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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHESTER COUNTY EMPLOYEES' RETIREMENT FUND, Plaintiff-Below/ Appellant, v. NEW RESIDENTIAL INVESTMENT CORP., WESLEY R. EDENS, MICHAEL NIERENBERG, ALAN L. TYSON, DAVID SALTZMAN, KEVIN J. FINNERTY, DOUGLAS L. JACOBS, FIG LLC, FORTRESS INVESTMENT GROUP LLC and FORTRESS OPERATING ENTITY I LP, Defendants-Below/ Appellees.	)	No. 457, 2017 CASE BELOW: Court of Chancery of the State of Delaware C.A. No. 11058-VCMR

APPELLANT'S CORRECTED OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

RULES

STATUTES

NATURE OF PROCEEDINGS

Five hundred million dollars constitutes enough purchasing power to buy the most expensive mansion in the United States[1] or several entire islands,[2] and it amounts to approximately the same or more than the gross domestic product of nine countries.[3] The Court of Chancery, however, found that New Residential Investment Corporation's ("New Residential") acquisition of a third-party, which was structured and financed to bestow benefits valued in excess of $500 million upon Fortress Investment Group ("Fortress"), New Residential's controller, did not constitute self-dealing. The trial court further found that the plaintiff Chester County Employees' Retirement Fund ("Plaintiff") failed to allege that benefits in excess of $500 million are material to Fortress even though this figure is nearly 28% of the revenue the defendants acknowledge that Fortress earned over an entire year. The trial court erroneously reached these conclusions and dismissed Plaintiff's derivative breach of

[1] Emmie Martin, "Take a look inside the most expensive home in America: a $500 million California mansion," CNBC.com (Sept. 27, 2017), https://www.cnbc.com/2017/09/27/most-expensive-house-in-the-u-s-worth-500-million.html

[2] Private Islands Inc., https://www.privateislandsonline.com/search?availability=sale (last visited Dec. 18, 2017).

[3] The World Bank, GDP ranking (last updated July 1, 2017) https://data.worldbank.org/data-catalog/GDP-ranking-table

fiduciary duty claims for failure to plead demand futility. On *de novo* review, this Court should reverse the dismissal and remand for further proceedings.

On October 30, 2015, Plaintiff filed its Amended and Supplemented Verified Class Action and Derivative Complaint (the "First Amended Complaint" or "FAC"), A30-129, against certain members of New Residential's Board of Directors (the "Board"), New Residential's controlling stockholder, Fortress, and Fortress affiliates, FIG LLC ("FIG") and Fortress Operating Entity I LP ("FOE I"). In Counts I and II,[4] Plaintiff challenged the fairness of New Residential's acquisition of Home Loan Servicing Solutions, Ltd. ("HLSS"). A108-115, FAC ¶¶152-168. Plaintiff alleged that Fortress exercised its control over New Residential to proceed with the risky and overpriced acquisition, even though HLSS was likely to receive a going concern qualification, so that Fortress could secure a material increase in fee-paying assets and other benefits. In Count III, Plaintiff challenged a termination agreement executed in connection with the HLSS acquisition that purported to release claims of the New Residential stockholders against HLSS.[5] A115-119, FAC ¶¶169-176.

[4] Plaintiff pursued Count I as a class claim but is not challenging on appeal the trial court's finding that both Counts I and II assert derivative claims. Ex. A at 16; Ex. C at n.79.

[5] Count III, as articulated in the First Amended Complaint, also challenges the validity of certain provisions in New Residential's charter and the management agreement between New Residential and FIG. Plaintiff chose not to pursue these challenges in the Second Amended Complaint (defined below).

The defendants moved to dismiss the First Amended Complaint, pursuant to Court of Chancery Rules 23.1 and 12(b)(6). A246. The trial court granted, in part, the defendants' motion in an October 7, 2016 Memorandum Opinion ("First Opinion" or "First Op.") (Ex. A), dismissing Counts I and II for failure to plead demand futility and Count III as unripe due to the dismissal of Counts I and II. Despite finding that at least half of the New Residential Board was not independent of Fortress, the trial court rejected Plaintiff's particularized allegations of Fortress's self-dealing and extraction of material benefits in connection with the HLSS acquisition and granted Plaintiff leave to replead. The trial court denied Plaintiff's request for reargument in a letter opinion dated December 1, 2016 ("Second Opinion" or "Second Op.") (Ex. B).

Plaintiff filed its Second Amended Verified Class Action and Derivative Complaint on February 27, 2017 (the "Second Amended Complaint" or "SAC"). A1413-1527. Plaintiff's claims largely remained the same but, by that time, the New Residential Board expanded to include two new directors. The defendants again moved to dismiss pursuant to Rules 23.1 and 12(b)(6), and the trial court granted the motion in its entirety on October 6, 2017 ("Third Opinion" or "Third Op.") (Ex. C).

The trial court committed legal error in its dismissal of the First Amended Complaint by denying Plaintiff's challenge to the self-dealing acquisition of HLSS that was structured to bestow material benefits upon Fortress at New Residential's

expense. For the reasons stated herein, this Court should reverse the trial court's dismissal of Plaintiff's claims.

SUMMARY OF ARGUMENT

1. Plaintiff sufficiently plead demand futility under the standard articulated in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). The trial court correctly found that at least half of the New Residential Board was beholden to Fortress in connection with New Residential's acquisition of HLSS. The trial court, however, erred in holding that the HLSS acquisition was not a self-dealing transaction. Plaintiff alleged with particularity in the First Amended Complaint that Fortress, New Residential's controller, engaged in self-dealing by causing New Residential to structure and finance the HLSS acquisition in a manner that was financially beneficial to Fortress.

2. The trial court also erred because Plaintiff alleged that Fortress had a material interest in the HLSS acquisition. Fortress and its principals benefitted handsomely from the HLSS acquisition. Fortress raised $1.3 billion in assets under management ("AUM") in connection with the HLSS acquisition, which benefits Fortress's business in a multitude of ways, including an estimated $500 million increase in management fees and incentive compensation. On top of this half billion dollar increase in income, the acquisition also granted Fortress other immediate benefits valued in excess of $100 million. These are material benefits for Fortress when compared to Fortress's historical income from New Residential, overall revenues and business model. By declining to find that Fortress engaged in self-

dealing or that Fortress received material benefits from the HLSS acquisition, the trial court erred as a matter of law.

STATEMENT OF FACTS

A. The Defendants

1. New Residential

New Residential is a publicly traded real estate investment trust ("REIT") that primarily invests in assets related to residential real estate, including excess mortgage servicing rights ("Excess MSRs") and residential mortgage-backed securities ("RMBS"). A41-42, FAC ¶12. New Residential's common stock trades on the New York Stock Exchange ("NYSE"). *Id.*

2. Fortress and its Affiliates Control New Residential

Fortress is a diversified global investment management firm that, together with its affiliates, controls New Residential. A54, FAC ¶44; A56-72, FAC ¶¶50-81. New Residential was spun off from Newcastle Investment Corp., another Fortress-controlled REIT, in May 2013. A42, FAC ¶12. Fortress has spun off New Residential and other entities into separate public corporations as part of its transition from traditional investment funds to "permanent capital vehicles." A55, FAC ¶48. New Residential is a permanent capital vehicle that is part of Fortress's private equity business segment. *Id.*; A42, FAC ¶13.

Fortress uses its control of New Residential and other permanent capital vehicles as a lucrative source of fees and other benefits based on the AUM owned by these vehicles. A55, FAC ¶48. As of December 31, 2014, Fortress reported its total AUM as approximately $67.5 billion, of which its private equity business

segment managed $13.9 billion, or approximately 21% of Fortress's total AUM. A54, FAC ¶¶44-45. As of December 31, 2014, New Residential represented $1.4 billion of Fortress's total AUM (approximately 2%). A62, FAC ¶57 (referencing Fortress 2014 Form 10-K (filed Feb. 26, 2015) (hereinafter, "Fortress 2014 Form 10-K")); A388, Transmittal Affidavit of Ronald N. Brown, III (Dec. 11, 2015) ("First Brown Tr. Aff."), Ex. 1 at 64.[6]

Fortress's directly and indirectly owned affiliates, FIG and FOE I, extract management fees, incentive compensation and stock options from New Residential. A55, FAC ¶¶47-48; A59-60, FAC ¶54. Defendant FIG is New Residential's manager and earns management fees and incentive compensation pursuant to a management agreement. A57, FAC ¶50(i). The management fees equal 1.5% of New Residential's "Gross Equity," which includes the total net proceeds from New Residential stock offerings. A74-75, FAC ¶85. The incentive compensation is 25% of New Residential's gains each year above a 10% return. A75, FAC ¶86. New Residential also issues stock options to FIG when New Residential issues equity. A53, FAC ¶41. Defendant FOE I, a limited partnership, holds New Residential stock and options granted by New Residential to FIG. A54, FAC ¶42.

[6] *Weiss v. Swanson*, 948 A.2d 433, 452 & n.84 (Del. Ch. Mar. 7, 2008) (A court may consider on a motion to dismiss documents expressly referred to and relied upon in the complaint itself.).

Despite Fortress's complicated organizational structure, the management fees and other compensation earned by FIG and FOE I flow to Fortress and its principals. Fortress and its affiliates are organized as follows: Fortress owns 100% of FIG Corp. A55, FAC ¶47. FIG Corp. is FOE I's general partner. A54, FAC ¶42. FIG Corp. and Fortress's principals own FOE I's limited partner interests. A62, FAC ¶57 (referencing Fortress 2014 Form 10-K); A334, First Brown Tr. Aff. Ex. 1 at 11 (explanatory diagram of Fortress's ownership structure). Finally, FOE I is the sole managing member of FIG. A54, FAC ¶42. Fortress also reports fees and other compensation received from FOE I and FIG in its financial disclosure documents. A62, FAC ¶57 (citing Fortress 2014 Form 10-K); A472, First Brown Tr. Aff. Ex. 1 at 148; A99, FAC ¶133 (citing Fortress's Earnings Supplement, Second Quarter 2015).

To ensure that they maintain a steady stream of income, Fortress and its principals control every aspect of New Residential's business, including the New Residential Board. Fortress appointed the initial Board in 2013, which largely remained intact through the filing of Plaintiff's First Amended Complaint. A62-63, FAC ¶¶58-59; A64-65, FAC ¶¶61-66. At the time, New Residential had six directors, Wesley R. Edens, Michael Nierenberg, Douglas L. Jacobs, David Saltzman, Kevin J. Finnerty and Alan L. Tyson. A43-44, FAC ¶¶14, 19; A48, FAC ¶25; A51-52, FAC ¶¶32, 35, 37. Messrs. Edens, Nierenberg and Jacobs also served

as a director or officer of Fortress. A43, FAC ¶¶15-16; A48-49, FAC ¶27; A52, FAC ¶36. Because of their dual-fiduciary roles and loyalties to Fortress, the trial court found that at least half of the Board was beholden to Fortress. Ex. A, First Op. at 25-27. In addition, all of New Residential's employees, and officers are employees of Fortress affiliates, including FIG. A42, FAC ¶13; A73, FAC ¶82. Fortress also uses other mechanisms to control New Residential and its Board, such as: (i) a classified board; (ii) the elimination of the stockholders' ability to call a special meeting or act by written consent; (ii) the elimination of fiduciary liability of FIG and FIG's directors, officers, stockholders and employees to New Residential and its stockholders; (iii) an exemption for Fortress and its affiliates from the 9.8% stock ownership limitation; and (iv) a Fortress dominated nominating committee. A56-71, FAC ¶¶50-77; Ex. A, First Op. at n.40.

Fortress uses the aforementioned corporate levers to control New Residential, while it maintains a limited 7.4% equity stake. A59, FAC ¶52. Fortress adopted this model to maximize the fees and other benefits that it could earn without the concomitant risks of majority equity ownership. *Id.*, FAC ¶53.

B. The HLSS Acquisition

1. The Troubled State of HLSS and Ocwen

The U.S. mortgage industry is highly concentrated, creating a significant risk of cross-defaults and rapid material losses resulting from a default by a major

participant in the industry. A80, FAC ¶98. Two major industry players, aside from Fortress and its permanent capital vehicles, include HLSS and Ocwen Financial Corp. ("Ocwen"). A82-83, FAC ¶¶102-103. HLSS is dependent upon Ocwen to achieve its business objectives because HLSS holds Excess MSRs, which generate fees and other income from servicing mortgages and servicer advances, and HLSS relies on Ocwen to service its mortgages. *Id*. HLSS bears the risk of losing the value of its Excess MSRs if Ocwen is terminated as the servicer of the mortgages by the holders of the loans or RMBS. *Id*. In addition, HLSS used Ocwen's facilities to finance its acquisition of servicer advances. A83, FAC ¶103.

By early 2015, HLSS was nearing collapse. It had (i) restated several years of consolidated financial statements; (ii) received multiple subpoenas from the Securities and Exchange Commission ("SEC"); (iii) had its corporate credit ratings downgraded; (iv) suffered lower ratings and stock price targets by analysts; (v) received letters from an investment manager claiming HLSS had defaulted on its term notes; (vi) had been sued in several class and derivative suits; and (vii) was at risk of defaulting on its credit agreements. A83-84, FAC ¶104. As a result, on January 13, 2015, HLSS's stock price dropped by more than $3 per share, closing at $12.51. *Id*., FAC ¶105. By the end of January 2015, HLSS's stock was trading at $11.82. *Id*.

Ocwen was also troubled, suffering from: (i) several regulatory investigations; (ii) hundreds of millions of dollars paid in settlements; (iii) downgrades by various ratings agencies; (iv) an untimely Form 10-K filing; and (v) poor 2014 financial results. A84-87, FAC ¶¶106-111. The relationship between HLSS and Ocwen increased the risk to HLSS's revenues and assets and of the likelihood of default. A84-85, FAC ¶106.

2. The Initial Merger Agreement

Despite the breadth of issues plaguing HLSS, on February 22, 2015, New Residential entered into a merger agreement to acquire HLSS for $18.25 per share or a total of about $1.3 billion (the "Initial Merger Agreement"), a significant premium to HLSS's market value, which had fallen to $11.82 by the end of January 2015. A35, FAC ¶2; A83-84, FAC ¶¶104-105; A89, FAC ¶114. The Initial Merger Agreement contained representations that HLSS had made all necessary SEC filings, and New Residential had the right to terminate the Initial Merger Agreement if HLSS breached this representation. A89, FAC ¶114.

On March 3, 2015, just nine days after signing the Initial Merger Agreement, HLSS reported that it needed additional time to complete its Form 10-K to determine the impact of recent adverse developments. A90, FAC ¶115. A March 17, 2015 HLSS Form 8-K announced HLSS could not file its Form 10-K because it needed "to prepare information related to its ability to operate as a going concern." *Id.* A

going-concern qualification would result in a credit default by HLSS. *Id.* NASDAQ notified HLSS that it was non-compliant with NASDAQ listing requirements because of the failure to file its Form 10-K. *Id*. HLSS also received a subpoena from the SEC. *Id.* With each passing day, the problematic transaction with HLSS became riskier.

3. The Revised Acquisition Agreement

Rather than walk away from the HLSS deal or extract better terms compared to the Initial Merger Agreement, the defendants pursued a new transaction that, like the Initial Merger Agreement, resulted in New Residential's acquisition of the entirety of HLSS. New Residential and HLSS entered into an April 6, 2015 Termination Agreement (the "Termination Agreement"), which purported to terminate and release all claims relating to the Initial Merger Agreement. A90-91, FAC ¶116. On the same day, New Residential and HLSS executed a Share and Asset Purchase Agreement (the "Acquisition Agreement"). A91-92, FAC ¶¶117-118. New Residential agreed to purchase all assets (except cash), assume all liabilities of HLSS and up to $50 million in post-closing liabilities, and payoff a term loan, in exchange for $1,007,156,148.57 in cash and 28,286,980 shares of New Residential common stock. A91, FAC ¶117. New Residential reported that the total consideration paid for HLSS was $1,491,248,000. A93, FAC ¶121.

The cost to New Residential did not end there. An SEC investigation into HLSS's restatement of financial statements and related-party disclosures caused HLSS to consent to a Cease and Desist Order and a settlement payment of $1.5 million, which New Residential would pay. A103, FAC ¶141. In addition, in anticipation of an Ocwen ratings downgrade that would adversely impact HLSS, New Residential obtained $4 billion in financing commitments. *Id.*, FAC ¶140. This financing proved necessary when, in September 2015, Ocwen caused a default under an indenture for $2.525 billion of notes issued by New Residential's HLSS Servicer Advance Receivables Trust. A102-103, FAC ¶139. The resulting default required New Residential to repay all the notes in full, on October 2, 2015, and caused New Residential's stock price to fall below $13 per share. *Id*.

C. The Public Offerings Used to Finance the HLSS Acquisition

The Acquisition Agreement required entry into a Registration Rights Agreement, which contemplated a public offering of New Residential stock that would be used to finance the acquisition. A37-39, FAC ¶¶5-7; A92, FAC ¶¶118-119; A94-95, FAC ¶¶123-125. Because the benefits that Fortress derives from New Residential are tied to New Residential's equity, Fortress had a direct financial interest in having New Residential raise additional equity capital through public stock offerings. However, New Residential did not implement any procedural mechanisms, such as a special committee or fully informed and disinterested

stockholder vote, to protect against this conflict of interest. A111-112, FAC ¶159. In fact, the defendants structured the revised transaction to deny the New Residential stockholders a vote, as the New Residential stock issuance to HLSS of 28,286,980 New Residential shares was only about ten (10) shares shy of the 20% threshold under Rule 312.03(c) of the NYSE requiring a stockholder vote. *Id.*; A38-39, FAC ¶7.

New Residential used the proceeds from public offerings in April and June 2015 (approximately $890 million) to fund the acquisition of HLSS and other investments. A95-96, FAC ¶125. In the April 2015 offering, New Residential and HLSS sold 57.5 million shares of New Residential common stock at the below-market price of $15.25 per share. A94-95, FAC ¶123. The stock sold included the 28.3 million shares issued to HLSS under the Acquisition Agreement, 21.7 million shares sold by New Residential and 7.5 million shares from the underwriters' exercise of their overallotment option. *Id.* New Residential received $446 million in proceeds, and HLSS received $431 million in proceeds. A94-95, FAC ¶123. New Residential raised an additional $444 million in the following June offering. A95-96, FAC ¶125.

D. Fortress Profits from the HLSS Transaction

Given the grave difficulties facing HLSS, New Residential could have secured a much better price and improved terms compared to the Initial Merger Agreement,

but the revised transaction ultimately cost New Residential more. With $200 million in adjustments, a $1.5 million settlement payment, and the repayment of HLSS's notes with $4 billion of financing, the revised HLSS acquisition cost New Residential at least $1.5 billion, or at least a $200 million increase from the $1.3 billion cost of the initial deal. A93, FAC ¶121. Fortress intentionally designed this costlier transaction for New Residential in order to secure an array of valuable benefits for itself. A97-101, FAC ¶¶129-136.

The public offerings that New Residential conducted to finance the HLSS acquisition produced a material increase in management fees and incentive income for Fortress. A98, FAC ¶132. For example, by June 2015, New Residential had increased its outstanding shares from 141,434,905 to 230,438,639, including 85,435,389 additional shares issued, 3,550,757 shares issued on the exercise of options by FIG affiliates and employees and 17,588 shares granted to New Residential's directors. *Id*. Fortress admitted that, as a direct result of the HLSS acquisition and the aforementioned equity increase, Fortress raised $1.3 billion in equity capital (or AUM) through New Residential. A99, FAC ¶133. According to Fortress's calculations, this $1.3 billion of additional New Residential equity will

generate management fees and incentive income for Fortress of ***$487.5 to $552.5 million***.[7] *Id*.

In addition, the use of New Residential stock as consideration in the revised transaction increased FIG's management fee for New Residential from $19.7 million to $26.1 million, a ***$6.5 million*** or 33% increase. A98, FAC ¶131. This management fee increase bolstered New Residential's ability to outperform its peers, as, even prior to the HLSS acquisition, New Residential was producing over 25% of Fortress's fees from its private equity vehicles. A97-98, FAC ¶130.

Fortress also used the HLSS acquisition to increase its incentive compensation. On May 7, 2015, FIG and New Residential entered into the Third Amended and Restated Management and Advisory Agreement ("Third Management Agreement"), which changed the amortization of certain expenses in calculating FIG's incentive compensation and retroactively increased FIG's incentive compensation by ***$3.3 million*** from January 1, 2015 to June 30, 2015. A101, FAC ¶137. The amendment provides that FIG receives a 25% incentive fee on "Non-Routine Items, minus Amortization of Non-Routine Items." A101-102, FAC ¶138. The amendment defines "Non-Routine Items" to include "non-capitalized

[7] These revenue figures are derived from Fortress's "Illustrative Example" of "Permanent Capital Economics," prepared for its investors, in which Fortress demonstrated that it could generate between $375 million and $425 million from $1 billion of capital in a permanent capital vehicle. A61, FAC ¶56.

transaction-related expenses (such as acquisition and integration expenses), write-offs of unamortized deferred financing fees incurred in connection with the refinancing of debt, gains or losses related to litigation, claims or other contingencies, and any other item approved by the Independent Directors upon reasonable request by the Manager." *Id*. FIG determines what portion of each Non-Routine Item will be considered "amortization." *Id.* Thus, Fortress gave itself a bonus on the non-capitalized transaction expenses incurred in the HLSS acquisition and related transactions. *Id*. Fortress also gave itself a bonus for write-offs, litigation and other contingencies. *Id.* The Fortress controlled Board, pursuant to the amendment, can designate "any other item" as a Non-Routine Item entitling Fortress to further increase its incentive compensation. *Id*.

Fortress also received additional incentive compensation because New Residential recharacterized a portion of the income from servicer advances acquired from HLSS, thereby raising pro forma interest income from $524.2 million to $695.1 million. A100, FAC ¶135. The recharacterization increased FIG's pro forma incentive compensation from $34.5 million to $78.3 million, a ***$43.8 million increase***.[8] *Id*.

[8] The defendants claim that this was an on-paper accounting adjustment that did not result in any payment to FIG. A1706, Defendants' Opening Brief in Support of Their Motion to Dismiss the Second Amended Complaint (Mar. 30, 2017) ("Def. Op. Brf. MTD SAC") at 36; A4945-4946, Defendants' Reply Brief in Further Support of Their Motion to Dismiss the Second Amended Complaint (June 5, 2017)

Beyond these exorbitant increases in management fees and incentive compensation, Fortress, through FIG and FOE I, also received 8,543,538 options as a result of the HLSS acquisition and the public offerings used to finance the deal. A99-100, FAC ¶134. Fortress garnered further gains as a result of the June 2015 sale by FOE I and certain FIG employees of 3,550,757 New Residential shares at $15.88 per share. A100-101, FAC ¶136. FOE I and the FIG employees exercised 6,697,026 options in a cashless exercise where 3,146,269 shares were surrendered to New Residential at a value of $16.63 per share, or $0.75 per share higher than the $15.88 public offering price. *Id.* The remaining 3,550,757 shares were sold in the secondary offering, resulting in ***$57 million*** of income to Fortress. *Id.*

In summary, Fortress expects to earn between $487.5 to $552.5 million of new management fees and incentive compensation as a result of the HLSS acquisition. Fortress also realized an immediate gain of more than $100 million, which includes: (i) a $6.5 million increase in management fees from New Residential; (ii) a $3.3 million increase in incentive compensation due to the management agreement amendments; (iii) a $43.8 million increase in incentive compensation due to the

("Def. Reply Brf. MTD SAC") at 19-20; A3216-3217, Transmittal Affidavit of Ronald N. Brown, III (Mar. 30, 2017) ("Second Brown Tr. Aff."), Ex. 12 at 1-2. However, even if the defendants' account is correct, the change indicates that New Residential will characterize certain HLSS income as interest income in order to maximize the incentive compensation that Fortress earns from New Residential.

recharacterization of HLSS income; (iv) $57 million from the option exercises and stock sales; and, (v) 8,543,538 New Residential stock options.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF DID NOT SUFFICIENTLY PLEAD DEMAND FUTILITY UNDER THE FIRST PRONG OF *ARONSON*

A. Question Presented

Having found that half of New Residential's directors are beholden to New Residential's controlling stockholder, Fortress, did the trial court err as a matter of law in finding that Plaintiff did not sufficiently plead demand futility under the first prong of *Aronson* where Plaintiff alleges with particularity that (i) the HLSS acquisition is a self-dealing transaction intended to benefit Fortress at New Residential's expense and (ii) Fortress has a material interest in the challenged transaction? *See* A851-859, Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss (Feb. 23, 2016) at 28-36; A1373-1380, Transcript of Oral Argument on Defendants' Motion to Dismiss (June 14, 2016) at 69-80; A1393-1399, Plaintiff's Motion for Reargument (Oct. 14, 2016) at 2-8; A4798-4806, Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint (May 11, 2017) at 29-37; A5110-5129, Transcript of Oral Argument of Defendants' Motion to Dismiss (July 10, 2017) at 54-73.

B. Scope of Review

Review of a Court of Chancery decision dismissing a derivative action under Court of Chancery Rule 23.1 is "*de novo* and plenary."[9]

[9] *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000).

C. Merits of Argument

1. The Demand Futility Standard

Court of Chancery Rule 23.1 imposes a demand requirement upon stockholders who seek to pursue a derivative claim.[10] A stockholder plaintiff, however, can satisfy this requirement by showing that a demand on the Board would have been futile, thereby excusing demand.[11]

The *Aronson* standard applies,[12] and provides that, in order to satisfy demand futility, a plaintiff need only plead particularized facts creating a reasonable doubt that: "(1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[13] Pleading "particularized facts" sufficient to show reasonable doubt does not require pleading evidence, but only pleading ultimate facts in a non-conclusory manner.[14]

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[10] Del. Ct. Ch. R. 23.1.

[11] *Id.*; *Aronson v. Lewis*, 473 A.2d 805, 808 (Del. 1984), *rev'd on other grounds, Brehm*, 746 A.2d at 253-54.

[12] The trial court applied the *Aronson* test for demand futility, Ex. A, First Op. at 23, and the parties did not dispute the application of *Aronson* below, Ex. C, Third Op. at 18; A275, Defendants' Opening Brief in Support of Their Motion to Dismiss Pursuant to Court of Chancery Rules 23.1 and 12(b)(6) (Dec.11, 2015) ("Def. Op. Brf. MTD FAC") at 18; A862, Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss (February 23, 2016) at 39. *See also Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008) ("The *Aronson* test applies to claims involving a contested transaction….").

[13] 473 A.2d at 814.

[14] *Brehm*, 746 A.2d at 254.

Moreover, "[t]he Court should draw all reasonable inferences in the plaintiff's favor."[15] Plaintiff satisfied the *Aronson* standard and the requirements of Rule 23.1.

2. Demand is Futile Because Fortress Engaged in Self-Dealing

The First Amended Complaint alleges particularized facts demonstrating that demand upon the New Residential Board was excused as futile. Plaintiff's well-pleaded allegations demonstrate that Fortress caused New Residential to proceed with the risky, self-dealing HLSS acquisition and to structure and finance the acquisition in a manner that was beneficial to Fortress. This is an example of a fiduciary standing on both sides of the transaction.[16]

Although the trial court correctly determined that Plaintiff's allegations are sufficient to support a reasonable inference that at least half of the Board is beholden to Fortress,[17] the trial court nonetheless determined that the HLSS acquisition was *not* a self-dealing transaction.[18] With no substantive factual or legal analysis, the trial court relegated this holding to a footnote, writing: "This is not a case of self-

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[15] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004) (emphasis omitted).

[16] *See Lee v. Pincus*, 2014 WL 6066108, at *13 (Del. Ch. Nov. 14, 2014) (explaining "the familiar definition of self-dealing as a transaction in which a fiduciary stands on both sides") (internal quotations omitted).

[17] Ex. A, First Op. at 27 & n.64 (citing *Gentile v. Rossette*, 2010 WL 2171613, at *7 (Del. Ch. May 28, 2010) for the proposition: "A board that is evenly divided between conflicted and non-conflicted members is not considered independent and disinterested.").

[18] Ex. A, First Op. at n.69.

dealing where the materiality requirement does not apply. ... Rather, the HLSS acquisition was a third-party transaction between New Residential and HLSS in which Fortress allegedly received a special side benefit." Ex. A, First Op. at 29. The trial court then found: "Fortress's interest in the challenged transactions must be material in order to show that the board had a disabling conflict." *Id.*

Neither the facts alleged by Plaintiff nor the precedent cited by the trial court support this holding. Thus, the trial court applied the wrong legal standard (the materiality standard) and committed reversible error.

a. Plaintiff Plead with Particularity Fortress's Self-Dealing in the HLSS Acquisition

Because Fortress controls New Residential through board control, contractual agreements and limited stock ownership,[19] A56-59, FAC ¶¶50-53, it has "heightened incentives" to cause New Residential to enter into risky transactions, like the HLSS acquisition, that will increase Fortress's fees and compensation.[20] Thus, despite its fiduciary role, Fortress caused New Residential to acquire HLSS and structure the

[19] The trial court did not determine whether Plaintiff sufficiently alleged that Fortress exercises control over New Residential. Ex. A., First Op. 19-20 & n.40.

[20] *In re EZCorp, Inc., Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *2 (Del. Ch. Jan. 25, 2016) ("As control rights diverge from equity ownership, the controller has heightened incentives to engage in related-party transactions and cause the corporation to make other forms of non-pro rata transfers."); *RCS Creditor Trust v. Schorsch*, 2017 WL 5904716, at *10 (Del. Ch. Nov. 30, 2017) ("The incentive to engage in these self-dealing transactions arose from the Control Defendants' ownership of a significantly larger economic stake in AR Capital than in RCAP.").

acquisition to benefit Fortress through increased fees and compensation. New Residential and the majority of its stockholders shouldered a disproportionate cost.

That Fortress engaged in this type of self-dealing is evident on the face of the HLSS acquisition. The original deal contemplated a simple cash transaction. A35, FAC ¶2; A89, FAC ¶114. After events occurred indicating that HLSS would be an even riskier transaction than originally contemplated, the defendants restructured the purchase as a part cash and part stock payment with an agreement to conduct public offerings. *Id.* The New Residential stock issuance, public offerings, management agreement amendment and recharacterization of HLSS income all substantially increased Fortress's AUM, fees, compensation and stock options that it derived from New Residential. A40, FAC ¶9; A61-62, FAC ¶56; A93-102, FAC ¶¶121, 123-138. For example, FIG's management fees are tied to New Residential's "Gross Equity," meaning that an increase in New Residential equity, no matter how risky, equals greater management fees for Fortress. A74-75, FAC ¶85. An increase in New Residential equity also translates into a greater number of free stock options for Fortress that it can use in cashless option exercises. A100-101, FAC ¶136.

The defendants incorrectly argued below that Fortress had no incentive to cause New Residential to overpay for HLSS because it would compromise Fortress's ability to earn incentive income. A282-284, Def. Op. Brf. MTD FAC at 25-27. FIG's incentive compensation is 25% of New Residential's income above a 10%

annual return. A75, FAC ¶86. This structure offers Fortress significant upside potential if the HLSS acquisition is successful. However, Fortress will circumvent any decline if the acquisition is unsuccessful by (i) causing New Residential to recharacterize HLSS income and (ii) designating items as Non-Routine Items under the Third Management Agreement in order to increase Fortress's incentive compensation. A100-102, FAC ¶¶135, 138.

Moreover, because Fortress holds a limited equity stake in New Residential, the real cost of a bad deal with HLSS is borne by New Residential and its other stockholders. A59, FAC ¶¶52-53. These contractual arrangements, therefore, incentivized Fortress to cause New Residential to acquire HLSS, even though the transaction was costly and risky, so that Fortress could extract substantial financial benefits.

Where, as here, a challenged transaction is crafted to increase fees and other compensation paid to a corporate fiduciary, that fiduciary has a conflict of interest with respect to the transaction and stands on both sides of the deal. *Kahn v. Portnoy* is instructive.[21] In an acquisition and related lease transaction (the "Petro Lease Transaction"), Hospitalities Properties Trust ("HPT") acquired real estate with 40 truck stops and leased those facilities to TravelCenters of America, LLC ("TA").[22]

[21] 2008 WL 5197164 (Del. Ch. Dec. 11, 2008).

[22] *Id.*, at *2.

Through a pre-existing agreement, Reit Management & Research LLC ("RMR") provided management and administrative services to both HPT and TA.[23] The plaintiff claimed that the lease agreement was more favorable to HPT because it would charge TA above-market rent and that RMR would benefit because it collected as a fee a percentage of the gross rent collected by HPT.[24] The plaintiff further claimed that the fees RMR collected from HPT would not be adversely impacted by the above-market rent payments.[25]

In the *Portnoy* Court's analysis of demand futility, it found that one director, who served on the boards of TA and HPT and owned RMR, was "clearly interested" in the Petro Lease Transaction.[26] The Court also found that another director, who served on the boards of TA and RMR, owed fiduciary duties to both companies, and "[b]ecause the interests of these two companies were in conflict for purposes of the Petro Lease Transaction, [the director] stood on both sides of the transaction and was therefore interested in the transaction."[27]

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[23] *Id.*

[24] *Id.*, at *3.

[25] *Id.*

[26] *Id.*, at *11.

[27] *Id.*, at *12; *see also In re Boston Celtics Ltd. P'ship S'holders Litig.*, 1999 WL 641902, at *7 (Del. Ch. Aug. 6, 1999) (holding that a reorganization constituted a self-interested transaction where it resulted in the payment of management fees to the defendant fiduciary that otherwise would not have been paid); *RCS*, 2017 WL 5904716, at *5, *9-13 (finding that director-defendants engaged in a "classic

Likewise here, the interests of Fortress and New Residential conflicted and the New Residential directors, who also owed fiduciary duties to Fortress, stood on both sides of the deal. Plaintiff's allegations regarding the structure of the HLSS acquisition and the financial benefits Fortress obtained, therefore, similarly support a reasonable inference that Fortress was interested in the HLSS acquisition and engaged in self-dealing.

It is unclear due to the brevity of the trial court's holding what arguments, if any, it found persuasive in reaching the erroneous conclusion that Fortress did not engage in self-dealing. The defendants argued below that Fortress was not interested in the HLSS acquisition because: (i) FIG's management fees are tied to the assets that FIG and its employees manage; and (ii) any increase in fees related to the HLSS acquisition means that FIG is simply getting paid for more work. A286-287, Def. Op. Brf. MTD FAC at 29-30; A903, Def. Reply Brf. MTD FAC at 14. Defendants' argument is flawed. There is no basis to adopt the *defendant-friendly* inference that any increase in fees and compensation generated from New Residential are

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example of self-interest in a business transaction" after arranging agreements that funneled advisory fees to other entities owned by the directors at the cost of the entity they served") (alterations omitted) (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993)); *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *11 (Del. Ch. May 13, 2013) (noting fund manager's stated "obvious conflict of interest" in a change in accounting treatment that would double the carrying value of assets under management and result in an increase in the management fee).

unintended and incidental to Fortress's business plan. The prospect of securing increased revenues in connection with a transaction renders a party interested in that transaction.[28] The trial court was required to accept the reasonable inference that Fortress operates and seeks to grow its business for the purpose of generating more revenue and more profit.

Plaintiff alleged facts sufficient to support the reasonable inference that the HLSS acquisition was a self-dealing transaction and Fortress structured the acquisition to benefit its own financial interests. Even the trial court agrees, where self-dealing is alleged, a court need not assess the materiality of the benefit obtained to find that a party is interested in the transaction.[29] Thus, the materiality standard does not apply here.

b. The Court's Application of the Materiality Standard is Not Supported by Delaware Law

Despite Plaintiff's contrary factual allegations, the trial court ruled that: "This is not a case of self-dealing where the materiality requirement does not apply." Ex.

[28] *See, e.g.*, *In re Rural Metro Corp*., 88 A.3d 54, 100 (Del. Ch. 2014) (finding that financial advisor was interested in a transaction where deal closing would mean additional and greater fees for future buy-side financing work).

[29] Ex. A, First Op. at 29 & n.69. *See also Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869, at *5 (Del. Ch. June 26, 2016) ("[T]he need to demonstrate materiality to establish the interest of a director in a transaction applies only 'in the absence of self dealing' and that 'whenever a director stands on both sides of the challenged transaction he is deemed interested and allegations of materiality have not been required.'") (quoting *Orman v. Cullman*, 794 A.2d 5, 23, 25 n.50 (Del. Ch. 2002)).

A, First Op. at 29. In support of this finding, the trial court referenced *Cambridge Ret. Sys. v. Bosnjak*,[30] which quotes *Cede & Co. v. Technicolor, Inc.*,[31] as follows: "[A] 'plaintiff's burden of proof of a director's self-interest in an arms-length third party transaction should be greater than in a classic self-dealing transaction where a director or directors stand on both sides of the transaction.'" This precedent does not support the trial court's ruling. It describes the *burden of proof* for self-interest rather than any relevant standard for *pleading* self-dealing. In fact, it supports a finding of self-interest here because the quoted text recognizes that self-interest can arise in third-party transactions like the HLSS acquisition.

The two opinions that the trial court proffered in support of its application of the materiality standard are also inapposite. Neither *Khanna v. McMinn*,[32] nor *Jacobs v. Yang*,[33] applied a materiality standard to personal benefits obtained by a controlling stockholder through manipulation of a third-party acquisition.

Finally, the trial court did not identify any legal support for its distinction between "self-dealing" and "a special side benefit" nor did it offer any guidance as to what factors the trial court considered when it labeled Fortress's spoils "side

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[30] 2014 WL 2930869, at *5 (Del. Ch. June 26, 2014).

[31] 634 A.2d 345, 362-63 (Del. 1999).

[32] 2006 WL 1388744, at *17 (Del. Ch. May 9, 2006).

[33] 2004 WL 1728521, at *6 (Del. Ch. Aug. 2, 2004).

benefit[s]" as opposed to "self-dealing." The trial court committed reversible error in holding that the HLSS acquisition was not a self-dealing transaction and by applying a materiality standard to the benefits Fortress extracted from the HLSS acquisition.

3. Demand is Also Futile Because Fortress had a Material Interest in the HLSS Acquisition

Even if the materiality standard applied here, Plaintiff's allegations are sufficient to survive a motion to dismiss. Delaware law applies a subjective "actual person" test in order to determine materiality.[34] The Court must consider the effect of the benefit on the particular fiduciary in question.[35] There is no bright-line threshold for establishing materiality.[36] Delaware courts have found the payment of fees amounting to 10% of a director's annual income to be material,[37] as well as compensation of $3.3 million to a director's financial firm.[38]

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[34] *Orman*, 794 A.2d at 24.

[35] *Cinerama, Inc. v. Technicolor, Inc.* 663 A.2d 1134, 1151-52 (Del. Ch. 1994).

[36] *Orman*, 794 A.2d at 30.

[37] *In re Emerging Comm'cns, Inc. S'holders Litig.*, 2004 WL 1305745, at *34-35 (Del. Ch. June 4, 2004) (finding that a special committee member lacked independence due to the expectation of receiving director and committee fees constituting 10% of his annual income).

[38] *Orman*, 794 A.2d at 30-31 ("I think it would be naïve to say, as a matter of law, that $3.3 million is immaterial."); *see also Southeastern Pa. Trans. Auth. v. Volgenau*, 2013 WL 4009193, at *15 (Del. Ch. Aug. 5, 2013) ("ordinarily the prospect of receiving $1.3 million would be material…."); *Chen v. Howard-Anderson*, 87 A.3d 648, 670 (Del. Ch. 2014) (director's interest material when he received more than $840,500 in benefits not shared with other stockholders).

Contrary to the trial court's holding, Plaintiff alleges that Fortress garnered material benefits from the HLSS acquisition. Demand is, therefore, excused because the Board was beholden to Fortress and Fortress had a $500 million material interest in the HLSS acquisition.[39]

a. Fortress and its Principals are the Ultimate Beneficiaries of All Benefits Alleged

Fortress is the ultimate beneficiary of the fees, compensation and options granted to FIG and FOE I in connection with the HLSS acquisition. The trial court incorrectly held that the First Amended Complaint failed to plead materiality because FIG received the management fees and incentive compensation and FOE I received the options. Ex. A, First Op. at 30-31. The court reasoned that, because Plaintiff did "not allege anything regarding the percentage of Fortress's ownership of FOE I, through FIG Corp," *id.* at 30, Plaintiff only "assume[d] that all of [the alleged] benefits flowed to Fortress from its affiliates." Ex. B, Second Op. at n.14. Plaintiff made no such assumptions.

Based upon Fortress's publicly available information, Plaintiff pleaded particularized facts detailing how Fortress manages its permanent capital vehicles, including New Residential, through its affiliates and uses them to generate management fees, incentive compensation and other benefits for Fortress. A54-55,

[39] *See Bosnjak*, 2014 WL 2930869, at *5.

FAC ¶¶45-48; A59-62, FAC ¶¶54-57. Plaintiff also alleged that Fortress reported fees and other compensation received from FOE I and FIG as revenue in its financial disclosure documents. A62, FAC ¶57 (citing Fortress 2014 Form 10-K); A472, First Brown Tr. Aff. Ex. 1 at 148); A99, FAC ¶133.

Plaintiff further alleged facts about the ownership structure of Fortress and its affiliates sufficient to infer that benefits from New Residential's acquisition of HLSS flow to Fortress and its principals. The First Amended Complaint provides: (i) Fortress owns 100% of FIG Corp.; and, (ii) FIG Corp. is FOE I's general partner. A54, FAC ¶42. If more granular detail was required, the Fortress 2014 Form 10-K, *which Plaintiff cited in the First Amended Complaint, the defendants submitted and the trial court referenced in the First Opinion*, includes an explanatory diagram of Fortress's ownership structure confirming that FIG Corp. and Fortress's principals own FOE I's limited partner interests.[40] Ex. A., First Op. at n.67; A334, First Brown Tr. Aff. Ex. 1 at 11. Plaintiff reviewed Fortress's publicly available documents and alleged specific facts from them that are sufficient to raise a reasonable inference that Fortress was the recipient of all material benefits alleged.

[40] On a motion to dismiss, the court is "free to consider…the complaint and any documents it incorporates by reference." *Orman*, 794 A.2d at 21 n.36.

b. The Benefits Alleged, including the $500 Million Projected Increase in Fortress Revenue, are Material to Fortress

The trial court also erroneously held that Plaintiff did not allege facts sufficient to support a materiality finding. Ex. A, First Op. at 29. The First Amended Complaint is replete with particularized factual allegations demonstrating that benefits flowing to Fortress from the HLSS acquisition are material to Fortress.

The $1.3 billion in fee-generating AUM that Fortress raised in connection with the HLSS acquisition is material to Fortress. A99, FAC ¶133. This equity raise constituted 55% of the $2.4 billion in capital Fortress raised through all of its permanent capital vehicles in the first half of 2015, increased the AUM in Fortress's private equity business by 10% and increased Fortress's total AUM by nearly 2%. *Id.*; A325, A389, First Brown Tr. Aff., Ex. 1 at 2, 65. These metrics alone support a finding of materiality. The First Amended Complaint, however, also explains how fee-generating AUM is a vital driver of Fortress's financial success and transition from traditional investment funds to permanent capital vehicles. A40, FAC ¶9; A59-62, FAC ¶¶54-57; A99, FAC ¶133.

In addition, in Fortress's own words, AUM "is ***critical*** for [Fortress] to continue to raise capital from fund investors. Without new capital, ***AUM declines over time*** as private equity investments are realized and hedge fund investors redeem capital based on their individual needs." A375, First Brown Tr. Aff. Ex. 1 at 51

(Fortress 2014 Form 10-K). AUM, in fact, is so "critical" to Fortress that Fortress's principals' compensation is partially dependent upon their success in raising new capital. A517-518, First Brown Tr. Aff Ex. 1 at 193-94 (Fortress 2014 Form 10-K). The fact that Fortress is in the business of raising AUM and has a constant need for new AUM indicates that a $1.3 billion increase in AUM is material to Fortress.[41]

The materiality of this AUM increase is no doubt why in Fortress conference calls, investor presentations and SEC filings, cited in the Complaint, Fortress bragged about raising $1.3 to $1.4 billion in the New Residential public offerings. A40, FAC ¶9; A60-61, FAC ¶55; A99, FAC ¶133. The trial court dismissed Plaintiff's references to Fortress's public disclosures in the Second Opinion, reasoning that just "because a fact is publicly disclosed" does not mean that "it necessarily is material to a business." Ex. B, Second Op. at 7-8. However, Fortress's public statements, together with Plaintiff's other allegations, support a more than reasonable inference of materiality.[42]

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[41] *Orman*, 794 A.2d at 30 (explaining the materiality of $75,000 of consulting fees was amplified because the fees were paid for the precise services that comprised the challenged director's principal occupation); *Cinerama*, 663 A.2d at 1152 (focusing materiality analysis on the effect of the financial interest on the fiduciary in question); *N.J. Carpenters Pension Fund v. Infogroup, Inc.*, 2011 WL 4825888, at *10 (Del. Ch. Sept. 30, 2011) ("[i]t would [be] naïve to say, as a matter of law, that $100 million in cash is immaterial to a man in need of liquidity.").

[42] *Cf. In re Zhongpin Inc. Stockholders Litig.*, 2014 WL 6735457, at *7-8 (Del. Ch. Nov. 26, 2014) (finding public statements made in a Form 10-K with plaintiff's other allegations supported the inference that the chief executive officer and 17% stockholder exercised control over the company), *rev'd on other grounds, In re*

Fortress also advertised to its stockholders that $1.3 billion of new equity would generate approximately $500 million in management fees and incentive income. A99, FAC ¶133. The trial court did not identify this sizeable benefit in the First Opinion and dismissed the allegations in the Second Opinion in response to Plaintiff's motion for reargument, concluding that the Complaint "fails to explain the relative importance of fees … to Fortress as a whole." Ex. B, Second Op. at 7. This was error. Defendants admitted in their briefing that Fortress reported a total of $1.8 billion in revenue for the year ended December 31, 2014 and submitted a copy of the Fortress 2014 Form 10-K. A442, First Brown Tr. Aff. Ex. 1 at 118. Based upon the defendants' own financial information, $500 million is nearly 28% of Fortress's total annual revenue. This is not an apples-to-apples comparison,[43] but even if the $500 million benefit arrived piecemeal, the realization of $500 million over a span of 5 to 10 years would still represent a nearly 3%-6% annual boost to

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Cornerstone Therapeutics, Inc., S'holder Litig., 115 A.3d 1173 (Del. 2015). The trial court's reliance on *Khanna,* 2006 WL 1388744, at *17 is misplaced. Ex. B., Second Op. at 8 & n.22. There, the court held that a proxy disclosure of a business relationship and the amounts paid for services alone was insufficient to cast a reasonable doubt on a director's independence. Here, by contrast, Plaintiff alleged particularized facts regarding Fortress's business model that indicate why the fees and other benefits that Fortress obtained are material to Fortress.

[43] The trial court observed that "while the [First] Amended Complaint alleges the present value of fees from New Residential, the present value of Fortress's other sources of future revenue is not alleged." Ex. B, Second Op. at 7. This information was not available to Plaintiff nor could Plaintiff utilize 8 *Del. C.* § 220 before filing the First Amended Complaint.

Fortress's $1.8 billion of reported revenue in 2014. By all of these measures, $500 million in fees and income constitutes a "sizeable portion" of Fortress's overall revenue, which is sufficient to support a reasonable inference that Fortress had a material interest in the HLSS acquisition.[44]

Even setting aside the projected $500 million increase in revenue, the $100 million immediate benefit (from increased fees, incentive compensation, stock sales and options) that Fortress already realized from the HLSS acquisition represents a year over year increase of 135% of Fortress's income from New Residential. A97-98, FAC ¶130. It also represents a more than 5% increase in Fortress's total revenue earned in 2014. New Residential was a leading generator of management and incentive fees for Fortress prior to the HLSS acquisition. *Id.* Thus, Fortress structured the HLSS acquisition so that it could reap even more significant benefits from New Residential. The trial court disregarded these important financial metrics when it found that Plaintiff did "not allege anything regarding … the ratio of the alleged benefits to any Fortress financial metric." Ex. A, First Op. at 30.

The alleged benefits taken together and in the context of Fortress's business are material to Fortress. Viewed another way, it is unlikely that Fortress would reject

[44] *Emerging Comm'cns*, 2004 WL 1305745, at *35; *see also Steiner v. Meyerson*, 1995 WL 441999, at *10 (Del. Ch. July 19, 1995) (holding a director was beholden to a CEO when the director's small law firm received $1 million in revenues in a single year from the CEO's company).

an opportunity to make $500 million, or $100 million, because it was immaterial to Fortress. A $500 million (or $100 million) benefit, simply due to the sheer magnitude of the benefit, would be material to most individuals and many businesses, including Fortress. Thus, the trial court erred in finding that Plaintiff did not adequately plead the materiality of these multi-million benefits to Fortress. Demand upon the New Residential Board is, therefore, excused because Fortress, not only engaged in self-dealing, but also, alternatively, had material financial interests in the HLSS acquisition.[45]

[45] Plaintiff's satisfaction of the pleading requirements for demand futility rids Counts I and II of the First Amended Complaint of the trial court's basis for dismissal. As a result, Plaintiff also states a valid, ripe claim in Count III for declaratory relief with respect to the Termination Agreement. *See* Ex. A, First Op. at 33 ("Plaintiff's claim as to the Termination Agreement is not ripe because Counts I and II are dismissed without prejudice.").

CONCLUSION

For the reasons set forth herein, the trial court's dismissal of Plaintiff's First Amended Complaint should be reversed and this matter should be remanded for further proceedings.

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CERTIFICATE OF SERVICE

I, Corinne Elise Amato, do hereby certify that on this 2nd day of January 2018, I caused a copy of the foregoing Appellant's Corrected Opening Brief to be served upon the following counsel of record via File & Serve*Xpress*:

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