IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SYDELL PROTAS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

RICHARD E. CAVANAGH, KAREN P. ROBARDS, FRANK J. FABOZZI, KATHLEEN F. FELDSTEIN, JAMES T. FLYNN, JERROLD B. HARRIS, R. GLENN HUBBARD, W. CARL KESTER, RICHARD S. DAVIS, HENRY GABBAY, G. NICHOLAS BECKWITH, III, KENT DIXON, ROBERT S. SALOMON, JR., BLACKROCK, INC., MERRILL LYNCH & CO., INC., BANK OF AMERICA CORPORATION, PNC FINANCIAL SERVICES GROUP, INC.,

Defendants,

and

BLACKROCK CREDIT ALLOCATION INCOME TRUST IV,

Nominal Defendant.

Civil Action No. 6555-VCG

MEMORANDUM OPINION

Date Submitted: March 30, 2012
Date Decided: May 4, 2012

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GLASSCOCK, Vice Chancellor

This matter involves allegations of breach of duty made by a common stockholder of a Delaware statutory trust against the trustees of that trust, as well as claims by the stockholder against those entities she alleges aided and abetted the breach. The Plaintiff failed to make a pre-suit demand against the Defendant trustees, who she concedes were independent and disinterested when they took the actions complained of. For the reasons given below, I find that the Plaintiff's claims are derivative, and not direct. The Plaintiff, therefore, has a long row to hoe. To survive a motion to dismiss in these circumstances under Section 3816 of the Delaware Statutory Trust Act ("DSTA"),[1] a plaintiff must plead particularized facts raising a reasonable doubt that the actions of the trustees were taken honestly and in good faith. Because a careful reading of the complaint discloses that the Plaintiff has failed to so plead, her complaint must be dismissed.

I. BACKGROUND

The facts below are taken from the Plaintiff's Amended Verified Derivative and Class Action Complaint.[2]

A. The Parties

Plaintiff Sydell Protas is a common stockholder in Defendant BlackRock Credit Allocation Income Trust IV ("BTZ" or the "Fund"), a Delaware statutory

[1] 12 *Del. C.* § 3816.
[2] This complaint shall be referenced hereinafter as "Complaint" or "Compl. ___."

trust, and she brings this action on behalf of the Fund's common stockholders.[3]

BTZ's Board of Trustees is responsible for the overall management and supervision of the affairs of the Fund and comprises thirteen independent directors (the "Trustee Defendants").[4]

Defendant BlackRock, Inc. ("BlackRock"), is an investment advisor and a Delaware corporation, and the fund sponsor of BTZ. Defendant Merrill Lynch & Co., Inc. ("Merrill"), is a Delaware corporation and a wholly owned subsidiary of Defendant Bank of America Corporation ("BOA"), also a Delaware corporation. Defendant The PNC Financial Services Group, Inc. ("PNC" and, together with Merrill and BOA, the "Bank Defendants"), is a Pennsylvania corporation.[5]

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[3] Compl. ¶¶ 11, 12(n).

[4] *Id.* ¶ 12. The named Trustee Defendants are Richard E. Cavanaugh, Karen P. Robards, Frank J. Fabozzi, Kathleen F. Feldstein, James T. Flynn, Jerrold B. Harris, R. Glenn Hubbard, W. Carl Kester, Richard S. Davis, Henry Gabbay, G. Nicholas Beckwith, III, Kent Dixon, and Robert S. Salomon, Jr. Though the Complaint alleged that the Trustee Defendants were conflicted, the Plaintiff now concedes, apparently on the basis of the definition of "Independent trustee" under the DSTA, that the Trustee Defendants are independent for purposes of this action. *See* 12 *Del. C.* § 3801(d) ("'Independent trustee' means, solely with respect to a statutory trust that is registered as an investment company under the Investment Company Act of 1940 . . . any trustee who is not an 'interested person' (as such term is defined below) of the statutory trust; provided that the receipt of compensation for service as an independent trustee of the statutory trust and also for service as an independent trustee of 1 or more other investment companies managed by a single investment adviser (or an 'affiliated person' (as such term is defined below) of such investment adviser) shall not affect the status of a trustee as an independent trustee under this chapter. An independent trustee as defined hereunder shall be deemed to be independent and disinterested for all purposes. For purposes of this definition, the terms 'affiliated person' and 'interested person' have the meanings set forth in the 1940 Act or any rule adopted thereunder."). Based on the Plaintiff's concession, my analysis assumes that the Trustee Defendants are independent and disinterested.

[5] *See id.* ¶ 12(o)-(r).

B. The Fund's Capital Structure and Relationship with BlackRock and the Bank Defendants

BTZ is a closed-end investment company organized on October 27, 2006.[6] The Fund raised money through the issuance of common and preferred stock, and it invests those proceeds in securities to provide a yield for its stockholders.[7] Like most closed-end funds, BTZ has no employees of its own.[8] Rather, BlackRock serves as BTZ's investment adviser and manages the Fund's investments and all operations for a fee.[9] BlackRock has provided similar services to around a hundred other closed-end funds it has sponsored.[10] These closed-end funds allegedly serve as an important part of BlackRock's overall business, as BlackRock collects management fees from the funds it sponsors.[11]

The Fund routinely declared dividends for both its common and preferred stock, although the preferred stock had a preference in both cumulative dividends and distributions upon the liquidation of BTZ.[12] In the event of liquidation, the preferred stockholders had a right to receive $25,000 per share and all accrued dividends.[13]

The preferred stock dividend rate resets periodically through an auction

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[6] *Id.* ¶ 2.
[7] *Id.*
[8] *Id.* ¶ 5.
[9] *Id.*
[10] *Id.*
[11] *Id.* ¶ 22.
[12] *Id.* ¶ 14.
[13] *Id.*

mechanism.[14] According to the Plaintiff, this auction process was intended to provide liquidity to the preferred stockholders, as the preferred stock, unlike the common stock, did not trade on an exchange.[15] Neither the Trustee Defendants nor BTZ were under any obligation, however, to provide such liquidity.[16] At these auctions, prospective buyers submitted an interest rate at which they would pay $25,000 per share of preferred stock.[17] The lowest clearing rate determined the dividend.[18] The dividend rate was subject to a cap, however: if the clearing rate was above the cap, the auction would fail, and the cap would become the dividend rate.[19] The Bank Defendants earned substantial fees from marketing this type of preferred stock, known as auction market preferred stock ("AMPS", or, when referring to the AMPS issued by BTZ, "Preferred Shares"), to investors.[20]

BlackRock's dependence on management fees from its closed-end funds required BlackRock to develop close relationships with the entities that issued stock in those funds, the Bank Defendants.[21] Merrill was particularly instrumental in BlackRock's closed-end fund business, and it served as lead underwriter for the

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[14] *Id.* ¶ 3. The Complaint is unclear as to whether this occurred weekly or monthly. *Compare id.* ("The dividend rate for the Preferred Shares was determined through weekly auctions . . . ."), *with id.* ¶ 15 ("Auctions were held monthly . . . .").
[15] *Id.* ¶¶ 4, 15, 19.
[16] *Id.* ¶¶ 4, 15.
[17] *Id.* ¶ 3.
[18] *Id.*
[19] *Id.* ¶ 15.
[20] *Id.* ¶ 6.
[21] *Id.* ¶ 22.

issuance of the Preferred Shares and conducted the auctions that set the dividend rates.[22] BlackRock's symbiotic relationship with Merrill was evidenced by BlackRock's 2008 Annual Report, which indicated that because "Merrill Lynch is an important distributor of BlackRock's products . . . [BlackRock] is . . . subject to risks associated with the business of Merrill Lynch . . . . Loss of market share with Merrill Lynch's Global Private Client Group could harm operating results."[23] In addition to issuing the Preferred Shares, the Bank Defendants issued AMPS from funds sponsored by other companies; as a result, the Bank Defendants came to own a large number of AMPS, which included Preferred Shares.[24]

C. The AMPS Auctions Freeze

The Preferred Shares remained liquid through much of February 2008, as the auctions continuously produced clearing rates below the dividend rate cap.[25] Beginning in mid-February 2008, however, the auctions for the Fund's Preferred Shares as well as auctions for other AMPS began to fail (i.e., the clearing bid was above the cap rate). These failures rendered the Preferred Shares illiquid, which, according to the Plaintiff, caused those Shares to be valued below their $25,000 issue price and liquidation preference.[26]

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[22] *Id.* ¶¶ 26-27.
[23] *Id.* ¶ 28.
[24] *Id.* ¶ 29.
[25] *Id.* ¶¶ 15, 19.
[26] *Id.* ¶ 30.

In the Plaintiff's view, these frozen auctions benefitted BTZ and its common stockholders. BTZ was not obligated to redeem the Preferred Shares, and the dividend cap ensured that BTZ had a perpetual source of financing at a relatively low rate during an increasingly turbulent market downturn.[27] Holders of the Preferred Shares, however, were stuck with an illiquid investment. Many AMPS holders, including holders of the Preferred Shares, complained to the banks that had counseled them to invest in AMPS, and these complaints spawned investigations by various government agencies into the issuing banks and brokers.[28] Several investment banks and brokers that had marketed AMPS, including the Bank Defendants, ultimately reached settlements with these government agencies whereby they agreed to purchase AMPS from their dissatisfied customers at par value.[29]

The banks and brokers that purchased AMPS back from their customers allegedly then began looking for ways to get the illiquid AMPS off their balance sheets.[30] Their solution was to get the issuing funds themselves to redeem the AMPS, either from the AMPS holders or from the banks and brokers who had already repurchased them. Merrill launched a campaign to pressure fund sponsors (including BlackRock) to cause their funds (including BTZ) to redeem the AMPS

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[27] *Id.* ¶ 31.
[28] *Id.* ¶¶ 32.
[29] *Id.* ¶ 34.
[30] *Id.* ¶ 35-36.

(including the Preferred Shares).[31] Merrill's brokers allegedly threatened another investment adviser that its representatives would "no longer be welcome in [Merrill's] offices" if it did not redeem the AMPS, and Merrill warned BlackRock that it faced higher expectations because of "its leadership position within [Merrill]."[32] As the chief distributor for BlackRock's funds, Merrill allegedly was in a unique position to pressure BlackRock into causing its funds to redeem the AMPS.[33]

D. The Fund Redeems the Preferred Shares

On June 9, 2008, the Trustee Defendants caused BTZ to begin redeeming the Preferred Shares, and by January 2011, the Fund had spent $462 million in redeeming all of the outstanding Preferred Shares.[34] The Plaintiff's principal objection to these redemptions is that they occurred at a substantial premium to "market value," despite the fact that BTZ had no obligation to redeem the Preferred Shares.[35] The Plaintiff asserts that after the AMPS auctions froze, a secondary market developed for AMPS holders looking to dump their shares for cash.[36] According to the Plaintiff, when the Trustee Defendants decided to begin redeeming the Preferred Shares, those Shares had already begun trading on the

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[31] *Id.* ¶ 37.
[32] *Id.*
[33] *Id.*
[34] *Id.* ¶ 38.
[35] *Id.*
[36] *Id.* ¶ 33.

secondary market at a substantial discount to their par value.[37] The Complaint repeatedly refers to the "market value" for the Preferred Shares as being substantially below the $25,000 issue price or liquidation preference as a result of the frozen auctions.[38] Notwithstanding these conclusory statements regarding the "market value" of the Preferred Shares, the Complaint specifically references only *one* trade on the secondary market, which allegedly occurred at a discount of 14%.[39] This trade occurred in December 2009, after the Trustee Defendants had begun redemptions that, as the Plaintiff admits, "would have indicated [BTZ's] willingness to bail out the Preferred Shareholders."[40] BTZ redeemed the Preferred Shares at par value, which, according to the Plaintiff, constituted a substantial premium on the Preferred Shares' market value as established through secondary market trading.[41] Aside from the single trade mentioned above, the Plaintiff does not articulate what this "market value" was, other than that it was somewhere below the liquidation preference of the Preferred Shares.

The Plaintiff points to several problems with BTZ's redemption of the

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[37] *Id.*

[38] *See id.* ¶ 30 ("This illiquidity caused the [AMPS] to trade below their issue price and liquidation preference."); *id.* ¶ 33 ("The prices at which Preferred Shares traded on [the secondary market] were substantially below their issuance price."); *id.* ¶ 39 ("The frozen auctions and market turmoil had caused the market value of the Preferred Shares to fall below their $25,000 issue price/liquidation preference."); *id.* ¶ 40 ("[T]he Preferred Shares were nonetheless trading at a significant discount to the original issue price.").

[39] *See id.*

[40] *Id.*

[41] *Id.* ¶ 39.

Preferred Shares. The Plaintiff contends that in paying more than "market value" for the Preferred Shares, the Trustee Defendants engaged in corporate waste and depleted funds that could otherwise have been distributed to the common stockholders, a depletion evidenced by BTZ's continually decreasing common stockholder dividend.[42] Additionally, the Plaintiff alleges that the Trustee Defendants treated the common stockholders unfairly by redeeming the Preferred Shares at a substantial premium without offering a similar opportunity for the common stockholders to sell their shares at a premium.[43]

E. The Fund Obtains Replacement Financing

The Plaintiff also asserts that BTZ took on inferior replacement financing to raise cash to redeem the Preferred Shares. This replacement financing primarily took the form of reverse repurchase agreements ("Reverse Repos"), through which BTZ sold securities for cash and agreed to repurchase those securities at a fixed price after a short period of time, the difference in price being the effective interest rate.[44] The Plaintiff contends that these Reverse Repos were a substantially riskier form of financing than the Preferred Shares for several reasons[45]: First, the Reverse Repos had short terms (often overnight), which left BTZ with the risk that credit would dry up or that rates would spike when the Fund needed to perform the

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[42] *Id.* ¶ 38, 46(a), 46(c).
[43] *Id.* ¶ 42.
[44] *Id.* ¶ 46(b).
[45] *See id.*

repurchase.[46] Second, there was no cap on "interest rates" for the Reverse Repos, and thus when it came time to refinance the Reverse Repos, whatever new financing was available to BTZ could be less favorable.[47] Third, the Investment Company Act of 1940 ("40 Act") requires BTZ to maintain less coverage for equity than for debt, and to avoid having the SEC categorize the Reverse Repos as debt, the Fund had to segregate liquid assets equal to its full obligations under the repurchase agreements, which severely limited the flexibility of BTZ to invest its assets.[48] Finally, although BTZ used the Reverse Repos as an immediate source of cash to fund the redemption of the Preferred Stock, many of the Reverse Repos were ultimately paid off through the selling of the Fund's assets when sale prices were depressed due to unstable market conditions.[49]

F. The Plaintiff's Claims

The Plaintiff contends that the Trustee Defendants' decision to redeem the Preferred Shares was not in the best interests of BTZ.[50] The Plaintiff argues that the redemptions did not provide any benefit to BTZ's common stockholders; rather, they served to reduce the obligations of the Bank Defendants, who had already repurchased a large portion of the Preferred Shares and had entered into

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[46] *Id.* ¶ 46(b)(i).
[47] *Id.*
[48] *Id.* ¶ 46(b)(iii).
[49] *Id.* ¶ 46(c).
[50] *Id.* ¶ 43-44.

settlement agreements to redeem additional Preferred Shares.[51] The Plaintiff asserts derivative and, purportedly, direct claims on these facts. The Plaintiff's chief argument is that the redemption of the Preferred Shares at par value clearly constituted waste, as the Shares were trading at a substantial discount in the secondary market. Moreover, the Plaintiff contends that in order to fund those wasteful redemptions, the Trustee Defendants obtained replacement financing—the Reverse Repos—that was categorically inferior to the Preferred Shares, which, the Plaintiffs allege, is another basis for a finding of corporate waste. Acknowledging that her waste claims are derivative, the Plaintiff also purports to assert a direct claim on the grounds that the redemptions harmed the Plaintiff class by unfairly conferring on the Fund's preferred stockholders a benefit not shared with the common stockholders. The Plaintiff argues that the Trustee Defendants redeemed the Preferred Shares at the common stockholders' expense. The Plaintiff also alleges that BlackRock and the Bank Defendants aided and abetted and were unjustly enriched by the Trustee Defendants' breaches of fiduciary duty, by knowingly encouraging the Trustee Defendants to redeem the Preferred Shares.

The Defendants seek dismissal under Section 3816 of the DSTA, which imposes the same pleading standard on derivative plaintiffs as does Court of

[51] *Id.* ¶ 43.

Chancery Rule 23.1.[52] The Defendants argue that the Plaintiff's claims are derivative, not direct, and that they should be dismissed on the grounds that the Plaintiff has not made demand or adequately pled demand futility. The Bank Defendants sought dismissal of the aiding and abetting and unjust enrichment claims against them on the grounds that the Plaintiff had made only conclusory allegations and had failed to state a claim under Court of Chancery Rule 12(b)(6). At oral argument on March 30, 2012, I dismissed these claims as to BOA and PNC, and reserved decision as to Merrill and BlackRock.

For the reasons below, I find that the Plaintiff's claims are derivative in nature and that the Plaintiff has failed to plead particularized facts raising a reasonable doubt that the Trustee Defendants exercised valid business judgment in redeeming the Preferred Shares. Consequently, the Plaintiff's claims against the Trustee Defendants, as well as their remaining claims against Merrill and BlackRock, must fail. I therefore dismiss this action in its entirety.

II. STANDARD OF REVIEW

A. Derivative or Direct?

The parties dispute whether the Plaintiff has asserted a direct claim in addition to her derivative claim. In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*,[53] our Supreme Court articulated the test for assessing whether a claim asserts

[52] *Compare* 12 *Del. C.* § 3816(c), *with* Ch. Ct. R. 23.1(a).
[53] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

derivative or direct harm. The relevant inquiry is two-fold: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[54] If the corporation suffered the harm and would receive the requested relief, the claim is derivative.[55] On the other hand, the claim is direct if the plaintiff has "suffered harm independent of any injury to the corporation that would entitle him to an individualized recovery."[56] Put simply, to assert a direct claim, the plaintiff must "demonstrate[ ] that he or she can prevail without showing an injury to the corporation."[57] Harm to the corporation, however, does not preclude direct harm to the stockholder. The same transaction may inflict both derivative and direct harm on a stockholder, so long as the plaintiff stockholders "suffered a harm that was unique to them and independent of any injury to the corporation."[58] The court gives little weight to the labels the plaintiff assigns to the claim; instead, "the court must look to the nature of the wrong alleged, taking into account all of the facts alleged in the complaint, and determine for itself whether a direct claim exists."[59]

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[54] *Id.* at 1033.
[55] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *7 (Del. Ch. May 5, 2010) (citing *Tooley*, 845 A.2d at 1036).
[56] *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008).
[57] *Tooley*, 845 A.2d at 1033 (quoting *Agostino v. Hicks*, 2004 WL 443987, at *7 (Del. Ch. Mar. 11, 2004)).
[58] *Gentile v. Rossette*, 906 A.2d 91, 102-03 (Del. 2006).
[59] *Hartsel v. Vanguard Group, Inc.*, 2011 WL 2421003, at *16 (Del. Ch. June 15, 2011).

The Plaintiff argues that the Trustee Defendants unfairly favored the interests of the preferred stockholders over those of the common stockholders when they redeemed the Preferred Shares, and that these redemptions directly harmed the common stockholders, who were not given a similar opportunity to sell their shares for a premium. The Defendants respond that the alleged harm to the Fund's common stockholders is in fact derivative of the injury allegedly suffered by BTZ: a depletion of BTZ's assets stemming from the above-market redemption of the Preferred Shares and the issuance of replacement financing.

The Defendants are correct. Though artfully presented as a claim for the unfair treatment of a particular class of stock,[60] the harm associated with the Plaintiff's "direct" claim is entirely dependent on the harm caused to the Fund by the alleged overpayment for the Preferred Shares. Claims of overpayment naturally

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[60] I refer here to the Plaintiff's argumentation in her brief answering the Motion to Dismiss as well as her presentation at oral argument. The Complaint, however, was less "artful" in presenting the waste allegations as a direct claim. Count II, the purported direct claim, simply substitutes "the common stockholders" for "the Fund" and adds a few token statements of the Plaintiff class's entitlement to monetary relief. The language in those Counts describing the harm is otherwise identical. *Compare* Compl. ¶ 63 ("In contravention of these duties, the Individual Defendants unfairly favored the Preferred Shareholders over the interests of *the Fund* by enabling the former to redeem their shares in the Fund at their Liquidation Preference, at the expense of *the Fund* and the Fund's common shareholders." (emphasis added)), *with id.* ¶ 68 ("In contravention of these duties, the Individual Defendants unfairly favored the Preferred Shareholders over *the common shareholders* by enabling the former to redeem their shares in the Fund at their Liquidation Preference, at the expense of *the common shareholders*." (emphasis added)). The last sentence of Paragraph 68, which is identical to the last sentence of Paragraph 63, is telling, as it does not even attempt to characterize the replacement financing as inflicting direct harm on the common stockholders. *Compare id.* ¶ 63 ("In addition, the Individual Defendants adopted replacement financing that was effectively more costly to the Fund tha[n] the Preferred Shares had been, and even sold assets in fire sale conditions at great cost to the Fund to finance these redemptions."), *with id.* ¶ 68 (same).

assert that the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders only derivatively so far as their stock loses value.[61] Though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend, these harms are "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. In the eyes of the law, such equal 'injury' to the shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually."[62]

The Plaintiff asserts that while the redemptions harmed the corporate entity by wrongfully depleting its assets, they also directly harmed the Plaintiff class. Tacitly acknowledging the similarities between her purported "direct" claim and the type of overpayment claim that this Court has long held to be derivative in nature, the Plaintiff attempts to slip her claim past the higher pleading standard by characterizing the harm as a "missed opportunity injury"[63] suffered by the common stockholders individually when they, unlike the preferred stockholders, were denied the chance to have their shares redeemed at a substantial premium over market value. Avoiding the demand requirement by restating a derivative claim

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[61] *See Gentile*, 906 A.2d at 99.
[62] *Id.*
[63] Pl.'s Mem. Opp. Defs.' Mots. to Dismiss at 17.

under the guise of a direct claim "alleging the same fundamental harm in a slightly different way" is the type of bootstrap allegation that this Court has consistently rejected.[64]

Then-Vice Chancellor Chandler addressed a claim nearly identical to the Plaintiff's here in *Brook v. Acme Steel Co.*:

> The gist of plaintiff's complaint is that Acme's directors "wasted corporate assets by paying too much for the partners' stock and discriminated against other shareholders by not allowing them the opportunity to obtain the same premium and causing the price of their stock to drop." The allegations of waste and denial of a like "premium" to all stockholders, plaintiff argues, support both his *individual* claims against the defendants and his *derivative* claims against Acme's board of directors. The director defendants contend, correctly I think, that all of the plaintiff's claims are derivative in nature.
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> . . . [The] plaintiff complains of a loss of a premium allegedly paid to the partners and not available to other shareholders. This premium, according to the plaintiff, was excessive, a waste of corporate assets, and caused an across the board decline in the per share value of Acme common stock.
>
> Accepting these allegations as true, they do not spell an injury to plaintiff that is distinct from that suffered by other shareholders. Indeed, plaintiff's complaint asserts that *all* of Acme's stockholders shared in the injury caused by the allegedly excessive payment to the partners. The injury of which plaintiff complains is therefore not special to him; it is, allegedly, a harm to the corporation endured by *all* of Acme's common stockholders.[65]

The Court's language in *Brook* suggests that the then-Vice Chancellor may have

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[64] *Feldman v. Cutaia*, 956 A.2d 644, 659-60 (Del. Ch. 2007), *aff'd*, 951 A.2d 727 (Del. 2008).
[65] *Brook v. Acme Steel Co.*, 1989 WL 51674, at *2 (Del. Ch. May 11, 1989) (citations omitted).

applied, at least in part, the "special injury" test.[66] In *Tooley*, which was decided after *Brook*, our Supreme Court explicitly discarded the "special injury" test and adopted the more straightforward approach of requiring direct claims to allege harm distinct from that suffered by the corporation.[67] Nevertheless, I find the salient portion of the Court's analysis in *Brook* to be its holding that the plaintiff's claim of discriminatory treatment—a claim identical to the Plaintiff's here—in fact alleged "a harm to the corporation," not to the plaintiff stockholder individually.[68] Much like the plaintiff in *Brook*, the Plaintiff here has alleged that the Fund's common stockholders were harmed when the Trustee Defendants redeemed the Preferred Shares without offering to repurchase the common stock. As the Court recognized in *Brook*, such a claim alleges an injury to the corporation that is borne only derivatively by the stockholders.[69]

The Plaintiff argues that *Brook* is inapplicable by pointing out that the plaintiff there did not allege that the defendant directors redeemed the partners' stock above fair market value, as the Complaint in this case alleges. In support of this conclusion, the Plaintiff cites the *Brook* Court's language that the complaint contained only "an allegation that the partners agreed to sell their stockholdings to

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[66] *See id.* at *2 ("The injury of which plaintiff complains is therefore not special to him . . . .").
[67] *See Tooley*, 845 A.2d at 1035-39.
[68] *Brook*, 1989 WL 51674, at *2. I also note that in *Tooley*, our Supreme Court cited with approval Chancellor Chandler's thorough analysis in *Agostino v. Hicks*, 2004 WL 443987, wherein the Chancellor discussed the doctrinal confusion surrounding the distinctions between direct and derivative claims. *See Tooley*, 845 A.2d at 1036.
[69] *Brook*, 1989 WL 51674, at *2.

Acme at the prevailing market level on September 15, 1988."[70] The Plaintiff simply misreads the case. The *Brook* plaintiff did, in fact, allege that the partners received an unfair premium for their shares, and that the repurchases were wasteful.[71] Though not explicit in the opinion, presumably the premium complained of resulted from a drop in the market price of the partners' interests between the date of the agreement and the date the date the defendants actually repurchased the interests.

The Plaintiff nonetheless argues that she has asserted a direct claim on the grounds that the Trustee Defendants violated their duty to treat different classes of stock equally barring a valid business justification. It bears noting that there is no blanket rule under Delaware law obligating directors to treat stockholders equally. Provided that the directors act with a legitimate business purpose and fulfill their duties of care and loyalty, they are free to treat stockholders differently.[72]

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[70] *Id.* at *1.

[71] *See id.* at *2 ("Here plaintiff complains of a loss of a premium allegedly paid to the partners and not available to other shareholders. This premium, according to the plaintiff, was excessive, a waste of corporate assets, and caused an across the board decline in the per share value of Acme common stock.").

[72] *See Nixon v. Blackwell*, 626 A.2d 1366, 1376-77 (Del. 1993) (noting that "[i]t is well established in our jurisprudence that stockholders need not always be treated equally for all purposes" and rejecting an argument that directors treated the plaintiff stockholders unfairly by establishing an employee stock ownership plan that provided liquidity to employee stockholders without providing similar liquidity to the plaintiffs); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("[I]t is . . . well established that in the acquisition of its shares a Delaware corporation may deal selectively with its stockholders, provided the directors have not acted out of a sole or primary purpose to entrench themselves in office."); *Tooley v. AXA Fin., Inc.*, 2005 WL 1252378, *5 n.18 (Del. Ch. May 13, 2005) ("[I]n certain circumstances, [the directors] may treat different classes of stockholders unequally. In doing so, however, they must

Assuming, however, that the Plaintiff has pled a claim recognized by Delaware law, the issue is whether the harm allegedly suffered by the common stockholders from being treated unfairly is distinct from the harm suffered by the corporation, such that the relief awarded to remedy the harm would flow to the Plaintiff class, rather than to BTZ. The Plaintiff, rationally, never really runs her "missed opportunity injury" claim through the *Tooley* analysis, focusing instead on convincing this Court that the common stockholders have indeed been treated unjustly, and that they were indeed injured when BTZ redeemed the Preferred Shares for a premium without offering a similar redemption for the common stock. This argument misses the mark, as it attempts to equate *any* injury to a specific class of stockholders with the type of injury required by *Tooley*, i.e., a direct injury to the plaintiff "independent of any alleged injury to the corporation."[73]

The Plaintiff's reluctance to engage with the *Tooley* test is understandable, as a straightforward application of the test reveals the shortcomings of her direct claim. If the Plaintiff has asserted a direct claim, then the remedy for that claim must be one that flows to the Plaintiff class. The Plaintiff's derivative claim is that the Trustee Defendants committed waste in repurchasing the Preferred Shares at a premium; her "direct" claim is that the same, wrongful offer was not extended to

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satisfy the full import of their fiduciary duties."); *Applebaum v. Avaya, Inc.*, 805 A.2d 209, 214 (Del. Ch. 2002) ("[S]tockholders need not always be treated equally for all purposes.").

[73] *Tooley*, 845 A.2d at 1039.

the common stockholders. What remedy could such a claim confer upon the common stockholders? Presumably, the Plaintiff quantifies the derivative waste harm as the difference between the redemption price of the Preferred Shares and whatever the "true" value of the Preferred Shares was when those Shares were redeemed. How, then, does the Plaintiff quantify the "direct" harm? Would the members of the Plaintiff class have suffered no harm if they, too, had been afforded the chance to extract a wasteful premium from the Fund? Would the remedy for this harm be compensatory damages in the amount of the premium the common stockholders would have received had the Trustee Defendants offered to redeem the common stock at a price substantially above market, thus compounding the waste committed?

The Plaintiff avoids these questions, perhaps because they expose the "unfair treatment" claim as a dressed-up waste allegation. The remedy for the purported direct claim would be, in fact, the same remedy that would issue if I were to find for the Plaintiff on her waste claim, except that there the remedy would inure to the benefit of the Fund, and to the derivative benefit of the stockholders, rather than to the sole benefit of the Plaintiff class.[74] And so it should: assuming the redemptions were wasteful, the common stockholders did not suffer harm in being denied the

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[74] *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 826 (Del. Ch. 2005) ("How . . . could the same directors ever be liable to pay actual compensatory damages to both the corporation and the class for the same injury? The answer . . . is that they could not."), *aff'd*, 906 A.2d 766 (Del. 2006).

opportunity to wastefully extract a premium of their own from BTZ; rather, BTZ suffered the harm in receiving inadequate consideration for its assets, a harm suffered only derivatively by the Plaintiff class.[75]

B. Pleading Demand Futility

Having found that the Plaintiff's claims are derivative, and not direct, I must determine whether she has met the requirements to bring a suit on behalf of the Fund, under Section 3816 of the DSTA. The Plaintiff asserts derivative claims and

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[75] The Massachusetts Superior Court has addressed claims practically identical to the Plaintiff's here and has found such claims to be derivative in nature. *See Manuszak v. Esty*, No. 10-3457-BLS1, slip op. at 13-19 (Mass. Super. Ct. June 20, 2011) (applying Massachusetts law, which, like Delaware law, requires direct injury to be "distinct from the injury suffered generally by the shareholders as owners of corporate stock"); *Beckham v. Keith*, No. SUCV2010-03574-BLS2, slip op. at 5-8 (Mass. Super. Ct. June 14, 2011) (applying Delaware law). In *Beckham*, the Court found:

> The heart of the allegation is that the Fund overpaid for [the] redemptions, is now less valuable, and that the common shareholders will suffer lower returns as a result. But this is clearly not a distinct injury.
>
> . . . .
>
> The authority relied on by the Plaintiff does not and cannot establish that whenever common shareholders are treated differently from preferreds, they may bring a direct action for breach of fiduciary duty on the simple allegation that "the duty of fair treatment is directly owed to the shareholders."

Beckham, No. SUCV2010-03574-BLS2, slip op. at 5-6, 7-8 (citing *Feldman*, 951 A.2d at 657, 732). In *Manuszak*, the Court held:

> The injury alleged by Manuszak regarding the decision to change financing from [AMPS] equity financing to the Replacement Borrowing debt financing is the depletion of the Funds' assets, leaving the Funds with less cash to distribute to the common shareholders in the form of dividends. If the Funds repurchased the [AMPS] at too high a price or paid too much for the alternative financing to [AMPS], then the Funds' assets were depleted. Masnuszak's harm is not distinct from that of the Fund, and any recovery must go the Fund, not directly to the common shareholders.

Manuszak, No. 10-3457-BLS1, slip op. at 18.

has not made demand on BTZ's Board of Trustees to bring suit. The DSTA permits a beneficial owner to bring an action derivatively on behalf of the trust.[76] Just as in corporate derivative actions, however, a plaintiff asserting derivative claims on behalf of the statutory trust must allege with particularity any efforts made in demanding that the trustees bring the action or, in the alternative, why such efforts are futile.[77] The standards used to determine demand futility when a plaintiff sues on behalf of a statutory trust are the same as those applied to derivative suits by corporate stockholders.[78] Where the plaintiff challenges a conscious business decision by the board, the *Aronson* test applies.[79] Under that test, to survive a motion to dismiss, the plaintiff must successfully plead demand futility by alleging particularized facts that raise a reasonable doubt that "(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[80] The Plaintiff does not assert demand futility under the first prong of *Aronson*, but rather contends that demand is futile under the second prong.

The second prong of *Aronson* is, for plaintiffs challenging board actions, something of a last resort that, in extreme circumstances, provides the court with

[76] *See* 12 *Del. C.* § 3816(a); *cf.* Ch. Ct. R. 23.1(a).
[77] *See* 12 *Del. C.* § 3816(c).
[78] *See Hartsel*, 2011 WL 2421003, at *20.
[79] *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984)).
[80] *Aronson*, 473 A.2d at 814.

the basis to review a transaction despite the appearance of otherwise independent and disinterested fiduciaries.[81] Rather than disputing whether the Trustee Defendants were disinterested, informed, or independent, the Plaintiff challenges the substance of the Preferred Share redemptions as plainly undeserving of the protection of the business judgment rule. The Plaintiff must therefore plead particularized facts sufficient to raise a reasonable doubt that the redemptions were actions "taken honestly and in good faith."[82] This is a heavy burden, essentially requiring the plaintiff to plead facts amounting to corporate waste.[83] The Plaintiff agreed at oral argument that the waste standard applies here.[84]

III. ANALYSIS

A. The Waste Standard

As I recently pointed out in a similar context, "judges are ill-suited by training (and should be disinclined by temperament) to second-guess the business decisions" of disinterested, informed fiduciaries.[85] Claims of waste nevertheless

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[81] *See Kahn v. Tremont Corp.*, 1994 WL 162613, at *6 (Del. Ch. Apr. 21, 1994) ("The second prong of *Aronson* is, I suppose, directed to extreme cases in which despite the appearance of independence and disinterest a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review.").

[82] *In re Goldman Sachs Group, Inc. S'holder Litig.*, 2011 WL 4826104, at *12 (Del. Ch. Oct. 12, 2011) (quoting *J.P. Morgan*, 906 A.2d at 824).

[83] *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *9 (Del. Ch. Oct. 10, 2006) (citing *Kahn*, 1994 WL 162613, at *6).

[84] *See* Oral Arg. Tr. 61:20-62:5 (Mar. 30, 2012). I stress that the Plaintiff here does not challenge the redemptions under the first prong of *Aronson*, but rather relies on the allegedly unjustifiable nature of the transaction itself to provide a cause of action.

[85] *Goldman*, 2011 WL 4826104, at *1.

invite the court to partake in such second-guessing, as they require the court to evaluate the adequacy of the consideration received by the corporation for its assets. As a product of its hesitancy to evaluate the substance of business decisions, this Court will only find waste where the corporation receives grossly inadequate consideration for its assets: "[W]aste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade."[86] Valid waste claims typically lie where there has been "a transfer of corporate assets that serves no corporate purpose[,] or for which no consideration at all is received."[87] Where, however, the corporation has received "*any substantial* consideration" and where the board has made "a *good faith judgment* that in the circumstances the transaction was worthwhile," a finding of waste is inappropriate, even if hindsight proves that the transaction may have been ill-advised.[88]

It is not sufficient, therefore, that the plaintiff simply disagrees with the merits of the challenged transaction, or even that a reasonable person might have acted differently. Rather, a plaintiff's waste claim must be dismissed absent

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[86] *Id.* at *16 (quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997)).
[87] *Lewis*, 699 A.2d at 336. *See, e.g.*, *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 137-38 (Del. Ch. 2009) (allowing a waste claim to go forward on the basis of the plaintiffs' allegations that the board approved the payment of a "multi-million dollar compensation package to a departing CEO whose failures as CEO were allegedly responsible, in part, for billions of dollars of losses at [the company]," in exchange for which the company obtained from the CEO non-compete, non-disparagement, non-solicitation, and release agreements of allegedly limited value).
[88] *Lewis*, 699 A.2d at 336.

particularized factual allegations of an "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[89] The allegations must "overcome the general presumption of good faith by showing that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests."[90] The standard for waste under the second prong of *Aronson* may be expressed as akin to *res ipsa loquitur*,[91] and is difficult to meet—rightfully so, else courts be tempted to employ their own judgment, post hoc, to decisions faced by disinterested and informed fiduciaries, who act in the moment and without the benefit of hindsight to fulfill their fiduciary duties.[92] I find that the Plaintiff's allegations fall short of the waste standard, as the Complaint presents only generalized allegations regarding the wisdom of the Trustee Defendants' redemption of the Preferred Shares and implementation of the Replacement Financing.

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[89] *Citigroup*, 964 A.2d at 136 (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)).

[90] *Citigroup*, 964 A.2d at 136 (quoting *White v. Panic*, 783 A.2d 543, 554 n. 36 (Del. 2001)).

[91] *Compare Kahn*, 1994 WL 162613, at *6 ("The second prong of *Aronson* is . . . directed to extreme cases in which despite the appearance of independence and disinterest a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review."), *with Gen. Motors Corp. v. Dillon*, 367 A.2d 1020, 1023 (Del. 1976) ("[T]he doctrine of Res ipsa loquitur . . . permits . . . the trier of the facts to draw an inference of negligence . . . . if the particular manner in which the plaintiff shows the injury to have occurred is so unaccountable that the only fair inference of the cause was the negligence of the defendant . . . .").

[92] Such post-hoc review would have a chilling effect on the fiduciaries' ability to create wealth through application of risk.

B. The Redemptions

The Plaintiff's waste argument with respect to the Preferred Share redemptions essentially proceeds as follows: when the AMPS auctions froze, the Preferred Shares began trading on the secondary market at a value substantially below their par value, and when the Trustee Defendants redeemed the Preferred Shares at par value, they did so at a substantial premium over the established market value. In paying a price for the Preferred Shares well above the price at which those Shares were available to the Trustee Defendants on the market, the Plaintiff alleges, the Trustee Defendants wasted the Fund's assets. One might expect a complaint espousing this argument to allege particularized facts asserting that the shares in question were actively traded on the secondary market, that this trading established a market price for those shares, what that market price was, and that the defendants redeemed the shares at a premium to market substantial enough to constitute waste. If the Plaintiff had alleged facts of this nature, she might indeed have satisfied the difficult pleading standard under the second prong of *Aronson*.

The Complaint, however, only alleges the occurrence of *one* trade at a discount (14%) to par value, a trade which purportedly occurred after the Trustee Defendants began the redemptions.[93] From this allegation, the Plaintiff posits that

[93] *See* Compl. ¶ 40.

the "market price" for the Preferred Shares must have been even lower before the redemptions began. The Plaintiff also points to the fact that the auctions froze as evidence that the Preferred Shares were not worth their liquidation value when the Fund redeemed them, yet, aside from sweeping generalities, the Complaint does not allege what the prevailing market price of the Preferred Shares actually was. An allegation of a single transaction that occurred after the redemptions began does not sufficiently allege that the Preferred Shares were trading at an established market price on the secondary market, or that redemption of the Preferred Shares was available to BTZ at that price on that market, such that any redemptions at par value would have been wasteful. Finally, the Plaintiff alleges that many banks and brokers, including the Bank Defendants, reached settlements with the federal government, the Financial Industry Regulatory Authority, and various state governments requiring them to purchase AMPS from their clients at par value. Notably, however, the Complaint does not specifically allege that *BTZ's* Preferred Shares were the subject of any of these settlements; rather, the Complaint simply refers generally to settlements involving bank defendants and the AMPS they had sold.[94]

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[94] The Complaint does not specifically allege that the Fund redeemed Preferred Shares from any of the Bank Defendants after the Bank Defendants had repurchased those Shares through settlements with the aforementioned government agencies. The only reference to "Preferred Shares" in connection with the AMPS settlements appears at Paragraph 43 of the Complaint: "[T]he Fund's redemption of the Preferred Shares permitted Merrill, PNC, and Bank of America to recover the amounts that they had agreed to pay in the settlements." *Id.* ¶ 43. The inference the

From these abstract assertions of frozen auctions and settlements that may or may not have involved Preferred Shares, and from a single alleged transaction occurring *after* the redemptions at issue, the Plaintiff draws the very specific conclusion that the Preferred Shares had an established market value that was substantially below their par value. What these allegations suggest, however, if anything, is not that a robust secondary market existed or that the Preferred Shares had a market value, but that the Preferred Shares were illiquid. It is a reasonable inference that the frozen auctions depressed the value of the Preferred Shares below their par value. Thus, it is also possible that the Fund redeemed the Preferred Shares at a price above the price that another buyer might pay for those Preferred Shares in a one-off transaction. The waste doctrine does not, however, make transactions at the fringes of reasonable decision-making its meat. Rather, the waste doctrine, in the context of *Aronson*'s second prong, is, as Chancellor Allen once quipped, much like Nessie[95]: an elusive beast with an appetite only for

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Plaintiff apparently hopes this Court will make is that government agencies forced the Bank Defendants to redeem the *Preferred Shares*. Yet the allegations only state that the Bank Defendants redeemed some AMPS (though perhaps not the Fund's Preferred Shares) and that the Fund repurchased Preferred Shares from the Bank Defendants. The Bank Defendants could have held Preferred Shares for a number of alternative reasons, such as unsold leftovers from the Bank Defendants' underwritings. The Plaintiff herself suggests this possibility in Paragraph 29 of the Complaint. *See id.* ¶ 29 ("[The Bank Defendants] each marketed the preferred stock of other funds, and . . . each ended up owning a significant amount of the auction rate securities. In particular, Merrill Lynch (and thus Bank of America) ended up owning many of the Fund's Preferred Shares.").

[95] *See Steiner v. Meyerson*, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995). Chancellor Allen's apt analogy was pointed out by Defendants' counsel at oral argument.

similarly elusive transactions—those that, despite being entered into by informed and disinterested fiduciaries, contain terms so "egregious or irrational that [they] could not have been based on a valid assessment of the corporation's best interests."[96] Like the cameras of many a tourist in Scotland, the allegations of the Plaintiff here are not sufficiently focused to bring the fabled beast within our ken.

Transactions amounting to waste do not include, as discussed above, deals where the corporation has received "*any substantial* consideration" and the board has made "a *good faith judgment* that in the circumstances the transaction was worthwhile."[97] The Plaintiff does not, and could not have, alleged that the Fund received no substantial consideration when it repurchased the Preferred Shares. At the very least, the Fund eliminated its obligations to pay the Preferred Share dividend, which was stuck at the maximum rate due to the frozen auctions. Whether this was an advisable business decision is not an issue within this Court's proper scope of review, absent particularized allegations meeting the extreme standard of waste.

C. The Replacement Financing

The Plaintiff also alleges that the Trustee Defendants committed waste when they adopted the Reverse Repos to finance the redemptions of the Preferred Shares. The Plaintiff contends that the Preferred Shares provided the Fund with superior

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[96] *Citigroup*, 964 A.2d at 136 (quoting *White*, 783 A.2d at 554 n.36).
[97] *Lewis*, 699 A.2d at 336.

financing because the dividend rate was favorable, the financing was perpetual, and the Preferred Shares placed minimal constraints on the Fund's assets when compared with the available alternate financing. According to the Plaintiff, the Reverse Repos were a substantially riskier form of financing: The Reverse Repos often had short terms, creating a greater risk that interest rates would spike when the Fund had to perform the repurchase. There was also the risk that the SEC would classify the Reverse Repos as debt, requiring a higher asset coverage ratio (300%) under the 40 Act than the Preferred Shares (200%). To avoid the debt classification, the Fund had to segregate liquid assets equal to its full obligations under the Reverse Repos, limiting the Fund's ability to invest its assets flexibly. The Plaintiff argues that these factors all made the Reverse Repos a riskier form of financing, and that the Trustee Defendants committed waste when they obtained the replacement financing to repurchase the Preferred Shares.

The Plaintiff's argument amounts to a simple claim that the Trustee Defendants did not adequately evaluate the risks of the Reverse Repos, absolutely or in contrast to the Preferred Shares. As this Court has noted, however, "[t]he essence of the business judgment of managers and directors is deciding how the company will evaluate the trade-off between risk and return."[98] Risk is inherent in almost every business decision, and the ability to weigh that risk against the

[98] *Citigroup*, 964 A.2d at 126.

potential for reward sans the apprehension of hindsight bias is central to the protection that the business judgment rule affords corporate decisionmakers. At oral argument, the Plaintiff offered a hypothetical of a refinancing decision that could constitute waste: If the Fund had an outstanding twenty-year bond with a seven percent interest rate, and the Trustee Defendants decided to redeem that bond and replace it with another bond with identical terms save for a nine percent interest rate, alleging such a transaction would presumably sustain a waste claim. Yet in addition to describing a transaction that might be Chancellor Allen's "Nessie," this hypothetical simply illustrates the deficiencies in the Plaintiff's allegations. The Complaint does not allege the stark contrast of interest rates and patent irrationality posited by the hypothetical. In fact, though it contains general statements regarding asset coverage ratios, terms, and refinancing risk, the Complaint does not at any point allege the actual cost of the Reverse Repo financing. The Complaint merely alleges that an alternative course of action—i.e., retaining the Preferred Shares—would have been more beneficial for the Fund. Such allegations cannot sustain a cause of action for breach of fiduciary duty.[99] That the Plaintiff would have stuck with what she saw as a "sure bet" in the

[99] *See In re Affliated Computer Servs., Inc. S'holders Litig.*, 2009 WL 296078, at *10 (Del. Ch. Feb. 6, 2009) ("A complaint which alleges merely that some course of action other than that pursued by the Board of Directors would have been more advantageous gives rise to no cognizable cause of action." (quoting *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810 (N.Y. Sup. Ct. 1976))).

Preferred Shares is of no moment. A corporation does not commit waste simply by entering a transaction comprising terms of debatable wisdom.[100] Barring the aberrant transaction that is approved by disinterested, informed fiduciaries yet nonetheless smacks of corporate malfeasance, this Court will not second-guess a board's business decisions.

Because I find that the Plaintiff has not sufficiently pled a claim for waste, it follows that the Plaintiff has failed to state a claim against BlackRock or the Bank Defendants for aiding and abetting a breach of fiduciary duty.

CONCLUSION

For the foregoing reasons, this action is dismissed with prejudice as to all Defendants.

IT IS SO ORDERED.

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[100] *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996) ("[T]hat plaintiff regards the decision as unwise, foolish, or even stupid in the circumstances is not legally significant; indeed that others may look back on it and agree that it was stupid is legally unimportant . . . .").