) (noting that liability under a Section 102(b)(7) provision "is *not* predicated upon the breach of the fiduciary duty of care; rather, liability results from the breach of the separate and distinct duty of good faith.") (emphasis in original). Even gross negligence, alone, cannot constitute bad faith. *See McPadden* v. *Sidhu*, 2008 WL 4017052, at *10 (Del. Ch. Aug. 29, 2008).

Plaintiffs' citation to *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002) is unavailing. (*See* Opp. Mem. at 62.) That action involved particularized allegations that a majority of a board that approved a cash-out merger was *interested in the transaction*—a classic example of a breach of the duty of loyalty. *Id.* at 14. Nor do plaintiffs' citations to opinions like *Stone* and *ATR-Kim ENG Fin. Corp. v. Araneta*, 2006 WL 3783520 (Del. Ch. Dec. 21, 2006), serve any purpose other than to reiterate long-held Delaware law requiring that directors attempt in good faith to oversee a company's employees and ensure that an internal reporting and control system exists.

As discussed above, plaintiffs' own allegations make clear that Citigroup had internal reporting and control systems in place.

IV. THE COMPLAINT FAILS TO PLEAD CLAIMS FOR BREACH OF FIDUCIARY DUTY, WASTE OR MISMANAGEMENT.[19]

Under Court of Chancery Rule 12(b)(6), a complaint must be dismissed if it fails to state a claim upon which relief can be granted. Although "a trial court must accept as true all of the well-pleaded allegations of fact and draw reasonable inferences in the plaintiff's favor," a court "is not . . . required to accept as true conclusory allegations '*without specific supporting factual allegations*.'" *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citation omitted).

A. The Complaint Fails to State a Claim for Breach of the Duty of Oversight.

There is no dispute that, in order to assert a claim for breach of the duty of oversight, plaintiffs must allege an utter failure to implement any reporting or information system or controls, or conscious failure to monitor or oversee the Company's operations. (Opp. Mem. at 64–65.) However, plaintiffs' bald assertion that "[t]he Complaint amply satisfies these requirements" (Opp. Mem. at 65) does not make it so. As discussed above, a mere description of the general market downturn and references to unrelated financial "scandals" does not sufficiently plead a failure of the duty of oversight with respect to Citigroup's CDO or SIV investments.

Plaintiffs' reliance on *Saito v. McCall* is misplaced. 2004 WL 3029876 (Del. Ch. Dec. 20, 2004). In *Saito*, the plaintiffs alleged that the director defendants learned about improper accounting practices at a specific board meeting, including the dollar amount of the potential

[19] Nominal Defendant Citigroup Inc. does not join this argument.

accounting discrepancy and the possibility of an SEC investigation, and that an independent auditing firm had raised red flags. *See id.* at *7. Even given these assertions—which are far more specific and indicative of bad faith than those set forth by plaintiffs here—the *Saito* Court ruled that "the complaint appears—*barely*—to state a claim under *Caremark*." *Id.* at *6 (emphasis added).

B. The Complaint Fails to State a Claim for Breach of the Fiduciary Duty of Disclosure.

The complaint fails to state a claim for breach of the duty of disclosure because plaintiffs do not plead with particularity how Citigroup's disclosures were inaccurate. Merely asserting that Citigroup violated FASB accounting standards and failed to disclose its "risky financial exposures" (Opp. Mem. at 65–66) does not identify specific material misstatements or omissions. Nor have plaintiffs pleaded facts supporting their conclusory assertion that the directors "deliberately" misinformed shareholders about the business of the corporation, and "caused Citigroup to improperly value numerous subprime mortgage related securities." (*Id.*)

C. The Complaint Fails to State a Claim for Corporate Waste.

As discussed *supra*, plaintiffs fail to plead properly a claim for corporate waste because the Company received value from both the Letter Agreement and the stock repurchases. Likewise, the Company received value when it purchased mortgage loans at "fire sale" prices and when it invested in SIVs.

Contrary to their assertion that "this Court has not hesitated to deny motions to dismiss waste claims where particularized facts such as those alleged here, demonstrate a reasonable doubt as to transactions 'substantially below' market" (Opp. Mem. at 66), plaintiffs fail to cite *a single case* in which a court ruled that allegations similar to theirs properly stated a claim of

corporate waste. The cases that plaintiffs *do* cite only serve to highlight the deficiencies in their own allegations.

For example, *Avacus Partners, L.P. v. Brian* is illustrative of the types of allegations that *are* sufficient to state a claim of corporate waste. 1990 WL 161909 (Del. Ch. Oct. 24, 1990). In denying the defendant's Rule 23.1 and 12(b)(6) motions, the *Avacus* Court stressed that the plaintiff "has alleged *specific facts that quantify the alleged inadequacy* of the consideration received" by the company. *Id.* at *8 (emphasis added). The plaintiff in *Avacus* alleged that the defendant directors had authorized an exchange of stock worth $5 million for shares and notes worth only $400,000 and another exchange of stock worth $16 million to gain control of a company whose primary asset had already been purchased for $100,000. *Id.* The disparities in the consideration given and received in *Avacus* stand in stark contrast to plaintiffs' allegations in this case. As shown above, plaintiffs fail to allege a single "fact[] that quantif[ies] the alleged inadequacy of the consideration received," *id.*, as nothing in the complaint quantitatively compares the consideration given and received by Citigroup in any of the challenged transactions.[20]

[20] Plaintiffs' other cases are also inapposite. *Stein v. Orloff* did not involve a 12(b)(6) motion and is therefore not relevant to plaintiffs' assertion. *See* 1985 WL 11561 (Del. Ch. May 30, 1985). The subject matter of *Weiss v. Swanson* was entirely different from the allegations advanced by plaintiffs in this case. 948 A.2d 433 (Del. Ch. 2008). The waste claim in *Weiss* related to the timing of interested directors' grants of stock options to themselves, and the Court detailed a long list of specific allegations in the complaint suggesting the director defendants' bad faith. *See id.* at 439, 450 (detailing allegations that inside directors used non-public information to time grants so as to benefit themselves and thereby deprived the company of funds with no valid business purpose).

D. The Complaint Does Not State a Claim for Reckless and Gross Mismanagement.

Plaintiffs concede that their claim for "reckless and gross mismanagement" is duplicative of their claim for breach of fiduciary duty. For the same reasons that plaintiffs have failed to state a claim for breach of fiduciary duty, *see supra*, their purported claims for "reckless and gross mismanagement" should be dismissed.

CONCLUSION

For the reasons set forth above, as well as those set forth in Defendants' Opening Brief in Support of Their Motion to Dismiss or Stay this Action or, in the Alternative, to Dismiss the Consolidated Second Amended Derivative Complaint, this action should be dismissed or stayed.

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Dated: January 28, 2009