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 REPLY TO PLAINTIFF'S OPPOSTION TO THE MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT FILED BY DEFENDANT UNITED STATES OF AMERICA AND NOMINAL DEFENDANT AMERICAN INTERNATIONAL GROUP, INC

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Defendant, the United States, respectfully submits this reply to plaintiff Starr International Co., Inc., et al. (Starr)'s opposition (Dkt. 121) (Opp.) to our motion to dismiss the second amended complaint (Dkt. 111) (Mot.). For the reasons set forth in our motion and this reply to Starr's opposition, we respectfully request that the Court dismiss Starr's complaint.

INTRODUCTION

Our motion to dismiss demonstrates that Starr lacks standing to pursue the direct and derivative claims asserted in its second amended complaint. Starr's opposition fails to refute our motion, and the complaint therefore should be dismissed in its entirety.

As we showed, two new material facts undermine Starr's alleged direct standing: Starr's admission that the alleged harm was ratable across all of AIG's outstanding common shares and the sale of Treasury's equity stake in AIG. Starr did not—and cannot—dispute those facts.

Nor did Starr confront the implications, under this Court's reasoning in the July 2, 2012 decision, of its admission that the harm alleged in its direct claims was "shared across all of [AIG's] outstanding common stock on a ratable basis, share for share." Mot. 4. As this Court explained, "[s]uch equal 'injury' . . . is not viewed as, or equated with, harm to specific shareholders individually," and no direct claim exists where the alleged harm is "confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares." *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 63 (2012) (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)) (internal quotation marks omitted). In our motion, we showed that—even putting aside the absence of the requisite controlling shareholder—Starr's admission is fatal to its standing. We also showed that Treasury's sale of its interest in AIG further undermined Starr's standing.

Unable to rebut these points, Starr erroneously asserts that we recycle arguments the Court previously rejected. Yet it is Starr that is, in effect, asking the Court to abandon the governing principles of applicable law quoted above, and to retract its reasoning regarding the relevance of Treasury's prior investment in AIG. In contrast, we respectfully request that the Court remain faithful to important aspects of its prior decision by applying the principles and reasoning to new facts, which leads to a different outcome.

Similarly, Starr's pursuit of a direct illegal exaction claim is, in essence, a request that the Court revisit its holding that "Starr still must show that it is an appropriate representative of AIG" to possess standing under Starr's illegal exaction theory—a holding that precludes Starr's direct illegal exaction claim. *Starr*, 106 Fed. Cl. at 84 n.25.

Starr has not shown, and cannot show, that it is an appropriate representative of AIG to maintain an illegal exaction claim. Indeed, acknowledging that "a deal is a deal," AIG has refused to allow Starr to sue on behalf of AIG on the same alleged illegal exaction claim that Starr now seeks to press directly. Starr's subsequently pleaded direct claim must be dismissed because it is actually derivative and because no illegal exaction claim may be maintained against the United States by individuals with whom it never directly dealt.

Starr's derivative claims should also be dismissed because Starr's response fails to show that AIG's board wrongfully refused Starr's demand, or that demand should be excused as futile. Starr now seeks to have the Court effectively force AIG to sue the Government against its will, requesting that the Court find that AIG's board of directors was incapable of exercising one of its fundamental duties. Starr's criticisms of AIG's board's process do not show that the board failed to exercise independent judgment or to conduct a reasonable investigation, as is required under the business judgment rule. Last, the Court should reject Starr's demand futility claim because Starr waived demand futility by making demand, and because Starr fails to demonstrate that AIG's board was incapable of making an independent decision.

Because Starr may not properly maintain either its direct or derivative claims, the Court should dismiss Starr's complaint in its entirety.

ARGUMENT

I. Starr's Claim I Should Be Dismissed Because Its Alleged Direct Claims Are Derivative In Nature

A. Starr's Acknowledgment That All Stockholders Were Harmed Equally Establishes That Starr's Alleged Direct Claims Are Derivative

Contrary to Starr's contentions, Opp. 35, our motion is supported by undisputed facts that are both new, having arisen after the Court's 2012 decision upon Starr's prior complaint, and material, as they squarely address the issues identified by the Court as relevant to Starr's standing to pursue direct claims: "(1) who suffered the alleged harm (the corporation or the suing shareholders, individually); and (2) who would receive the benefit of any recovery (the corporation or the stockholders, individually)?" *Starr*, 106 Fed. Cl. at 62 (discussing applicable law and quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). [1]

1. The Suing Shareholders Did Not Suffer The "Unique and Individual Harm" Necessary To A Direct Claim

Starr's February 11, 2013 statement that the alleged harm affected AIG shareholders proportionately demonstrates—under the applicable principles of Delaware law cited by the Court—that the harm alleged is exclusively derivative in nature.

As the Court explained in reciting applicable law, "any dilution in value of the corporation's stock is merely the unavoidable result . . . of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction" and "[s]uch equal 'injury' . . . is not viewed as, or equated with, harm to specific shareholders individually." *Starr*, 106 Fed. Cl. at 63 (quoting *Rossette*, 906 A.2d at 99) (internal quotation marks omitted). Although the Court observed that there may be a direct claim where "the minority shareholders lost a portion of the economic value and voting power of their stock interest," the Court also noted that a direct claim exists only when that alleged harm "'is *not* confined to an equal dilution of the economic value and voting power of each of the corporation's *outstanding* shares.'" *Starr*, 106 Fed. Cl. at 63 (quoting *Rossette*, 906 A.2d at 99) (emphasis added); *see also Feldman v.*

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[1] Starr mistakenly argues that we are "reassert[ing] arguments that the Court has previously rejected," including the argument that Starr's direct claims "'lack the unique and individual harm that is fundamental to a direct claim.'" Opp. 1, 34, 35 (quoting Mot. 4)). Although much of the same governing Delaware authority is relevant—and was relied upon by the Court in its prior decision—our motion's arguments are premised upon new, undisputed material facts not previously before the Court.

Cutaia, 951 A.2d 727, 733 (Del. 2008) ("In order to state a direct claim, the plaintiff must have suffered some individualized harm not suffered by all of the stockholders at large.").[2]

Starr's statement that the harm alleged in its direct claim was "shared across all of [AIG's] common stock on a ratable basis, share for share," Pl. Reply Supp. Mot. Class Cert. (Feb. 11, 2013) (Dkt. 92) at 8, confirms that the alleged harm *is* "'confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares,' *i.e.*, the basis for the derivative claim." *Starr*, 106 Fed. Cl. at 63 (quoting *Rossette*, 906 A.2d at 99).

Starr's argument that the Court already has considered and applied the governing Delaware case law, Opp. 36, is mistaken**.** The Court did not previously have Starr's 2013 statement of its alleged direct claim before it when it ruled upon our 2012 motion with respect to Starr's first amended complaint. If the Court then had Starr's later statement before it, the Court could not have concluded, consistent with its articulation of the applicable Delaware law standards governing whether a claim is direct or derivative, that Starr possessed direct claims.

Starr's contention that the cases upon which the Court relied "only require that the class establish 'unique and individual' harm distinct from the entity who committed the harm, *i.e.*, the entity in control of the corporation," Opp. 36, is wrong and relies erroneously upon the history of *Gatz* and *Rossette* on remand, Opp. 36 & n.14; Opp. 38. In neither of those cases could it be said that the harm alleged was, as Starr has stated in this case, shared across all outstanding common stock on a ratable basis, share for share. *See Rossette*, 906 A.2d at 93 ("The transaction . . . wrongfully *reduced* the cash-value and the voting power of the public stockholders' *minority*

[2] We respectfully preserve our objections to the Court's conclusion upon our 2012 motion to dismiss that Starr possesses standing to pursue a direct claim – including the argument that a wrongful dilution claim is exclusively derivative, except when an existing controlling shareholder wrongfully causes dilution in its favor. Respecting the Court's March 22, 2013 scheduling order, Dkt. 107, we preserve by incorporating by reference rather than repeating all of our prior arguments for dismissal of Starr's direct claims. Mot. 7 & n.3.

interest, and *increased* correspondingly the value and voting power of the controller's *majority* interest.") (emphasis added); *Gatz v. Ponsoldt*, 925 A.2d at 1265, 1272 (Del. 2007) (challenging a transaction that reduced the economic value and voting rights of the public shareholders' interest and increased the economic value and voting rights of the controlling shareholder's *outstanding* interest). Starr also misplaces its reliance upon *In re Tri-Star Pictures, Inc. Litigation*, 634 A.2d 319 (Del. 1993). Opp. 40. In *Tri-Star*, the alleged harm of the challenged transaction did not affect all outstanding shares ratably. *See* 634 A.2d at 330 (challenged transaction resulted in "a relative diminution in the minority's proportionate interest over corporate affairs," while "[t]he proportionate interest of the majority . . . increased substantially"). Thus, in *Rossette*, *Gatz* and *Tri-Star*—unlike here—the dilution alleged was not shared across "all" of the company's outstanding common stock "on a ratable basis, share for share."

Delaware law, in defining whether a claim is direct, holds that dilution claims are individual in nature only where a defendant increases its equity interest at the expense of a minority interest. Specifically, a direct claim must involve a redistribution of economic value and voting power from a minority of shareholders to another. That requirement is not satisfied in a case where, as here, it is alleged that a corporation issued new equity to a third party that was not *already* a shareholder. Mot. 12 (citing *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 815 (Del. 2005)).[3] Starr tacitly conceded the point by failing to address *J.P. Morgan*,

[3] The court in *J.P. Morgan* further explained that "[a]lthough 'dilution claims emphasizing the diminishment of voting power have been categorized as direct claims,'[n.24] '[they] are individual in nature [only] where a significant stockholder's interest is increased at the sole expense of the minority.' [n.25] '[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 dismissed.'" 906 A.2d at 818.

which established that no direct dilution claim arises in connection with a transaction by which a non-shareholder becomes a shareholder.

2. Starr's Claim Fails For The Additional Reason That No Applicable Duty Supports A Direct Claim For Dilution

Starr's direct claim fails for the additional reason that its 2013 statement of its shareholders' purportedly direct claim for a harm shared across all shares is inconsistent with any applicable duty that could support a direct claim against the United States.

Starr argues that it has standing to pursue direct claims because "the Government had a duty to pay just compensation irrespective of whether it was a controlling shareholder or not." Opp. 37. But, as previously demonstrated, no direct claim for wrongful dilution exists unless a controlling shareholder causes dilution in its favor. Mot. 11 & n. 6. Further, Starr ignores our showing that, under Delaware law, a defendant's duty to shareholders is necessary—but not sufficient -- to support standing to pursue a direct claim. *See* Mot. 12 & n.7; I.A.1, *supra*. To the extent Starr claims a duty independent of shareholder status, it is claiming a duty that is by nature derivative. *See Rossette*, 906 A.2d at 99 ("In the typical corporate overpayment case, a claim *against the corporation's fiduciaries* for redress is regarded as exclusively derivative, irrespective of whether the currency or form of overpayment is cash or the corporation's stock.") (emphasis added). Therefore, the bedrock requirement of a controlling shareholder for a direct claim does not simply depend on the fact that a controlling shareholder owes fiduciary duties to other shareholders, and the necessity of a controlling shareholder cannot be replaced merely with any person owing fiduciary duties, or other duties, to those shareholders.

For example, in *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348 (Del. 1988),[4] the former shareholder plaintiff sued a Delaware corporation, its chairman and its president, alleging that the individual defendants had breached their fiduciary duties to shareholders by diverting corporate assets, including by issuing stock options to themselves. *See id.* at 349-50. Although there was no dispute that the individual defendants had owed fiduciary duties to the former shareholders, the Delaware Supreme Court held that "the wrong alleged is entirely derivative" because "[a]ny devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder." *Id.* at 353.[5]

B. The United States Would Not Receive The Benefit Of Any Derivative Recovery

Starr's standing to bring a direct claim relied upon a second issue: who would receive the benefit of any recovery. *Starr*, 106 Fed. Cl. at 62. Treasury's complete divestment of its equity stake in AIG means that the United States would not receive the benefit of any derivative recovery to AIG. Therefore, under the Court's reasoning that Treasury's "continuing ownership interest in AIG provides further support for the view that Plaintiffs have standing to bring a direct claim," *id.* at 65, Treasury's divestment undermines Starr's standing to pursue direct claims. Starr argues that Treasury's divestment "does not alter anything in the Court's previous

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[4] The Delaware Supreme Court expressly approved the analysis in *Kramer* of "the direct/derivative distinction" under Delaware law. *See Tooley*, 845 A.2d at 1038-39 ("The proper analysis has been and should remain that stated in *Grimes*; *Kramer* and *Parnes*.").

[5] *See also Green v. LocatePlus Holdings, Corp.*, 2009 WL 1478553 (Del. Ch. May 15, 2009), at *1-2 (holding, in a case lacking a controlling shareholder diluting a minority, that a wrongful dilution claim was derivative where it was based, in part, upon the issuance of shares that allegedly benefitted the corporation's directors (who, as directors, owed fiduciary duties to shareholders) "by granting them additional voting power at the upcoming shareholder meeting"). In the absence of a controlling shareholder breaching its fiduciary duty to a minority of shareholders, Starr alleges the Government was a "controlling lender" with "de facto" control. Opp. 37. Neither allegation is relevant to, or overcomes, Starr's lack of a non-uniform harm to a minority of shareholders.

conclusion that Plaintiff has direct claims," Opp. 38, but to the contrary, it is Starr's current position that disregards and is inconsistent with the Court's prior decision.

Starr also argues that a derivative recovery would be inappropriate because shareholders in the classes would have to share the (indirect) benefit of any derivative recovery with other existing AIG shareholders. Opp. 37. Starr's argument proves too much because it would eliminate corporate property rights if there is any shareholder turnover between the time of the alleged harm and that of the corporation's recovery, and ignores the reality that when a shareholder decides to sell its shares, the right to any potential future benefits from the company's legal claims transfers along with the shares. Indeed, adopting Starr's argument would improperly "swallow the general rule that equity dilution claims are solely derivative." *Feldman v. Cutaia*, 956 A.2d 644, 657 (Del. Ch. 2007), *aff'd*, 951 A.2d 727 (Del. 2008).

C. The Court Should Dismiss Starr's Newly Pleaded Direct Illegal Exaction Claim

Starr's assertion of a direct illegal exaction claim should be dismissed because Starr cannot satisfy the Court's ruling that Starr must show it is an appropriate representative of AIG and, alternatively, because the United States never dealt with individual shareholders.

1. Starr Cannot Meet The Court's Requirement That "Starr Still Must Show That It Is An Appropriate Representative Of AIG"

Previously, the Court noted the persuasive authority of *Lucas v. Fed. Reserve Bank of Richmond*, 59 F.2d 617, 621 (4th Cir. 1932), in which the United States Court of Appeals for the Fourth Circuit "determined that only 'the government, the sovereign which created and limited its powers,' has standing to enforce a Federal Reserve bank's compliance with Section 13(3)." *Starr* 106 Fed. Cl. at 83. The Court at that time declined to dismiss Starr for lack of standing to sue with respect to the United States' authority under the Federal Reserve Act, after determining that "there is no obvious regulator of a Federal Reserve bank other than the member banks and associated financial institutions that it serves,"[6] and that "[m]ember banks and associated financial institutions, and their appropriate representatives, ought to have standing to ensure a Federal Reserve bank's compliance with the rule of law." *Starr,* 106 Fed. Cl. at 83-84. The Court nonetheless held that "Starr still must show that it is an appropriate representative of AIG, a question not addressed in this opinion." *Id.* at 84, n.25.

Starr has not shown that it is an appropriate representative of AIG. Even assuming that "[m]ember banks and associated financial institutions" possess standing under the Act—a notion contrary to *Lucas*—Starr is neither a member bank, nor an associated financial institution. Nor is Starr an appropriate representative of AIG. As AIG reported, in refusing to allow Starr to represent it to sue the United States for a taking or an illegal exaction based upon the deal that AIG accepted to rescued it from failure, a "deal is a deal." Dkt. 87-1 at 7. Further, status as an appropriate representative would, at best, allow Starr to bring a derivative claim; it would not give rise to direct standing. Accordingly, Starr's direct illegal exaction claim must be dismissed.

2. Starr And Other Individuals Do Not Possess An Illegal Exaction Claim Because They Neither Paid Their Money To The United States Nor Were They Required To Do So Directly By The United States

Alternatively, Starr's claim should be dismissed because no illegal exaction claim may be maintained by individuals with whom the United States never dealt. They neither paid their

[6] On reconsideration, the Court acknowledged that "the Board of Governors serves a regulatory role in exercising general supervision over Federal Reserve banks like the FRBNY," but concluded that "[i]llegal exactions create substantive rights conferring standing," citing its initial decision on Tucker Act jurisdiction. *Starr Int'l Co. v. United States*, 107 Fed. Cl. 374, 377-78 (2012). The Court did not, however, reverse its holding as to illegal exaction *standing* that "Starr still must show that it is an appropriate representative of AIG," *Starr,* 106 Fed. Cl. at 84 n.25. The Court held only that, "provided Starr has validly asserted an illegal exaction claim, standing is established." 107 Fed. Cl. at 378.

money (or their stock) to the United States nor paid their money (or stock) to someone else at the direction of the United States. Starr contends that it and other individual shareholders possess an illegal exaction claim even though they have not paid money directly to the Government or even "'dealt directly' with the Government at any point." Opp. 38. Starr is mistaken.

The decisions upon which Starr relies do not support its alleged illegal exaction claim. Starr cites no authority that establishes that an individual may maintain an illegal exaction claim where it neither conveyed money or stock to the United States nor was directly compelled by the United States pursuant to a statute or regulation to pay money or stock to the United States or anyone else. Starr cites *dicta* from the trial court's decision in *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 48 Fed. Cl. 137, 144 (2000), but that case actually demonstrates that Starr has no claim. Both the trial court and the appellate court in *Casa de Cambio* held that the plaintiff had no illegal exaction claim because the plaintiff lacked privity with the Government. As in this case, the Government had dealt only with a third party financial institution and neither took nor required any action directly against the individual plaintiff. Consequently, there, as here, the Government's action had no "direct and substantial impact on the plaintiff," and plaintiff cannot maintain an illegal exaction claim. *Casa de Cambio S.A., de C.V. v. United States*, 291 F.3d 1356, 1364 (Fed. Cir. 2002).[7]

Starr does not allege that it actually was compelled directly to pay its money to, or at the direction of, the United States. Starr instead alleges an indirect harm: dilution in value as an indirect consequence of AIG's election to save itself from bankruptcy by accepting a financial

[7] *See also Norman v. United States*, 429 F.3d 1081, 1096 (Fed. Cir. 2005) (quoting the direct and substantial impact test articulated by *Casa de Cambio*, 291 F.3d at 1364); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996) (holding that an illegal exaction may be recovered where "[t]he money was paid directly to the government, or was paid to others at the direction of the government *to meet a government obligation*.") (emphasis added).

rescue offered by the Federal Reserve Bank of New York. Because Starr's claim depends upon the action of a third party (AIG), Starr and other shareholders have no illegal exaction claim against the United States.[8]

Starr also contends that, for standing purposes, the court should treat its direct illegal exaction claim as if it were a direct taking claim for dilution. Opp. 39-40 (citing *Emerald,* 54 Fed. Cl. at 684). *Emerald*, however, held that money that coal producers charged the plaintiff for an excise tax that the producers remitted to the IRS did not constitute an illegal exaction because, as in *Casa de Cambio*, plaintiff's "loss" was not occasioned by Government action that had a direct and substantial impact on the plaintiff, but rather derived from the actions of others in privity with the plaintiff. 54 Fed. Cl. at 685. Even if Starr's ability to maintain a direct illegal exaction claim is analyzed like a takings claim, controlling precedent dictates that Starr cannot pursue its claim because it is premised upon the indirect effect of alleged governmental actions. *E.g.*, *Huntleigh USA Corp. v. United States,* 525 F.3d 1370, 1380 (Fed. Cir. 2008) (no cognizable taking claim where plaintiff's airline security business suffered as a result of Congress's legislation regulating airlines with the effect of frustrating plaintiff's business expectations); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005) (claimed "economic injury" was not a viable taking claim because it sought compensation for a "derivative injury" that was the "attenuated result of the government's purported taking of other people's property").

Starr lacks standing to pursue a direct claim of an illegal exaction because such a claim fundamentally reaches beyond the boundaries of precedent regarding both direct claims and

[8] Similarly, non-controlling trial court decisions cited by plaintiff adhere to Federal Circuit precedent, *e.g., Emerald Int'l Corp. v. United States*, 54 Fed. Cl. 674 (2002) (no illegal exaction because Government's excise tax was imposed by third party's contracts with plaintiff), or were distinguished by the Federal Circuit, *see Fireman v. United States*, 44 Fed. Cl. 528 (1999), *distinguished by Casa de Cambio*, 291 F.3d at 1364 n.1. *See also Emerald*, 54 Fed. Cl. at 685 (*Fireman* inconsistent with and "arguably was overruled" by *Casa de Cambio*).

illegal exactions. Starr is complaining about an agreement AIG made to rescue itself from impending bankruptcy, but is suing the United States, a third party that is not in privity with Starr or any individual shareholder. No court—especially one constrained by Congress' limited waiver of sovereign immunity—should grant a plaintiff standing to sue the United States when the United States has never taken action directly affecting the plaintiff. Where, as here, a shareholder complains of alleged dilution of an equity interest not caused by or secured against by a transaction directly between the United States and the shareholder, the shareholder lacks standing to sue the United States directly. *Cf. S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 422 F.3d 1319, 1331 (Fed. Cir. 2005) (dilution damage not attributable to an agreement between shareholder and Government).[9]

For these reasons, Starr may not properly maintain direct claims. The Court should dismiss Claim I of Starr's complaint.

II. Starr Failed To Demonstrate Wrongful Refusal Of Its Derivative Claims Because It Failed To Plead Particularized Facts Creating A Reasonable Doubt As To AIG's Board's Evaluation Of Its Demand Under The Business Judgment Rule

AIG's decision to reject Starr's demand was made by a board of directors that has no economic interest in the outcome and is not beholden to any party, concerning a decision that involves no allegation of wrongdoing by any board member and no allegation of wrongdoing by

[9] It is well-established that a corporation's contract does not confer upon the corporation's shareholder privity or standing to sue upon the corporation's contract. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006) (noting that the corporate form and rules of agency deny a sole shareholder rights under a corporation's contract, even when the shareholder "negotiated, signed, performed, and sought to enforce" those contracts). Nor does government exercise of a regulatory authority—such as authorizing a financial institution's regulatory capital treatment—extend to the institution's shareholders any individual rights to sue the government. *Cain v. United States*, 350 F.3d 1309, 1315 (Fed. Cir. 2003); *Fed. Deposit Ins. Corp. v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003).

the lawyers who advised the board. No case has ever overturned the judgment of a board with this degree of independence.

As we explained in our opening brief, board decisions regarding whether to bring a claim are protected by the business judgment rule, which establishes "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 v. Lewis*, 473 A.2d 805, 812 (Del. 1984). "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).[10] A plaintiff claiming wrongful refusal must plead particularized facts creating a reasonable doubt that the board failed to exercise its duties "in good faith or to conduct a reasonable investigation." *Id.* at 75. Starr's criticisms of the AIG's board's procedures, second-guessing of its analysis, and unsubstantiated allegations that it was unduly swayed by public or Government pressure, fail to meet this burden.

A. Starr's Allegation That AIG's Board's Procedures Compromised Its Decision-Making Process Is Legally And Factually Unsupported

Starr complains that AIG's board's procedures for considering Starr's demand compromised its decision-making process. Starr fails to demonstrate that the board's decision should not be entitled to the protection of the business judgment rule and its claim is belied by the evidence that the board thoroughly considered the relevant facts and legal opinions.[11]

[10] *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 v. Eisner*, 746 A.2d 244 (Del. 2000).

[11] *See* Letter from C. Seitz, Jr. and P. Curnin to D. Boies (Jan. 23, 2013) (Dkt. 87, Attch. 1).

First, Starr contends the board's decision-making process was compromised by the involvement of two law firms that provided advice with respect to the transactions at issue—Simpson Thacher & Bartlett LLP (Simpson) and Weil, Gotshal & Manges LLP (Weil). *See* Opp. 16-18. But, at the very outset of the process, AIG informed all parties that these firms were involved. Weil conveyed questions to the parties, and Starr actively participated by contributing three rounds of submissions to AIG's board via counsel at Weil.[12] Instead of raising any concerns it may have had about the firms' involvement, Starr remained silent until now, only after receiving an outcome it disagrees with. The Court should rebuff Starr's untimely claim of error in the board demand process, just as it does when a person who is aware of a patent error in a Government contracting process chooses to "sit on its rights" and "roll the dice and see" if it receives award before filing a challenge.[13]

Second, Starr wrongly compares the AIG demand process to the opinion of a parallel Federal court in *Stepak v. Addison*, 20 F.3d 398, 403 (11th Cir. 1994). *See* Opp. 15-19. In *Stepak*, unlike this case, the court found the plaintiff raised a reasonable doubt alleging that the board's investigation was dominated by the advice of a law firm that had previously defended officers and directors of the company in criminal investigations related to the subject of the demand. The *Stepak* court explained that the law firm was conflicted because the corporation was "the ultimate beneficiary of any recovery against [directors and officers]," which potentially

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[12] *See* Email from S. Radin of Weil firm to parties re: Starr Demand Protocol (cc: to P. Curnin, M. Nathan, and M. Garvey of Simpson) (Oct. 1, 2012) (attached as Ex. A). The parties sent the subsequent written submissions to AIG's board to attorneys from Weil and Simpson.

[13] *See Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1314 (Fed. Cir. 2007) ("Vendors cannot sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive award [sic] and then, if unsuccessful, claim the solicitation was infirm.") (quoting *Argencord Mach. & Equip, Inc. v. United States*, 68 Fed. Cl. 167, 175 n.14 (2005)).

made the corporation's interests "directly adverse" to the firm's individual clients. 20 F.3d at 404. As a result, the concerns in *Stepak* regarding conflicts of interest of the firm that advised the board in the underlying transaction do not apply.[14]

This case also differs from *Stepak* in that Starr fails to substantiate its claim that the board "was dependent on" the firms' choices of independent experts and legal opinions. *See* Opp. 20. As Starr concedes, AIG's board received extensive written submissions in response to written questions, Powerpoint presentations, and an oral presentation from, among others, Starr itself. *See* Opp. 23. Given these unconstrained opportunities for Starr to state its views, Starr has no basis to claim that AIG's board "was dependent on" the firms' analysis. Similarly, Starr's unsubstantiated second-guessing of the independent experts' qualifications or alleged biases, *see* Opp. 21-22, fails to support its contentions.

Third, contrary to Starr's insinuation that the board engaged in a "deliberative process [no] longer than three hours," Opp. 28-29, AIG's decision letter confirms that: (1) each round of written submissions was sent to the board upon arrival and discussed by a subcommittee of the board; (2) the board discussed all of the written submissions prior to the January 9, 2013 board meeting and heard the oral presentations at that meeting; and (3) the board met after the oral presentations to discuss the submissions and parties' presentations. *See* AIG Decision Letter, Dkt. 87-1. These pre- and post-meeting deliberations belie Starr's claim that the board gave inadequate consideration to the demand.

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[14] The other cases Starr cites involving alleged conflicts by firms are equally inapplicable because they involve claims against insider directors being considered by a special litigation committee, which the corporation creates if part of the board has a conflict, whereas no such conflict is alleged here. *See Brinckerhoff v. JAC Holding Corp.*, 263 A.D.2d 352, 353 (N.Y. 1st Dep't 1999); *In re Par Pharm., Inc. Derivative Litig.*, 750 F. Supp. 641, 647 (S.D.N.Y. 1990).

Fourth, Starr also incorrectly criticizes the participation of board members who approved the underlying transaction in the deliberations, and claims that the vote without those board members was a "charade." *See* Opp. 22-23. Delaware law, however, provides that a board should consider its own knowledge of the facts in considering a demand.[15] Furthermore, Starr's selective quotation of the minutes of the board meeting, in which board members "questioned whether the 79.9% equity interest requirement was, in fact, punitive," Opp. 22-23, ignores that the stated reason for the question was that "the term sheet the private lenders were proposing, which was for a lower loan amount, included the same 79.9% equity interest." *See* Ex. B. to Opp. 4. Starr thus fails to support its criticisms of the board's deliberations.

B. Starr's Criticisms Of AIG's Board's Analysis Conflate Disagreement With The Outcome With A Flaw In The Process

In the alternative, Starr contends that AIG's board "disregard[ed] key factors that any rational board would consider"—which constitutes an erroneous attack on the decision itself rather than a failure of good faith or a reasonable investigation. *See* Opp. 24 (heading). Under the business judgment rule, a board's "decisions will not be disturbed if they can be attributed to any rational business purpose." *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Starr fails to meet this exacting and highly deferential standard.

Starr's principal criticism is that the board failed to pay sufficient attention to the Court's denial of the Government's motion to dismiss. Opp. 24-25. But the Court only ruled that Starr had stated a claim, not that the Government was liable, and was required, unlike AIG's board, to accept Starr's factual allegations as true. AIG's decision letter explicitly discusses the board's

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[15] *See, e.g., Rales*, 634 A.2d at 935 ("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"); *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.").

discussion of the Court's opinion, the opinion of the Southern District of New York, and the opinions of counsel and independent experts. *See* AIG Decision Letter, Dkt. 87-1.

Likewise, Starr's contention that the board "ignored AIG's own prior contemporaneous determination" of the valuation of the 79.9 percent equity interest, Opp. 25, fails because AIG's board stated that it considered its own evidence and opinion of independent experts. Starr's quotation from an AIG SEC filing valuing the equity interest ignores the possibility that the board recognized that the $23 billion valuation was made only after the company received an $85 billion credit to stave off its collapse into bankruptcy, and does not reflect what the company's equity would be worth in the absence of rescue lending.

Similarly, Starr's citation to AIG's filing a declaratory judgment action with respect to the right to sue counterparties for Maiden Lane II does not show that the board irrationally valued the releases for Maiden Lane III. Starr second-guesses the board's assessment of the Maiden Lane III releases' value as "limited," Opp. 25, but fails to show that the underlying contracts with counterparties in Maiden Lane II and III or their valuations should be identical, or that AIG's board was incapable of evaluating their value. Starr's criticisms thus fail.

C. Starr's Claims That AIG's Board Was Unduly Swayed By Public And Governmental Pressure Are Unsupported And Irrelevant

Next, Starr incorrectly claims that AIG's board was improperly influenced by "reputational considerations," which Starr acknowledges "favored denial of the demand, regardless of the Board's view of the merits of the case." *See* Opp. 27-28. Under Delaware law, a board's consideration of a demand may include "ethical, commercial, promotional, public relations, employee relations, fiscal as well as legal" considerations. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981). Starr thus fails to show that the board acted improperly.

Starr's citation to the "public and governmental outcry that erupted just prior to the Board's consideration of the demand," illustrates that AIG, not the directors, faced "reputational risk." *See* Opp. 27-28. The statements Starr cites from Treasury's private counsel and members of Congress refer to potential public reaction of the sort already experienced by AIG prior to the board meeting. As a seller of promises to the public in the form of insurance contracts, it was proper for AIG to consider the public reaction to its actions regarding its contractual promises (here, the deal it made to exchange equity for a rescue). Starr thus mistakenly conflates public reaction to AIG's actions with the directors' personal reputation.

Starr's citations to *Hill v. Wallace*, 239 U.S. 44, 60-61 (1922), and *In re Oracle Corp. Derivative Litigation*, 824 A.2d 917, 941 (Del. Ch. 2003), also do not support Starr's contention that special considerations should apply because the defendant is the Government. *See* Opp. 28. *Hill* does not proscribe a special rule requiring boards to authorize suit against the Government, but merely holds that the board should exercise the same judgment as it would against another defendant. As for *Oracle*, the "social" factor of professors authorizing suit against a major donor to their university does not apply here because the Government did not own any AIG shares at the time of the vote and had no power to remove the directors. Starr's claim thus fails.

III. Starr Waived Demand Futility By Making Demand And Fails To Show That AIG's Board Was Incapable Of Evaluating Its Demand

Last, Starr maintains that the Court may find demand futility notwithstanding Starr's having waived a futility claim by making demand. "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's sole basis for evading waiver is its demand agreement with AIG. *See* Opp. 30; Dkt. 64-1 ¶ 6. Starr points to no case where parties were permitted to contract around the legal effect of making demand—particularly where, as here, *the defendant* was not a party to the contract.

Similarly, Starr's argument that the Government should not be permitted to "nullify one of the conditions under which Plaintiff and AIG agreed to demand," Opp. 31 n.11, fails to support its claim. Under Delaware law, a defendant that is not the corporation may raise a failure to make demand, which we did. *See Kaplan v. Peat Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988). The Court authorized Starr's belated demand upon the grounds that the demand procedure "will moot the Government's March 1, 2012 motion to dismiss the derivative claims for failure to make a demand." *See* Order (Sept. 13, 2012) (Dkt. 67) at 2. Starr now seeks to take the benefit of this ruling while escaping the legal consequences of making demand.

Starr's substantive grounds for demand futility amount to nothing more than repeating that the Government used to be a majority shareholder and that the Trustees had previously selected the board members. *See* Opp. 32-33. Under Delaware law, majority shareholder status alone is insufficient to demonstrate demand futility. *See Aronson*, 473 A.2d at 816. Nor were the board members subject to the same duties as the Trustees, and, in any event, the trust itself had dissolved before Starr filed its original complaint. Starr's vague reference to "context," *see* Opp. 32-34, fails to demonstrate any reason to treat the Government differently from any other majority shareholder. Starr thus fails to show demand futility.

CONCLUSION

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

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