IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STARR INTERNATIONAL COMPANY, INC., on its behalf and on behalf of a class of others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 11-779C
	)	(Judge Wheeler)
UNITED STATES,	)	
Defendant,	)	
and	)	
AMERICAN INTERNATIONAL GROUP, INC.,	)	
Nominal Defendant.	)	

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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Pursuant to Rules 12(b)(1), 12(b)(6), and 23.1 of the Rules of the United States Court of Federal Claims (RCFC) and this Court's orders of March 1 and March 22, 2013, defendant, the United States, respectfully moves to dismiss the second amended complaint (2nd Am. Compl.) filed by plaintiff, Starr International Company, Inc. (Starr), for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.[1]

The United States respectfully requests that the Court dismiss both claims in Starr's second amended complaint. First, we request dismissal of Claim I on the grounds that changed material and undisputed facts are fatal to Starr's direct claims. In particular, Starr admitted in its class certification motion that its direct claims allege harm shared by all AIG shareholders

[1] This motion asserts grounds for dismissal based upon new or revised allegations in Starr's second amended complaint and the American International Group Inc.'s (AIG) determination to reject Starr's claims. Pursuant to the Court's order, we do not repeat any unchanged grounds for dismissal that we have previously asserted, but we maintain and preserve those grounds as well. *See* Order (Mar. 22, 2013) (Dkt. 107) at 2.

ratably. Separately, the United States Department of the Treasury (Treasury) sold all of its equity in AIG. These undisputed facts demonstrate that Starr's claims are exclusively derivative, not direct. In addition, in its second amended complaint, Starr asserts for the first time a direct claim of illegal exaction on behalf of individual AIG shareholders. Such a direct claim is legally flawed, however, because shareholders never paid anything to or otherwise dealt with the United States. They have no basis for a claim separate from the derivative exaction claim Starr has purported to bring on behalf of AIG.

Second, we request dismissal of Starr's Claim II, which consists of claims brought derivatively on behalf of AIG. Those claims must now be dismissed based upon the AIG board of directors' rejection of Starr's demand that AIG prosecute the claims or allow Starr to pursue them. That decision is dispositive of the derivative claims as Starr cannot demonstrate that the demand was wrongfully refused or that demand was futile. Starr, therefore, lacks standing to bring those claims on AIG's behalf.

BACKGROUND

On January 9, 2013, AIG's board of directors unanimously refused Starr's demand that it either prosecute Starr's derivative claims or authorize Starr to prosecute them in AIG's name. AIG's board made this decision after an extremely thorough process of investigation and deliberation. This process included evaluating the facts known to AIG (the party in the best position to know the relevant facts); reviewing the facts in the extensive public record; hiring legal experts to analyze the merits of Starr's claims; and soliciting multiple submissions from Starr, the Federal Reserve Bank of New York (FRBNY), Treasury (which formerly owned AIG shares as a result of the rescue), and the Department of Justice (the sole authorized representative of the United States with respect to this litigation). The process also provided Starr with the

extraordinary opportunity to be heard directly by AIG's board of directors during a several hour hearing that included oral presentations and a question and answer session. *See* Letter from C. Seitz, Jr. and P. Curnin to D. Boies (Jan. 23, 2013) (Dkt. 87, Attachment 1) (*hereinafter* AIG Decision Letter).

The facts considered by AIG's board showed, among other things, that: (1) FRBNY and the Government did not coerce AIG into accepting the rescue that AIG's board chose over its other alternatives; (2) FRBNY and the Government did not seek to undermine a private sector solution; and (3) no institution similarly situated to AIG was granted access to the Federal Reserve's discount window prior to the FRBNY rescue of AIG. *See id.* at 4. Consistent with AIG's public expressions of pride that it had kept its promises to taxpayers, the board reasoned that "a deal is a deal" and that it was in AIG's best interest to honor the rescue agreement it had reached with FRBNY. *See id.* at 7. AIG's board considered Starr's story that, contrary to all other accounts of the rescue, AIG's agreements with FRBNY were caused by Government duress, were unconstitutional, or were otherwise illegal. After an exceptionally comprehensive review of the claims, AIG's board elected not to permit suit.

The AIG board's refusal of Starr's demand makes clear that Starr stands alone in accusing FRBNY and the Government of forcing a harmful rescue on AIG. History has proved that the rescue was not harmful, but prevented AIG's disorderly collapse and brought the company back to profitability from the brink of failure. Notwithstanding AIG's rejection of Starr's claims, Starr continues to attempt to usurp the AIG board's proper exercise of its authority. The United States now moves to dismiss both Starr's purported direct claims (which are properly considered as derivative claims), as well as its derivative claims.

PRELIMINARY STATEMENT

In its second amended complaint, Starr asks the Court to take the extraordinary step of overriding the business judgment of AIG's board of directors in rejecting Starr's demand, and allowing Starr to usurp the board's authority over claims that belong to AIG. First, Starr pleads claims that, as new material and undisputed facts show, are nothing more than derivative claims disguised as direct claims. Second, Starr asserts, contrary to all relevant case law, that the AIG board wrongfully refused Starr's demand and, in the alternative, that AIG's board was legally disabled from considering the demand that Starr nonetheless made. Starr's attacks on the AIG board, and its wrongful attempt to take control of AIG's claims, are unfounded. Therefore, Starr lacks standing to bring any of its claims, this Court lacks jurisdiction over those claims, and they should be dismissed.

Starr's direct claims should be dismissed. Starr's second amended complaint asserts direct claims under facts and circumstances that have fundamentally changed since Starr previously brought those claims. The most significant new development is Starr's admission, on which this Court relied in granting Starr's class certification motion, that its direct claims are premised on harm that was "shared across all of [AIG's] common stock on a ratable basis, share for share." Pl. Reply in Support of Mot. for Class Cert. (Feb. 11, 2013) (Dkt. 92) at 8; *see also* Order (Mar. 11, 2013) (Dkt. 100) at 7. Pursuant to this Court's reasoning that "'[s]uch equal "injury" . . . is not viewed as, or equated with, harm to specific shareholders individually,'" *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 63 (2012) (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)), Starr's concession confirms that its direct claims lack the "unique[] and individual[]" harm that is fundamental to a direct claim, and are instead derivative claims, *id.* at 63. Starr cannot have it both ways. Starr, having successfully relied upon that accurate

description of its direct claims in its motion for class certification, must now accept the bitter with the sweet, including the fatal implications for Starr's direct standing.

Another significant change in circumstances is Treasury's sale of all of its ownership interest in AIG. In concluding that Starr had standing to assert direct claims, the Court emphasized that Treasury's then-61 percent "continuing ownership interest in AIG provides further support for the view that Plaintiffs have standing to bring a direct claim." *Id.* at 65. Treasury today owns no AIG shares. That factor provides further support for the conclusion that Starr *lacks* standing to pursue direct claims.

Finally, since Starr last asserted direct claims before this Court, the AIG board has rejected Starr's demand and the United States District Court for the Southern District of New York has dismissed Starr's claims in a closely related lawsuit based on the same underlying allegations.[2] These decisions, at a minimum, provide a reason for the Court to carefully scrutinize Starr's standing to assert the direct claims before allowing Starr to continue to prosecute those claims, causing substantial expense and burden to the United States and third parties. As shown below, Starr's standing to pursue those claims does not survive scrutiny.

For all of these reasons, it would be erroneous and unjust to permit Starr to continue to prosecute what are, as a matter of law, derivative claims in the guise of direct claims.

Starr's derivative claims also should be dismissed. The Court should also dismiss Claim II and reject Starr's assertions that demand was wrongfully refused or, in the alternative, that demand should have been excused as futile. Starr's allegations do not establish the bad faith or lack of reasonable investigation by AIG's board requisite to a finding of wrongful refusal. AIG's

[2] *See Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, __ F. Supp. 2d __, 2012 WL 5834852, at *10 (S.D.N.Y. Nov. 16, 2012) ("[M]easured against the settled standards for corporate control under Delaware law, Starr has not adequately pled that FRBNY controlled AIG at the time of any of the three relevant events (*i.e.*, November 2008, June 2009, and January 2011).").

board followed an extraordinarily thorough and inclusive demand protocol, conducted a lengthy investigation in which Starr participated, and considered all of the allegations that Starr made to the board. Starr's complaint lacks the particularized allegations necessary to warrant overriding the board's business judgment not to authorize suit based upon Starr's claims.

Nor has Starr pleaded demand futility. Starr's attempt to do so simultaneously with wrongful refusal is barred as a matter of law. It is well established under Delaware law that by making demand, Starr acknowledged the independence of AIG's board to decide whether to bring suit. Further, even if Starr had not waived its demand excused argument, its demand futility allegations fail to raise a reasonable doubt that a majority of AIG's board — who are not defendants in Starr's actions — was independent and disinterested as to Starr's demand.

ARGUMENT

I. Standard Of Review

Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits. *Ultra-Precision Mfg., Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1356 (Fed. Cir. 2003). A complaint should be dismissed for failure to state a claim upon which relief can be granted "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). Labels, conclusions, and conclusory allegations are not entitled to the assumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

II. The Court Should Dismiss Claim I Because Starr's Alleged Direct Claims Are Derivative In Nature

New material and undisputed facts that came to light after the Court's denial of our original motion to dismiss demonstrate that Starr's direct claims are, in fact, exclusively derivative claims.[3] Additionally, Starr's newly asserted direct illegal exaction claim, pleaded for the first time in the second amended complaint, is not legally viable as a direct claim because it would provide third parties who never dealt with the United States with a separate claim directly against the United States.

A. New Material Facts Warrant Dismissal of Starr's Direct Claims

1. Starr Has Now Conceded That Its Direct Claims Lack The "Unique and Individual" Harm Fundamental To A Direct Claim

Starr's recent representations to the Court undermine Starr's standing to assert its direct claims. Relying on Starr's allegations, the Court concluded that Starr had pleaded a direct claim because shareholders were harmed "uniquely and individually." *See Starr*, 106 Fed. Cl. at 65 ("First, assuming the truth of Starr's allegations, . . . AIG's shareholders were harmed *uniquely and individually* to the same extent that the Government benefited.") (quotations omitted;

[3] The Court has previously addressed certain of our arguments to dismiss direct and derivative claims in Starr's amended complaint, and refrained from deciding at the pleading stage issues dependent upon factual allegations. Pursuant to the Court's March 22, 2013 Order, we reassert by reference all of our prior arguments but will not brief them again. With respect to Claim I, this includes, but is not limited to, our prior explanation with respect to Starr's *taking* claims that: (1) the direct claims are purely derivative in nature because Delaware law dictates that dilution claims are derivative in nature and the controlling shareholder exception does not apply; (2) the Fifth Amendment does not supply property rights and therefore cannot supply a direct right against stock dilution separate from that which is defined under state law, *see* Def. Reply to Mot. Dismiss (Apr. 26, 2012) (Dkt. 46) at 4-6; Def. Mot. Recon. (Aug. 9, 2012) (Dkt. 55) at 6-11; Def. Reply to Mot. Recon. (Aug. 31, 2012) (Dkt. 63) at 5-8; and (3) the June 30, 2009 stock split votes are neither a property interest nor a harm separate from the harms alleged to stem from the September, 2008 transactions, *see* Def. Reply Mot. Dismiss (Apr. 26, 2012) at 11-12, 24-26.

emphasis added). In its motion for class certification, however, Starr adopted a contrary position.

Starr, in arguing that it satisfied the "typicality" and "commonality" requirements of RCFC 23, expressly relied upon and quoted from Dr. Rausser's declaration, which described the harm alleged in Starr's direct claims as "shared across all of the common stock on a ratable basis, share for share." Rausser Decl. (Dec. 3, 2012) (Dkt. 81, Attachment 1), ¶ 19 (emphasis added); Pl. Mot. For Class Cert. (Dec. 3, 2012) (Dkt. 80) at 3 (expressly incorporating Rausser Decl. by reference); Pl. Mem. in Support of Mot. for Class Cert. (Dec. 3, 2012) (Dkt. 81) at 10 (quoting Rausser Decl. ¶ 19); Pl. Reply in Support of Mot. for Class Cert. (Feb. 11, 2013) (Dkt. 92) at 8 (quoting Rausser Decl. ¶¶ 19-20). The Court, in turn, relied upon Starr's position as to how the shareholders were harmed in determining that the class satisfied RCFC 23, expressly citing Starr's new position in granting Starr's motion for class certification. Order (Mar. 11, 2013) (Dkt. 100) at 7.

Starr's admission that all of the AIG shareholders were harmed equally demonstrates that its supposedly direct claims are, as a matter of law, exclusively derivative claims. It is black letter law that, if "*all* of a corporation's stockholders are harmed and would recover *pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders*, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 735 (Del. 2008) (*Feldman II*) (emphasis added); *see also Starr*, 106 Fed. Cl. at 63 ("'[s]uch equal "injury" . . . is not viewed as, or equated with, harm to specific shareholders individually'") (quoting *Rossette*, 906 A.2d at 99). Absent the unique and individual harm that is necessary to any direct claim, Starr's claims are, by definition, derivative.

2. Treasury Has Sold The AIG Stock Cited By The Court As Support For Starr's Direct Claims

Treasury has sold all of its equity in AIG since the Court ruled that Starr had standing to pursue a direct claim. In fact, Treasury sold its AIG stock before the AIG board's refusal of Starr's demand. In its denial of our previous motion to dismiss, the Court considered "who would receive the benefit of any recovery." *Starr*, 106 Fed. Cl. at 62 (quotation omitted). The Court then relied upon Treasury's holding of AIG stock as a basis for its decision that Starr had standing to pursue a direct claim, reasoning that otherwise, the Government could receive some of the proceeds from the suit. *Id.* at 65. Because Treasury no longer owns any AIG stock or warrants, the Court's prior conclusion that "the Government's continuing ownership interest in AIG provides further support for the view that Plaintiffs have standing to bring a direct claim" no longer holds. *Id.*

Just as the Court previously took notice of Treasury's ownership percentage, it may now take judicial notice that Treasury has no equity interest in AIG. On December 14, 2012, Treasury announced that it had sold all of its AIG common stock.[4] On March 1, 2013, Treasury sold all of its AIG warrants.[5] This basis for the Court's earlier opinion has been vitiated by subsequent events. Consideration of who would be "the beneficiary of any recovery" now supports the conclusion that Starr lacks standing to pursue a direct claim. *See Starr*, 106 Fed. Cl. at 65.

[4] *See, e.g.*, 12/14/12 AIG Press Release, "AIG Announces Completion of the U.S. Treasury's $7.6 Billion Offering AIG Common Stock," *available at* www.aig.com/press-releases_3171_438003.html (last visited Apr. 5, 2013).

[5] *See, e.g.*, 3/1/13 AIG Form 8-K, *available at* www.sec.gov/Archives/edgar/data/5272/000119312513086875/0001193125-13-086875-index.htm (last visited Apr. 5, 2013).

B. The Court Should Dismiss Starr's Newly Asserted Direct Illegal Exaction Claim Because Such A Claim Is Solely Derivative In Nature

In its second amended complaint, Starr pleads, for the first time in a complaint, a direct illegal exaction claim. Starr had previously only argued an illegal exaction claim in response to our motion to dismiss, and it did not specify whether the claim was direct or derivative in nature. Although the Court ruled in its July 2, 2012 opinion that Starr had stated an illegal exaction claim, and in its March 8, 2013 order allowed certification of a class alleging an illegal exaction claim, until now the Court has never had before it a complaint from Starr setting forth a direct illegal exaction claim. We, therefore, have not had the opportunity to demonstrate to the Court, as we do below, why such a claim is not viable, nor has the Court addressed such a motion.

1. Starr Does Not Possess An Illegal Exaction Claim Because It Never Paid Money Or Conveyed Stock To The United States

An illegal exaction claim has been recognized when "the Government has the citizen's money in its pocket." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996). We are aware of no precedent supporting an illegal exaction claim by an individual who never dealt with the United States, but instead alleges it suffered an *indirect* economic consequence from an agreement between the Government and a corporation in which the individual is a shareholder.

The Government does not now have, and has never had, any money or property belonging to Starr "in its pocket." The United States never dealt with Starr, and has no money of Starr's. *See Aerolineas Argentinas*, 77 F.3d at 1573. Given those facts, even if the Court recognizes a *taking* premised on Starr and class members' loss of "property interests and voting rights relating to their holding of AIG Common Stock," 2nd Am. Compl. ¶ 230, the premise cannot extend to an illegal exaction claim. Starr thus lacks standing for its direct illegal exaction claim, and that claim should be dismissed.

2. The Alleged Diminution In The Value Of Starr's Stock Was Not A Direct And Substantial Impact That Would Justify A Direct Action

Nor can a direct exaction claim be based upon some notion that Starr's stock's *value* was exacted as a consequence of transactions between AIG and the FRBNY. Starr has asserted no legal precedent supporting a direct illegal exaction claim based upon an alleged indirect economic consequence to the value of property — and we know of none. Rather, precedent requires that the alleged illegal exaction have a "direct and substantial impact on the plaintiff asserting the claim." *Norman v. United States*, 429 F.3d 1081, 1096 (Fed. Cir. 2005) (quoting *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1364 (Fed. Cir. 2002)). The diminution in value Starr alleges is, by its nature, indirect. Thus, because Starr cannot state a basis for a "direct and substantial impact" on Starr from the alleged illegal exaction of AIG's stock, its illegal exaction claim should be dismissed.

3. Because The Government Was Not A Controlling Shareholder At The Time Of The Alleged Illegal Exaction, Starr's Dilution Claim Is Solely Derivative

As we have previously explained in the context of Starr's takings claim, a direct shareholder claim for alleged wrongful dilution in the value of stock of a Delaware corporation is not legally cognizable, except when a corporation's share issuance is wrongfully caused by a controlling shareholder.[6]

This general rule of law applies to Starr's illegal exaction claim because the rule extends to all claims involving alleged wrongful dilution of the economic power and voting rights of stock, regardless of the cause of action or theory of the claim. *See, e.g.*, *Feldman II*, 951 A.2d at 733 (rejecting the plaintiff's attempt to recast a derivative claim as a direct claim "by alleging the same fundamental harm" under a different legal theory); *Kramer v. W. Pac. Indus. Inc.*, 546 A.2d

[6] *See* Def. Reply Mot. Dismiss (Apr. 26, 2012) at 4-6; Def. Mot. Recon. (Aug. 9, 2012) at 8-11; Def. Reply Mot. Recon. (Aug. 31, 2012) at 5-8.

348, 349-50 (Del. 1988) (applying the general rule that a wrongful dilution claim is exclusively derivative to a waste claim involving dilution); *see also Starr*, 106 Fed. Cl. at 61-62 & nn.8, 10.

Nor does Starr's illegal exaction claim fall within the exception to the rule. That exception depends on "an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest." *Starr*, 106 Fed. Cl. at 61-62 (quoting *Rossette*, 906 A.2d at 99). The exception is not triggered by a redistribution to a party, other than a controlling shareholder, merely because that party owes duties to the shareholders. *See Feldman II*, 951 A.2d at 729, 733, 735 (rejecting a shareholder's "creative attempt to recast" as a direct claim an exclusively derivative claim for dilution resulting from the issuance of stock options to an inside director and an officer); *Kramer*, 546 A.2d at 349-50 (holding that a waste claim involving alleged dilution resulting from the issuance of stock options to the corporation's Chairman and President, each of whom owed fiduciary duties to shareholders, was exclusively derivative).[7] Further, under Delaware law, the exception is not triggered simply because there is a redistribution of economic value and voting power from shareholders to a person who becomes a shareholder by virtue of the dilution. *See, e.g.*, *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) ("[T]o the extent that any alleged decrease in the asset value and voting power of plaintiffs' shares . . . results from the issuance of new equity to a third party . . . , plaintiffs' dilution theory as a basis for a direct claim fails and any individual claim for dilution must be

[7] In reaching a contrary conclusion in the context of the Government's general obligation not to take property without just compensation, this Court relied on its interpretation of an unpublished Delaware Court of Chancery decision. *Starr*, 106 Fed. Cl. at 65 (citing *Dubroff v. Wren Holdings, LLC*, 2009 Del. Ch. LEXIS 89, at *11 (May 22, 2009)). We previously explained why *Dubroff* does not support the Court's holding that Starr had standing to assert a direct claim. Def. Reply to Mot. Recon. (Aug. 31, 2012) (Dkt. 63) at 6 n3. Regardless, that interpretation cannot be reconciled with the Delaware Supreme Court's holdings in *Feldman II* and *Kramer*.

dismissed."). Therefore, a duty of the Government not to illegally exact money (or other property) does not trigger an exception to the rule that wrongful stock dilution claims are exclusively derivative.

Because the Government was not a controlling shareholder when the dilution about which Starr complains occurred, Starr's illegal exaction claim is exclusively derivative, Starr lacks standing to prosecute a direct illegal exaction claim, and this Court lacks jurisdiction over such a claim. Further, as we have previously shown, Starr's asserted reverse stock split claim is not separate from its wrongful dilution claim, so both claims fall together.[8] Therefore, Claim I of the second amended complaint should be dismissed.

III. Starr's Wrongful Refusal Allegations Fail To Overcome The Presumption That AIG's Board Exercised Its Business Judgment In Refusing Starr's Demand

Starr's allegations fail to demonstrate that AIG's board wrongfully refused Starr's demand. Under Delaware law, the board of directors of a company has the exclusive right to decide critical questions such as whether to pursue a claim on behalf of the company. That decision is presumed to be a valid exercise of the board's business judgment, and can only be overridden by a minority shareholder if the shareholder makes a particularized showing that raises a reasonable doubt as to whether the board is entitled to the presumption of regularity and good faith.

Starr fails to make that showing. First, Starr points to no basis for procedural invalidity in the AIG board's extraordinary and inclusive demand review process. Second, Starr identifies no plausible basis to question the AIG board's independence in evaluating Starr's demand. Third, Starr's substantive disagreements with the AIG board's decision do not demonstrate a lack of good faith or reasonable investigation.

[8] *See* Def. Mot. Recon. (Aug. 9, 2012) at 22; Def. Reply. Mot. Recon. (Aug. 31, 2012) at 20.

A. Standards Applicable To Wrongful Refusal Claims

It is black-letter law that a corporate board of director is charged with determining important policy matters of the company, including whether or not to pursue a claim in litigation. *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (it is a "fundamental precept that directors manage the business and affairs of corporations"), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990) ("The decision to bring a law suit or to refrain from litigating a claim on behalf of a corporation is a decision concerning the management of the corporation. Consequently, such decisions are part of the responsibility of the board of directors.") (citations omitted). By making a demand to file suit, a shareholder plaintiff "place[s] control of the derivative litigation in the hands of the board of directors." *Spiegel*, 571 A.2d at 775.

Minority shareholders appropriately face rigorous burdens under Delaware law to overrule the decision of the board of directors in deciding whether making a claim is in the corporation's best interests. Board decisions regarding whether to bring a claim are protected by the business judgment rule—"a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson*, 473 A.2d at 812. "If a demand is made and rejected, the board rejecting the demand is entitled to the presumption of the business judgment rule unless the stockholder can allege facts with particularity creating a reasonable doubt that the board is entitled to the benefit of the presumption." *Scattered Corp. v. Chicago Stock Exch., Inc.*, 701 A.2d 70, 74 (Del. 1997); *see also Grimes v. Donald*, 673 A.2d 1207, 1219 (Del. 1996); *Rales v. Blasband*, 634 A.2d 927, 935 (Del. 1993); *Levine v. Smith*, 591 A.2d 194,

212 (Del. 1991); *Aronson*, 473 A.2d at 815, *all overruled in part on other grounds by Brehm*, 746 A.2d 244.[9]

The board's independence is not in issue when the shareholder plaintiff has made a demand because "[b]y electing to make a demand, a shareholder plaintiff tacitly concedes the independence of a majority of the board to respond." *Spiegel*, 571 A.2d at 777.[10] In evaluating a demand, "the directors must determine the best method to inform themselves of the facts relating to the alleged wrongdoing and the considerations, both legal and financial, bearing on a response to the demand." *Rales*, 634 A.2d at 935. "If a factual investigation is required, it must be conducted reasonably and in good faith." *Id.*; *see also Levine*, 591 A.2d at 213; *Spiegel*, 571 A.2d at 777. Thus, "in assessing whether a demand has been wrongfully refused, the Court looks only to good faith and the reasonableness of the investigation." *Scattered Corp.*, 701 A.2d at 75; *see also Levine*, 591 A.2d at 198 ("The only relevant question is whether the directors acted in an informed manner and with due care, in a good faith belief that their action was in the best interest of the corporation."); *Spiegel*, 571 A.2d at 777.

The requirement that the facts alleged to show a lack of good faith or a reasonable investigation be pleaded with particularity extends far beyond the requirements of mere notice pleading, and demands substantially more than conclusory statements. *Brehm*, 746 A.2d at 254-55. The pleadings alone must cause the Court to have a "reasonable belief" that the board could

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[9] This heightened pleading standard for derivative actions is a substantive component of Delaware law that Federal courts routinely apply when considering derivative claims purportedly brought on behalf of Delaware corporations like AIG. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 96-97 (1991) ("the function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'").

[10] Furthermore, even if the Court were to consider the issue of the board's independence in connection with the wrongful refusal claim, Starr has not pleaded facts sufficient to establish a lack of independence by AIG's board. *See* Section IV.B, *infra*.

not rationally have reached its decisions by pursuing appropriate consideration of the demand and exercising good faith business judgment. *Grimes*, 673 A.2d at 1217 n.17. If the shareholder plaintiff fails to meet its burden, the Court should not disturb the board's decision.

B. Starr Points To No Basis For Procedural Invalidity In The Demand Process

Starr has not demonstrated any plausible basis for procedural invalidity in the demand process that would support an allegation of a lack of good faith or failure to conduct a reasonable investigation. AIG undertook an extraordinary and inclusive demand process over a period of several months. AIG filed with the Court a description of its planned demand process, and Starr agreed to participate in that process. *See* AIG Demand Protocol (Oct. 1, 2012) (Dkt. 87, Exhibit 2) (outlining process). AIG's board solicited written responses from Starr, AIG's transactional counterparties (FRBNY and Treasury), and defendant's counsel (the Department of Justice), with multiple rounds of questions and responses spanning several months. *Id.* Each of these rounds of written responses was forwarded to the board for its consideration. *See* AIG Decision Letter at 2-3. Additionally, although a board is not required to permit a shareholder to make an oral presentation to the board, *see Levine*, 591 A.2d at 214, AIG's board permitted Starr to make an oral presentation and to participate in a follow-up question-and-answer process with the board on January 9, 2013.

After this lengthy and involved process, AIG's board provided both Starr and the Court with a lengthy explanation of its decision, in which it explicitly referred both to its factual analysis and the analysis it obtained from independent counsel and experts. *See* AIG Decision Letter. Contrary to Starr's implication that AIG's board failed to take sufficient time to evaluate the demand (2nd Am. Compl. ¶ 216), in addition to reviewing each round of written responses as they arrived, AIG's board met the night before the January 9, 2013 board meeting to discuss

these considerations, and met again after the January 9, 2013 board meeting to discuss the oral presentations. The board considered the opinion of its independent legal counsel and experts, who concluded that Starr had a "low" likelihood of success for its claims, and that the potential damages were "far below the value claimed by Starr." *See* AIG Decision Letter at 4-5.

In addition to the merits, the board considered a broad range of other factors pertaining to whether pursuing the claim was in the best interest of AIG and its shareholders. *See id.* at 5-7. After this extensive procedure, AIG unanimously determined to refuse Starr's demand in its entirety. Starr fails to allege any procedural defect that would undermine the validity of this process.

AIG's process was extraordinarily inclusive and diligent. A review of wrongful refusal caselaw reveals no case in which a board provided such process only to have its business judgment overturned by a court. To the contrary, courts routinely refuse to overturn a board's business judgment based upon procedures far less thorough and inclusive than those engaged in by AIG's board. *See, e.g.*, *Levine*, 591 A.2d at 214 (upholding refusal despite lack of oral presentation at board meeting and agreeing that a "board of directors is not legally obligated to permit a demanding shareholder to make an oral presentation at a meeting"); *Rales*, 634 A.2d at 935 n.11 ("In most instances, a factual investigation is appropriate so that the board can be fully informed about the validity, if any, of the claims of wrongdoing contained in the demand letter. Nevertheless, a formal investigation will not always be necessary because the directors may already have sufficient information regarding the subject of the demand to make a decision in response to it."); *FLI Deep Marine LLC v. McKim*, 2009 WL 1204363, at *4 (Del. Ch. 2009) (granting motion to dismiss and concluding, "[t]o allow Plaintiffs the ability to dictate the manner in which the Board, or its special committee, investigates their allegations would 'be an

unwarranted intrusion' upon the authority our law confers on a board of directors to manage the business and affairs of the corporation.") (quoting *Levine*, 591 A.2d at 214); *Charal Inv. Co., Inc. v. Rockefeller*, 1995 WL 684869, at *3 (Del. Ch. 1995) ("Reasonable minds may differ as to what a thorough investigation may involve.").

C. Starr Pleads No Plausible Basis To Question AIG's Board's Independence

Despite not having raised such concerns during the demand process, Starr speculates that the demand process was compromised due to conflicts of interest. Starr's purported grounds for conflict are: (1) that the same law firms advised the board for the transactions at issue and the demand (2nd Am. Compl. ¶ 205); (2) that a few directors who witnessed and participated in the deliberations for the 2008 rescue transactions also participated in the board's decision (*id.* ¶ 206); (3) that some directors were originally elected with the support of the AIG Credit Facility Trustees (*id.* ¶ 207); and (4) alleged unspecified and unsubstantiated "threats" made by the Government during the demand process (*id.* ¶¶ 208-09). Starr provides no plausible basis for how or why these alleged conflicts of interest compromised the process.

With respect to the several outside law firms that AIG engaged, Starr pleads no plausible facts in support of the conflict of interest it belatedly alleges, nor does it support the proposition that employing some of the same firms that participated in the original transaction compromised the integrity of the board. Starr points to no plausible basis to question these firms' independence solely due to their prior representations of AIG and its board, respectively. Furthermore, as detailed in the letter, AIG's board considered opinions from independent legal experts and a consulting firm that had no prior connection to the board or the transactions at issue. *See* AIG Decision Letter at 3-5. Starr thus points to no basis for a conflict of interest.

With respect to the board members who approved the 2008 rescue transactions prior to any Government ownership, Starr fails to explain its allegation that they had a "personal interest in defending conduct attacked in this litigation," (2nd Am. Compl. ¶ 206), or that their independence was compromised by their having been elected by the AIG Credit Facility Trust (*id.* ¶ 207). By making demand, Starr conceded the independence of the directors, subject to a showing of a lack of good faith or reasonable investigation. *See Rales*, 634 A.2d at 935 n.12; *Spiegel*, 571 A.2d at 777. Moreover, as detailed in AIG's decision letter, the demand on the board "does not allege wrongdoing by any AIG director or any personal interest on the part of any director with respect to the subject matter of the Demand." AIG Decision Letter at 2. Moreover, the Government is no longer a shareholder of AIG, nor was it at the time of the board's decision. *See id.* Starr thus pleads no plausible basis for the alleged conflict.

Next, Starr makes unsubstantiated allegations regarding alleged threats made by the Government (*see* 2nd Am. Compl. ¶ 208) and unnamed Government officials in the days leading up to the January 9, 2013 AIG board meeting (*id.* ¶ 209). Starr has pleaded no plausible factual basis for its speculative claims of a Government "threat," and we are aware of none. Further, to the extent that Starr's allegations refer to predictions of public reaction to AIG's possibly filing suit, a corporate board's consideration of a demand properly may include commercial, promotional, public relations, and other matters of business judgment as to what is in the corporation's best interest to consider, as well as legal considerations. Such consideration is especially appropriate for a company whose business involves the sale of contractual promises. Indeed, AIG's written request for responses prior to the January 9, 2013 board meeting explicitly asked the parties to discuss the public relations ramifications of AIG's decision. *See* AIG Demand Protocol at 4 ("Discuss the impact, if any, of allowing derivative claims to proceed on

AIG's business and constituencies other than shareholders, including AIG's public perception and brand name."). AIG's board discussed such considerations, including the potential effect on AIG's "corporate brand and image." *See* AIG Decision Letter at 5, 7. Starr's allegations thus fail to raise a reasonable doubt as to the validity of the AIG board's actions.

D. Starr's Disagreement With AIG's Board's Decision Does Not Overcome The Presumption That AIG's Board Acted In Good Faith, Upon A Reasonable Investigation

In an improper attempt to have the Court reweigh AIG's board's consideration of the demand, Starr relies upon one-sided statements asserting its view of the merits of its substantive claims. For its factual allegations, Starr recites what it apparently believes to be its strongest points based on the discovery it has obtained well before the close of fact discovery. *See* 2nd Am. Compl. ¶¶ 192-204. Starr had the opportunity to present all of these factual claims to AIG's board, and did so. Moreover, these allegations are implausible and fail to satisfy Rule 23.1 as they are either factually unsupported, incomplete, and/or incorporate Starr's legal conclusions. Furthermore, in addition to discovery being incomplete, no ruling from this Court has established that the Government has any liability, only that the Court has found that Starr has stated a claim based upon the lenient RCFC 12(b)(6) standards. Starr's recitation of its view of the merits of its claim does not establish that AIG's board failed to consider the issues. *See Grimes*, 673 A.2d at 1220 ("Such conclusory, *ipse dixit*, assertions are inconsistent with the requirements of Chancery Rule 23.1.").

In addition to attempting to reargue the factual bases for AIG's board's decision, Starr alleges that AIG's board failed to give proper "weight" or "deference" to the Court's denial of our motion to dismiss the derivative claims. *See* 2nd Am. Compl. ¶¶ 210-11. This argument misunderstands the import of a denial of a motion to dismiss, in considering which a court must

accept as true the allegations of the complaint. Unlike the Court, AIG's board not only did not need to accept Starr's allegations as true, but was in possession of pertinent facts not available to the Court. *See Levine*, 591 A.2d at 214; *see also Grimes*, 673 A.2d at 1220. Similarly, Starr's assertions that AIG's board "ignored evidence as to damages," (2nd Am. Compl. ¶ 213), or failed to provide a damages estimate (*id.* ¶ 214), are belied by AIG's board's discussion of Starr's argument and its procurement of an independent damages assessment. *See* AIG Decision Letter at 5.

All of Starr's contentions amount to disagreement with AIG's board's decision, not grounds to find that AIG's board failed to exercise its business judgment. Starr's disagreement with the board's findings and conclusions does not establish that AIG's board failed to act "independently, disinterestedly, or with due care in response to the demand." 2nd Am. Compl. ¶ 218. Accordingly, Starr fails to allege facts sufficient to demonstrate a "reasonable doubt that the board is entitled to the benefit of the presumption" of the business judgment rule. *Scattered Corp.*, 701 A.2d at 74.

IV. Starr's "Demand Excused" Allegations Are Procedurally Improper And Do Not Establish That AIG's Board Was Incapable Of Evaluating Starr's Demand

Pleading in the alternative, Starr asserts that the Court should excuse demand as futile. *See* 2nd Am. Compl. ¶¶ 179-91, 219. This argument contradicts Delaware law providing that a plaintiff waives the right to plead demand futility by making demand. Starr also fails to plead particularized facts sufficient to support its demand futility allegations. Thus, the Court should deny Starr's demand futility argument.

A. Starr Waived Any Futility Allegation By Making A Demand And Participating In The Board Proceedings

As a matter of law, Starr's demand futility allegations are irrelevant because Starr has actually filed a demand, which legally concedes the independence of AIG's board for the purposes of demand futility. *See Rales*, 634 A.2d at 935 n.12 (by making a demand, a stockholder "concedes the independence and disinterestedness of a majority of the board to respond") (citing *Spiegel*, 571 A.2d at 777). "If the stockholders make a demand, as in this case, they are deemed to have waived any claim they might otherwise have had that the board cannot independently act on the demand." *Scattered Corp.*, 701 A.2d at 74.

Starr contends that, notwithstanding its having made a demand, it should nevertheless be permitted to argue demand futility pursuant to its September 5, 2012 agreement with AIG. *See* 2nd Am. Compl. ¶ 190. The agreement merely provides that Starr and AIG each may make whatever arguments they wish in later proceedings. Agreement (Sept. 5, 2012) (Dkt. 64, Exhibit 1) at ¶ 6. That includes legal arguments that Starr has waived any demand futility claim. Moreover, even if the agreement did somehow limit AIG's arguments, Starr cannot properly assert demand futility. The private agreement does not supersede Delaware law, *see Rales*, 634 A.2d at 935, and the Government was not party to the agreement. The Court thus should not allow Starr to evade the effect of its demand under Delaware law.

Furthermore, Starr's argument contradicts the factual premise of the Court's order that the "contemplated procedure authorized by AIG's Board will moot the Government's March 1, 2012 motion to dismiss the derivative claims for failure to make a demand." Order (Sept. 13, 2012) (Dkt. 67) at 2. Indeed, were Starr free to ignore the consequences of its making a demand, the demand process would amount to nothing more than a free option for Starr to make

its demand and then, if unsuccessful, claim that its demand had no legal effect. Neither Delaware law nor the Court's order contemplates such a one-sided and wasteful process.

B. Starr Fails To Plead Facts Sufficient To Establish Demand Futility

Even if the Court were to consider the merits of Starr's demand futility allegations, Starr fails to plead particularized facts sufficient to establish demand futility. In deciding a demand futility allegation, the Court should "examine whether the board that would be addressing the demand can impartially consider its merits without being influenced by improper considerations. Thus, a court must 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. If the derivative plaintiff satisfies this burden, then demand will be excused as futile." *Rales*, 634 A.2d at 934. Because Starr fails to meet this burden, the Court should dismiss Starr's demand futility allegation. *See id.* at 934-36 & n.12; *see also Aronson*, 473 A.2d at 816.

Starr cites two alleged grounds for demand futility: (1) the fact that the Government owned a majority of AIG's voting shares and elected a majority of AIG's board as of November 21, 2011, the date of the original complaint (2nd Am. Compl. ¶ 188); and (2) an alleged "promise" referred to by the Government in its final letter to AIG's board prior to the January 9, 2013 board meeting (*id.* ¶ 189). Neither of these grounds supports demand futility.

Delaware law presumes that directors are independent and that "their acts have been taken in good faith and in the best interests of the corporation." *Aronson*, 473 A.2d at 815. Where, as here, the board whose independence is being challenged was not the board that approved the challenged transaction, the Court should "examine whether the board that would be

addressing the demand can impartially consider its merits without being influenced by improper considerations." *Rales*, 634 A.2d at 934. To show that a director lacks independence, the plaintiff must plead facts that show that the director is "beholden" to the proposed defendant or "so under [its] influence that [his] discretion would be sterilized," or that the director's decision would be based on "extraneous considerations or influences" rather than "the corporate merits of the subject before the board." *Id.* at 936 (citation omitted).

Starr asserts that AIG's board "could not be expected to authorize a lawsuit against the Government at a time when the Government owned a majority interest in AIG, and when all of the members of the AIG Board had been elected by the Government, including by the Trustees of the Trust holding a super-majority of AIG's stock who had agreed not to act contrary to the Government's interest." 2nd Am. Compl. ¶ 188; *see also id.* ¶ 183 (describing the board at the time of the filing of the initial complaint). In other words, Starr's sole basis for futility is the Government's voting control at the time of the original complaint. However, to show a lack of independence, "it is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director." *Aronson*, 473 A.2d at 816.

Similarly, none of Starr's allegations concerning the duties of the Trustees pertains to the directors. Starr incorrectly alleges that the Trustees were not independent because: (1) the Trust Agreement includes the standard of care owed by a trustee to a trust beneficiary, namely, not acting contrary to the interests of the beneficiary; (2) two of the three Trustees were former Government or FRBNY officials; and (3) the Trustees received advice from FRBNY officials (2nd Am. Compl. ¶¶ 183-87). While none of these allegations establish even that the Trustees lacked independence, they do nothing to attack the independence of the directors themselves.

Starr does not allege — nor can it — that the directors assumed any duty contrary to their duty to act in the best interest of AIG and its shareholders. Furthermore, the Trust itself dissolved in January 2011, over ten months prior to Starr's having filed suit, with the closing of the January 2011 recapitalization plan. *See id.* ¶¶ 84, 116. Starr's claims of a lack of independence thus are unsupported.

Starr also falsely characterizes the Government's final written response to AIG's board's question in the demand process as evincing a "promise" allegedly made by AIG's board that established demand futility. *See id.* ¶ 189. The statement Starr appears to cite — a sentence from a January 4, 2013 letter to AIG's board concluding our third written response to its questions — refers to the promises AIG made as part of the core agreements in this case, including the Credit Agreement that Starr now alleges to be a taking. *See* DOJ Letter to AIG (Jan. 4, 2013) (Dkt. 87, Exhibit 21) at 2 ("Thus, any decision by AIG 'not to block Starr's efforts' must be viewed legally — and will be viewed by the United States — as an affirmative decision by AIG to repudiate its promises and sue the United States for the very actions that rescued AIG."). A contract such as the Credit Agreement constitutes a "promise." That AIG chose to honor that agreement three years later does not transform AIG's rejection of Starr's demand into grounds for futility.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss Starr's second amended complaint.

Respectfully submitted,

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