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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Judge Eileen Bransten Justice

PART 3

Index Number : 600381/2008
SWOPE, HOWARD
VS
QUADRA REALTY TRUST INC
Sequence Number : 001
DISMISS ACTION

INDEX NO. 600381/08
MOTION DATE 11/20/08
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7-16-09

Judge Eileen Bransten J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

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HOWARD SWOPE, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

QUADRA REALTY TRUST, INC., et al.,

Defendants,

-and-

QUADRA REALTY TRUST, INC.,

Nominal Defendant on the Derivative Claims.

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Index No.: 600381/08
Motion Date: 11/20/08
Motion Seq. Nos.: 001, 002, 003

Bransten, J.:

Motion sequence numbers 001, 002, and 003 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Defendants all move to dismiss the complaint based on lack of standing, documentary evidence, and failure to state a claim (CPLR 3211 [a] [1], [3], and [7]), and defendants Evan F. Denner, Juergen Fenk, Bettina Von Oesterreich, Hypo Real Estate Capital Corp., and HRECC Sub Inc. also seek dismissal pursuant to CPLR 3016 (b).

This shareholders' class and derivative action arises out of the sale of defendant Quadra Realty Trust, Inc.("Quadra") to an affiliate of defendant Hypo Real Estate Capital Corporation ("HRECC") through a tender offer and merger (the "Merger"). Quadra was in the business of investing in commercial real estate mortgages and loans. It suffered in the

now well-publicized credit crunch, in that when the secondary market for subprime residential mortgages collapsed, there was an adverse effect on the commercial credit markets as a whole, particularly the market for collateralized debt obligations ("CDOs"), which Quadra used for its longer term funding (*see* Amended Complaint, ¶ 69).

Plaintiff claims that HRECC used its position as the largest shareholder of Quadra to force out plaintiff and those he purportedly represents for inadequate consideration, and in a manner designed to further HRECC's own financial interests. He urges that the price per share that the shareholders were paid in the Merger represented a 24.6% discount with respect to Quadra's book value per share. He also urges that the process by which the price per share was arrived at was flawed, as it was dominated and controlled by HRECC, and the terms of the Merger effectively discouraged competing offers. Plaintiff alleges that the Board of Directors of Quadra failed to exercise control or oversight over Quadra until it was in financial crisis, and then acceded to HRECC's wishes so that the Quadra directors could obtain protection for their breaches of fiduciary duties.

Defendants contend that, under Maryland law, which is controlling, plaintiff lacks standing to sue directly for the alleged injuries, and that he also fails to meet the requirements to sue derivatively. Alternatively, defendants contend that plaintiff's claims are precluded by a provision of Quadra's Articles of Incorporation, and that he fails to plead facts that

would take the conduct of the director defendants out of the ambit of the business judgment rule.

BACKGROUND

Plaintiff Howard Swope alleges that he was an owner of the common stock of Quadra (Amended Complaint, ¶ 7). He claims to represent a class consisting of all shareholders of Quadra at the time of the tender offer, except for defendants (*id.*, ¶ 39).

Defendant Quadra is a real estate investment trust formed in 2006 under Maryland law (*id.*, ¶ 8). It was in the business of raising capital from public investors so that it could loan money. It also engaged in short-term borrowing to make its loans (*id.*, ¶ 54). Quadra purchased many of the loans in its portfolio from HRECC and its affiliated companies. In order for it to fund additional loans, it would securitize some of the existing loans in its portfolio as CDOs, which would enable it to efficiently sell these loans to others (*id.*, ¶ 55). This gave Quadra liquidity to make new loans, which would then generate more interest and fees for Quadra (*id.*).

Quadra's business objective was to generate income, and make a profit, by maximizing the difference, referred to as the spread, between the yield on the assets in its portfolio (the commercial real estate loans Quadra invested in), and the cost of financing those investments (Exhibit C to Affirmation of Lawrence P. Kolker in Opposition, Prospectus, Summary, at 1).

HRECC, a Delaware corporation, managed Quadra, exercising day-to-day control over Quadra and its loan portfolio (*id.*, ¶¶ 8-9).

Defendants Robert H. Mundheim, Robert L. Glauber, Thomas F. McDevitt, Robert M. Stuart, and Lawrence A. Weinbach served as independent directors of Quadra (the Independent Directors) (*id.*, ¶¶ 11, 14-15, 17-18).

Defendants Evan F. Denner, Juergen Fenk, and Bettina von Oesterreich served as directors of Quadra, and were affiliated with HRECC and/or its affiliates (the Hypo-Affiliated Directors) (*id.*, ¶¶ 12-13, 16).

On February 21, 2007, Quadra issued 16,670,000 shares of common stock at a price of $15 per share in an initial public offering (IPO) on the New York Stock Exchange (*id.*, ¶ 65). HRECC contributed initial assets of various loans in exchange for over $141 million in cash, and 8,930,100 shares of Quadra stock, making it a 34.7% owner of Quadra's total outstanding shares (*id.*, ¶¶ 65-66). A prospectus was filed with the SEC in connection with the IPO (Exhibit C to Kolker Affirm.). In the prospectus, Quadra disclosed its business model as generating income by maximizing the spread between the yield on the loans in its portfolio and the cost of financing those investments (*id.*, Summary at 1). To enhance its investment returns, Quadra disclosed that it would rely heavily on leveraged investments, and that it would finance and leverage them by meeting its short-term needs with warehouse credit facilities, and use CDOs for longer term funding (*id.* at 44-53, 69-70). The prospectus

also contained detailed information about the portfolio of loans acquired from HRECC (*id.* at 61-69). It disclosed the risk factors inherent in investing in Quadra (*id.* at 5, 14).

In connection with the IPO, Quadra entered into a management agreement with HRECC, regarding the daily management of Quadra's operations. This Management Agreement was attached to the prospectus (*id.* at 7).

On March 29, 2007, Quadra entered into a warehouse facility agreement with Wachovia Bank, N.A., which provided it with funding of up to $500 million (Amended Complaint, ¶¶ 67-68).

In the summer of 2007, the collapse of the secondary market for subprime residential mortgages began to affect the commercial credit markets, particularly the market for CDO transactions (Amended Complaint, ¶¶ 58, 69). Quadra reported that there was significant widening of credit spreads, and a general reduction of liquidity in the commercial real estate sector. It indicated that, due to these changes in the market conditions, Quadra was expanding its exploration of acceptable financing alternatives, and that the failure of the CDO market to recover could cause Quadra to change its business plan (Exhibit 8 to Affirmation of David Wei in Support, SEC Form 10-Q, at 18, 21, 25; *see* Amended Complaint, ¶ 70). Quadra sought alternative financing from Hypo Holding, its largest shareholder, to ease its liquidity concerns, but Hypo Holding refused (Amended Complaint, ¶¶ 71-72).

On October 12, 2007, Quadra's Board of Directors held a meeting to receive an update from management regarding Quadra's liquidity, the credit quality of its loan portfolio, and its business plan in light of the credit market turmoil (*id.*, ¶ 75). At the meeting, defendant Denner informed the Board that Quadra was studying alternatives to address the liquidity issues, including changing its portfolio by syndicating or selling some of its construction loans, and that the CDO market problems would likely cause an adjustment to Quadra's business plan (*id.*).

On November 6, 2007, at a Board meeting, the Board determined, after discussions about the liquidity issues, to appoint a special committee (the "Special Committee"), consisting of defendants Mundheim, Stuart, and Weinbach, to identify, study, and evaluate strategic alternatives available to Quadra (*id.*, ¶ 76). The Special Committee engaged Bass, Berry & Sims PLC as its legal counsel, and Blackstone Advisory Services L.P. ("Blackstone"), as its financial advisor (*id.*). The Special Committee held numerous meetings, as well as conference calls, to evaluate and discuss various alternatives (*id.*, ¶¶ 76, 83-100).

Hypo Holding began looking into acquiring Quadra through an affiliate of HRECC. It had its financial advisor conduct due diligence, and negotiated with defendant Mundheim about potential offer prices (*id.*, ¶¶ 77, 79-81, 83-87, 89-100). Originally, it was offering approximately $11.70 per share, which offer decreased to $11.51, due to Quadra's

declaration of a dividend on December 20, 2007, and then to between $10.50 and $11 per share (*id.*, ¶¶ 80-81, 84, 94, 96).

At the Special Committee's request, Blackstone contacted other third-party potential purchasers, which resulted in only one *bona fide* expression of interest, namely a stock-for-stock merger at a lower price than Hypo Holding was offering at $9 per share (*id.*, ¶¶ 88, 104 [e]; *see also* Exhibit 11 to Wei Affirm., at 20; Exhibit 13 to Wei Affirm., at 5).

On January 25, 2008, after six weeks of negotiations, Hypo Holding made a final offer to acquire Quadra through a tender offer and merger at a price per share of $11.00 per share of common stock, which would include $10.6506 per share in cash, and a dividend of $0.3494 per share to be paid by Quadra to its shareholders (Amended Complaint, ¶ 108). Over the next several days, the non-Hypo affiliated directors (the "Independent Directors") met to consider the offer (*id.*, ¶ 110). Blackstone delivered an opinion to the Special Committee that the consideration was fair from a financial viewpoint to the shareholders (*id.*, ¶ 111).

On January 28, 2008, the Special Committee unanimously recommended that Quadra's Board approve the proposed merger agreement ("Merger Agreement") and that the Quadra shareholders tender their shares into the tender offer contemplated by the Merger Agreement, and the Board approved it (*id.*, ¶¶ 118-119). The Merger Agreement provided that Quadra was permitted to continue to solicit offers for 30 days after execution, and to

terminate the Merger Agreement if it received a better offer from a financial viewpoint (the "Go-Shop" provision) (*id.*, ¶ 104). It also provided that there had to be a tender of 55% of outstanding Quadra shares, excluding the shares held by HRECC (Exhibit 10 to Wei Affirm., Merger Agreement, at Annex A). The Merger Agreement further provided that the Independent Directors had authority to consummate any superior offer, including tendering HRECC's shares, and voting them in favor of the superior offer (*id.*, § 8.7 [f]).

On February 7, 2008, plaintiff filed his original complaint, as a class action, naming Quadra and all its directors as defendants.

On February 27, 2008, the Go-Shop period expired, and Quadra had not received any superior offers.

On March 13, 2008, HRECC announced the successful completion of the tender offer with Quadra's shareholders tendering 95.2 % of the outstanding shares not owned by HRECC. On March 14, 2008, a subsidiary of HRECC merged with and into Quadra, with Quadra continuing as the surviving corporation and a wholly owned subsidiary of HRECC. HRECC became the only shareholder of Quadra (Exhibit 14 to Wei Affirm., at 3).

On April 4, 2008, plaintiff filed an amended complaint ("Amended Complaint"). Pled as a class action complaint, plaintiff asserts claims against all the defendants for breach of fiduciary duty, abuse of control, gross mismanagement, and aiding and abetting breach of fiduciary duty (the first through third and fifth causes of action, respectively). Plaintiff also

alleges a class claim for unjust enrichment against defendants HRECC, HRECC Sub, Denner, Fenk, and Oesterreich, seeking restitution. The sixth claim, alternatively, asserts all of the above claims as derivative claims on behalf of Quadra.

Defendants all move to dismiss the Amended Complaint on a number of grounds. First, they argue that the class action claims must be dismissed because plaintiff has no standing, under Maryland law, to bring direct claims for breach of fiduciary duty, aiding and abetting such breach, gross mismanagement, and abuse of control. They contend that these claims can only be brought derivatively on behalf of the corporation, under both Maryland statutory and case law. Defendants assert that the wrongs alleged by plaintiff were wrongs alleged to have been committed against all the shareholders alike, and there is no violation of any right personal to plaintiff. Defendants next contend that, to the extent that plaintiff seeks to assert the claims derivatively in the sixth cause of action, plaintiff has no standing to assert any derivative claims, because he is no longer a shareholder of Quadra. In addition, they contend that even if the court were to overlook that "fatal flaw," plaintiff fails to allege demand on the Board, or that a demand would have been futile. The defendants further assert that the claims should be dismissed for failure to state a claim for breach of fiduciary duty. They assert that dismissal also is appropriate based on the business judgment rule, Maryland's Director Protection Statute (Section 2-405.2 of the Maryland Corporation and

Associations Code), and on a provision in Quadra's charter limiting the liability of its directors to the maximum extent permitted under Maryland law.

In response, plaintiff contends that he has standing. He asserts that he may pursue the claims as direct claims, because he has alleged injury that is distinct from that suffered by Quadra. He contends that his and the class' injuries derive from the merger in which their equity was cashed out at an unfair price, and through an unfair process motivated by the defendants' desire to benefit their personal interests and to immunize themselves from liabilities for breaches of fiduciary duty in connection with the merger. He claims that any recovery would go directly to himself and the class. With regard to the business judgment rule, plaintiff argues that it is not a bar to this action, because the Amended Complaint sets forth facts establishing that the director defendants placed their own personal interests, and those of HRECC, ahead of Quadra's corporate interests in connection with the merger. He further argues that they failed to exercise meaningful oversight over Quadra's business until it had fallen into financial crisis. Plaintiff urges that his claims are all legally sufficient to state a claim. Finally, with regard to derivative standing, plaintiff contends that he lost his standing to interpose a derivative action, because of defendants' wrongful conduct in connection with the merger, and not because he tendered his stock. He asserts that defendants designed the transaction to take Quadra private to enable them to immunize

themselves and others from liability for breaches of fiduciary duty related to their management of Quadra.

DISCUSSION

Quadra is a Maryland corporation. Claims brought in New York, against a foreign corporation and its directors, involving matters of corporate governance, are governed by the substantive law of the place of incorporation (*see Kamen v Kemper Fin. Serv., Inc.*, 500 US 90, 108-109 [1991]; *Eos Partners SBIC, L.P. v* Levine, 42 AD3d 309, 309 [1st Dept 2007] [apply law of state of incorporation to standing issue]; *David Shaev Profit Sharing Account v Cayne*, 24 AD3d 154, 154 [1st Dept 2005]; *Hart v General Motors Corp.*, 129 AD2d 179, 182-183 [1st Dept], *lv denied* 70 NY2d 608 [1987], citing *Diamond v Oreamuno*, 24 NY2d 494, 503-504 [1969]).

Maryland has codified a corporate director's fiduciary duties in section 2-405.1 (a) of the Maryland Corporations and Associations Code (the Maryland Code). The Maryland Code provides, among other things, that corporate directors must perform their duties in good faith, in a manner the director believes to be in the best interests of the corporation, with the care that any ordinarily prudent person in a like position would use under similar circumstances (Maryland Code, Corporations and Associations, § 2-405.1 [a]). The statute further provides that "[n]othing in this section creates a duty of any director of a corporation enforceable otherwise than by the corporation or in the right of the corporation" (*id.*, § 2-

405.1 [g]). This language, viewed in its ordinary and natural meaning, is clear and unambiguous. It bars a direct claim by a shareholder against directors for breaches of fiduciary duties, requiring that these claims be pursued by the corporation, or derivatively by its shareholders. Applying this statute to plaintiff's claims of breaches by the director defendants of their fiduciary duties, labeled in the Amended Complaint as breach of fiduciary duty, aiding and abetting such breach, abuse of control, and gross mismanagement, requires their dismissal for plaintiff's lack of standing.

Maryland common law, as expressed by the Maryland Court of Appeals, is equally clear that the duties of directors do not run directly to the shareholders, but rather only derivatively on behalf of the corporation. In *Waller v Waller* (187 Md 185 [1946]), the Court of Appeals stated that "[w]here directors commit a breach of trust, they are liable to the corporation, not to its creditors or stockholders" (*id.* at 190). This is so even if the injury may incidentally result in diminishing or destroying the value of the shareholder's stock (*id.*). This rule recognizes that there is no legal privity or direct connection between the directors and the individual shareholders (*id.*). The *Waller* Court determined that it does not matter that the directors' acts were done maliciously to injure a particular shareholder or shareholders "for the wrongdoing affects all the shareholders alike" (*id.* at 191). Therefore, under Maryland law, a violation of rights common to all shareholders alike is "done to the corporation, affect[ing] all the stockholders of the corporation, and could be redressed only

by an action brought by the corporation or its receivers" (*id.* at 194). While the *Waller* Court recognized that a shareholder may bring a suit in his own name to recover damages from an officer or director for a violation of a duty arising out of a contract or otherwise and owing directly from the director to the shareholder, those situations have been very limited, involving direct contracts and personal rights between the particular shareholder and the corporate officers (*id.* at 192-193 [shareholder had no right to bring direct claim where no allegation of a right personal to the plaintiff, only a violation of rights common to all shareholders] [citations omitted]; *see also Danielewicz v Arnold*, 137 Md App 601, 616-619 [Md Ct Spec App], *cert denied* 365 Md 65 [2001] [no standing for loss of controlling interest in corporation]).

In *Werbowsky v Collomb* (362 Md 581, 599 [2001]), the Court of Appeals reaffirmed that the obligation of directors to perform in good faith, "runs, however, to the corporation and not, at least directly, to the shareholders." Maryland courts continue to follow this rule, holding that claims for breaches of fiduciary duties are claims belonging to the corporation, which must be pursued derivatively (*see e.g. In re Laureate Educ., Inc. Shareholder Litigation*, 2007 WL 5021405, *1 [Md Cir Ct June 26, 2007], *affd* [Md Ct Spec App, Oct 16, 2008] [affirmance unreported] [action dismissed for lack of standing where shareholder brought direct claims challenging going private tender offer and merger]; *Patterson v Patterson*, 2006 WL 990998, *4 [Md Cir Ct Jan 31, 2006] [dismissed breach fiduciary duty

and related claims because plaintiff had not brought derivative action as required by § 2-405.1 (g)]).*

In this case, plaintiff's direct claims against the directors for breach of fiduciary duty, abuse of control, gross mismanagement, and aiding and abetting those breaches, clearly are derivative claims within the meaning of *Waller*. Plaintiff alleges wrongs against, and injuries to Quadra and all of Quadra's shareholders. Plaintiff does not allege any violation of a right personal to him. He does not allege any personal contractual right, or any fiduciary duty other than that which the law imposes on all directors (*see* Maryland Code, Corporations and Associations § 2-405.1[a]). Rather, he asserts a violation of rights common to all the shareholders of Quadra, which could be redressed only by an action brought by, or on behalf of, Quadra (*Waller v Waller*, 187 Md at 194). His claim that defendants' wrongs caused a reduction in the value of the Quadra stock, or in the consideration received in the merger, does not give him standing to sue directly. As the *Waller* Court explained, where an action causes harm to the corporation, even if the injury incidentally results in diminishing the value of a shareholder's stock, the shareholder may only challenge it in a derivative suit (*id.* at 189).

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*Under Maryland Court Rules, the affirmance by the Maryland Court of Special Appeals in the *In re Laureate Educ, Inc. Shareholder Litigation* case was unpublished, and, therefore, did not constitute binding or persuasive authority in those courts (*see* Maryland Rules 1-104). This court, however, finds the case instructive.

Plaintiff's unjust enrichment claim similarly seeks to bring a direct claim against the Hypo Affiliated Directors, HRECC and HRECC Sub for breaches of fiduciary duties, seeking restitution instead of damages. It just reformulates the breach of fiduciary duty and related claims discussed above as an unjust enrichment claim. Again, this claim is for injury to Quadra, and does not involve the violation of any right, contractual or otherwise, that is personal to plaintiff.

Plaintiff's reliance on *Strougo v Bassini* (282 F3d 162 [2d Cir 2002]), is misplaced. The Second Circuit, while indicating that it was applying Maryland law, did not cite or discuss the applicable Maryland Code provision requiring that breach of fiduciary duty claims against directors be brought derivatively, nor did it cite the *Werbowsky* case by the Maryland Court of Appeals. Its decision, apparently based on a policy rationale that shareholders should not be left without a remedy, is not in accordance with Maryland statutory or common law as discussed above (*see Jolly Roger Fund LP v Sizeler Prop. Invs., Inc.*, 2005 WL 2989343, * 5 [D Md 2005] [court refused to follow *Strougo* case on the ground that it did not discuss the 2001 Maryland Court of Appeals decision in *Werbowsky*]; Exhibit L to Quadra's Compendium of Unreported Authorities, James J. Hanks, Jr., Maryland Corporation Law ¶ 7.21 [b] n. 185a ["One court has erroneously held that under Maryland law directors and officers may be sued directly by stockholders for breaches of fiduciary duty" citing *Strougo* [1995 and Dec 2007 Supp]). Therefore, the direct claims in

the Amended Complaint--the first through fifth causes of action--are dismissed for lack of standing.

The sixth claim, asserting all the previous claims derivatively, also is dismissed for lack of standing. In the Amended Complaint, plaintiff clearly states that he is no longer a shareholder of Quadra as a result of the Merger, and, therefore, he lost standing to pursue a derivative claim (Amended Complaint, ¶ 175). This pleading apparently is in recognition of the contemporaneous ownership rule in Maryland, which provides that once a plaintiff ceases to be a shareholder, a derivative action cannot be maintained based on lack of standing (*Jolly Roger Fund LP v Sizeler Prop. Invs., Inc.*, 2005 WL 2989343, *7; *see Danielewicz v Arnold*, 137 Md App at 613-615). Plaintiff requests that he be granted "equitable standing," but there is no such exception under Maryland law (*see* Amended Complaint, ¶¶ 176-177). In addition, as defendants aptly point out, plaintiff's initial complaint was filed on February 7, 2008, five weeks before the March 13, 2008 completion of the Merger. As of February 13, 2008, Quadra shareholders were informed that the Merger would be completed by the March 13 date (Exhibit 11 Wei Affirm., at 3). Plaintiff, however, did not assert a derivative demand on the Quadra Board, or commence an injunction proceeding while he was still a shareholder.

Plaintiff's derivative claim also fails, because he does not allege that he made a demand on the Quadra Board, or that such a demand would be futile. Under *Werbowsky*, a

plaintiff shareholder has to make a good faith effort to have the corporation act directly, and explain why that good faith effort either was not made or was not successful (*Werbowsky v Collomb*, 362 Md at 600). This pre-suit demand requirement gives the directors an opportunity to exercise their business judgment to either pursue the claim, or waive a legal right vested in the corporation if they believe that the corporation's best interests would be promoted by not insisting on such a right (*id.* at 601).

The demand requirement is subject to the well-recognized exception that no prior demand is required when it would be futile (*id.* at 601-602). Under Maryland law, demand futility is "a very limited exception" (*id.* at 620). It will be applied only when the allegations or evidence

> "clearly demonstrate, in a very particular manner, either that (1) a demand, or a delay in awaiting a response to a demand, would cause irreparable harm to the corporation, or (2) a majority of the directors are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule"

(*id.*). The Court of Appeals in *Werbowsky* explained that it was not willing to excuse the failure to make a demand just because a majority of the directors approved or participated in the challenged decision or transaction, or based on "generalized or speculative allegations that they are conflicted or are controlled by other conflicted persons," that they were chosen

as directors by the controlling shareholders or that they would be hostile to the action (*id.* at 618). "Common sense dictates that this inquiry cannot begin and end with a mere conclusory allegation that the directors have been guilty of misconduct. If that were all that were required, the futility exception would swallow the demand rule" (*Grill v Hoblitzell*, 771 F Supp 709, 711-712 [D Md 1991]).

Here, plaintiff fails to allege that a demand, or a delay in awaiting a response to a demand, would have caused irreparable harm. Plaintiff also fails to plead the personal and direct conflict required for application of the demand-futility exception. The complaint contains boilerplate allegations. It does not distinguish among directors, and the roles they allegedly played in the purported wrongdoing. Plaintiff contends, in summary terms, that the all of the directors placed their own personal interests, and those of HRECC, ahead of Quadra in connection with the Merger (Plaintiff's Memorandum of Law in Opposition, at 54). He asserts, again with no supporting facts, that the directors were conflicted, because they faced a substantial likelihood of liability for breaches of fiduciary duties related to their management of Quadra, and, therefore, were personally interested that the Merger be consummated (*id.*; *see also* Amended Complaint, ¶¶ 52-53, 179). He further argues that the Independent Directors were otherwise dominated and controlled by the HRECC affiliated directors, citing to allegations in the Amended Complaint that the Quadra Board was imposing a deadline on Hypo Holding to deliver a firm offer or they would resign (Plaintiff's

Memorandum of Law in Opposition, at 54; *see* Amended Complaint, ¶¶ 114-118). This showing is based on speculation, not on evidence. Plaintiff fails to present evidence that the directors were conflicted or controlled by HRECC to the point that a demand upon them would have been futile. No evidence was presented that their service to Quadra as Quadra directors would have caused them to reject a demand for any reason not within the business judgment rule (*see Werbowsky v Collomb*, 362 Md at 622). The conclusory allegations that the directors must have been guilty of misconduct, should have foreseen the credit crisis's effect on Quadra's business, and were trying to protect themselves from liability, fail to meet the requirements for showing personal conflicts by a majority of the directors. The Independent Directors, the only ones who were permitted to vote for the Merger, were outside directors. Simply because these directors approved the Merger or participated in some way in it, does not meet the particularized pleading requirement for demand futility under Maryland law (*see Werbowsky v Collomb*, 362 Md at 618). Therefore, the sixth cause of action is dismissed.

Accordingly, it is

ORDERED that the motions by defendants (motion sequence numbers 001, 002, and 003) to dismiss the Amended Complaint are granted and the Amended Complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This Constitutes the Decision and Order of the Court.

Dated: July 16, 2009

ENTER:

Hon. Eileen Bransten