L.A. Grika v McGraw
2016 NY Slip Op 32618(U)
December 21, 2016
Supreme Court, New York County
Docket Number: 650459/2016
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. *Justice* **PART** 48

Index Number : 650459/2016
GRIKA, L A
vs.
MCGRAW, III, HAROLD
SEQUENCE NUMBER : 002
DISMISSAL

INDEX NO. ____________
MOTION DATE ____________
MOTION SEQ. NO. ____________

The following papers, numbered 1 to _____, were read on this motion to/for ____________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ **No(s).** ____________
Answering Affidavits — Exhibits ____________ **No(s).** ____________
Replying Affidavits ____________ **No(s).** ____________

Upon the foregoing papers, it is ordered that this motion is

Mtn decided in accordance w/ the accompanying memorandum decision/order of this court.

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

Dated: 12/29/16

JEFFREY K. OING J.S.C., **J.S.C.**

1. **CHECK ONE:** .... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .... **MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** .... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
--x

L.A. GRIKA, Derivatively on Behalf of Nominal Defendant MCGRAW HILL FINANCIAL, INC.,

Plaintiff,

-against-

HAROLD MCGRAW III, DOUGLAS L. PETERSON, DEVEN SHARMA, ANDREA BRYAN, KATHLEEN A. CORBET, BARBARA DUKA, THOMAS GILLIS, VICKIE A. TILLMAN, JOANNE ROSE, DAVID TESHER and PATRICE JORDAN,

Defendants,

-and-

MCGRAW HILL FINANCIAL, INC.,

Nominal Defendant.

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Index No. 650459/2016

Mtn Seq. Nos. 001 & 002

DECISION AND ORDER

JEFFREY K. OING, J.:

In this shareholder derivative action, nominal defendant McGraw Hill Financial, Inc. ("McGraw Hill" or the "Company")[1] moves, pursuant to CPLR 3211(a)(1), (3), (5) and (7) and Business Corporation Law ("BCL") § 626(c), to dismiss the amended complaint (mtn seq. no. 001).

The individual defendants separately seek pre-answer dismissal of the amended complaint pursuant to CPLR 3013, 3016(b), 3211(a)(1), (3) and (7) (mtn seq. no. 002).

Both motions are consolidated for disposition.

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[1]On April 27, 2016, McGraw Hill changed its name to S&P Global Inc.

FACTUAL ALLEGATIONS

This shareholder derivative action asserts claims on behalf of McGraw Hill against certain of its employees, officers and directors to recover for losses McGraw Hill incurred as a result of allegedly improper conduct perpetrated by its Standard & Poor's Ratings Services business ("S&P").

S&P is a credit rating agency relied upon by investors to issue fair and accurate assessments of credit risks. The alleged improper conduct relates to S&P's credit ratings for residential and commercial mortgage-backed securities ("RMBS" and "CMBS"), and second-order structured finance securities known as collateralized debt obligations ("CDOs") between 2004 and 2007. The amended complaint also alleges misconduct that occurred between 2010 and 2014 with respect to the rating of conduit/ fusion commercial mortgage-backed securities ("CF CMBS") and the use of improper loss assumptions in its ongoing surveillance of RMBS ratings (Am. Cmplt., ¶¶ 107-152).

The amended complaint alleges that rather than follow its own internal and publicly-stated guidelines and commitment to issuing credit ratings based on analytically rigorous methodology S&P, with the knowledge and/or tacit approval of the Company's board of directors (the "Board"), ignored those guidelines and provided investment grade credit ratings for mortgage-backed

securities which were not deserving upon the investment merits of those securities. These actions were allegedly taken to avoid large investment banks and others involved in the issuance of structured-finance taking their deals to S&P's competitors, Moody's and Fitch, to get higher or at least investment grade credit ratings. At the start of the 2007-2010 financial crisis, S&P was forced to withdraw investment grade ratings from many thousands of mortgage-backed securities.

The Company has been forced to pay millions of dollars to settle charges by federal and state regulatory agencies, as well as lawsuits by investors, in connection with this alleged wrongdoing, and McGraw Hill still faces additional untold liability in ongoing and potential lawsuits.

On August 18, 2008, another shareholder of McGraw Hill, Teamsters Local 456 Pension Fund ("Teamsters"), made a demand on the Board claiming that the Company's current and former directors and officers had breached their fiduciary duties by not preventing S&P from issuing false credit ratings for CDOs in the period leading up to July 2008 (Burnovski Affirm., Ex. F).

On October 3, 2008, the Board rejected the Teamsters' demand advising that the Company's officers and directors are entitled to indemnification against claims based on their actions as officers and directors (Id., Ex. G). To avoid full

indemnification, the Company would have to establish bad faith, intentional misconduct, a knowing violation of the law, or actions taken for personal financial profit (citing BCL § 402 [b]), and no such facts were alleged in the Teamsters' demand or known to the Board that would support any such claim against any officer or director. A second reason was that the Company's interests would not be served by asserting claims against its own personnel while it was the subject of at least nine lawsuits relating to its issuance of ratings between 2006 and 2008, and government investigations by Connecticut, Massachusetts, and the United States Securities and Exchange Commission ("SEC").

Following the Board's rejection of the Teamsters' demand, a shareholder derivative action was filed on January 8, 2009 in the Southern District of New York entitled Teamsters Allied Benefit Funds v McGraw, No. 09 Civ. 140 (PGG) (the "Federal Action"), asserting federal securities law claims and state law claims against Harold McGraw III, Harold McGraw, Jr., and the Board members for breach of fiduciary duty, gross mismanagement, corporate waste, and unjust enrichment arising from inflated ratings of RMBS and CDO deals that were backed by risky sub-prime home loans.

In March 2010, the District Court dismissed the complaint, holding that the Teamsters' demand did not place the Board on

adequate notice of the Teamsters' federal claims and that the Teamsters' complaint failed to plead that a proper demand would be futile (Teamsters Allied Benefit Funds v McGraw, 2010 WL 882883, at *4-6, 2010 US Dist LEXIS 23052 [SD NY Mar. 11, 2010]). The District Court also held, in the alternative:

> Even if Plaintiff's demand were adequate to support the federal securities law violations alleged in the Complaint, dismissal would still be required, because Plaintiff has failed to allege facts demonstrating that the Board's rejection of its demand was not made in good faith by disinterested directors.

(Id., at *6). The District Court further held that the Teamsters' complaint pleaded no facts regarding whether the directors who considered the demand were disinterested or did not employ sufficient investigative procedures, alleging only that the Board rejected the demand on October 3, 2008 and refused to pursue legal action against any director or officer (Id., at *7).

With respect to the state law claims, the District Court declined to exercise supplemental jurisdiction. Although the Teamsters was given leave to amend the complaint (id., at *12), it did not do so. As such, the District Court directed the clerk to close the case on March 23, 2010.

In the meantime, on July 9, 2009, the California Public Employees Retirement System ("CalPERS") commenced an action in California state court against Moody's, S&P and Fitch alleging that the methods used by the rating agencies to grant AAA ratings

to structured investment vehicles ("SIV") were seriously flawed (the "CalPERS Action").

On March 10, 2010, the State of Connecticut sued McGraw Hill and S&P alleging that they had violated the Connecticut Unfair Trade Practices Act in connection with their ratings of securities backed by sub-prime loans, the first of twenty such lawsuits brought by various state attorneys general and the District of Columbia.

On February 4, 2013, the United States Department of Justice ("DOJ") filed suit against the Company and S&P in California federal court, asserting claims pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 based on alleged fraud, misrepresentations and concealment of material facts in connection with S&P's credit ratings of RMBS and CDO securities between 2004 and 2007 (the "DOJ Action"). As stated, supra, nineteen other states, including the District of Columbia, filed lawsuits against McGraw Hill and S&P between 2011 and 2013 (Kaufman Affirm., Ex. A at 1-3), and these cases, together with the Connecticut action, were eventually consolidated with the DOJ Action.

On February 22, 2013, plaintiff herein, through his counsel, sent a letter to the Board demanding that it assert claims against its own employees responsible for the conduct underlying

the DOJ's claims (the "2013 Demand") (Am. Cmplt., ¶ 174 & Ex. A). The 2013 Demand asserted that unnamed current and former officers and directors of the company "devised, participated in, executed or condoned a scheme whereby the Company issued false and inflated ratings that were relied upon by investors in determining the credit-worthiness" of RMBS and CDO securities from September 2004 through at least October 2007 (Id., Ex. A at 1-2). As a result of the scheme, the Company had become the subject of numerous state and federal investigations and civil lawsuits. The 2013 Demand asserted that the Company should not have to bear the enormous financial burdens caused by the actions of the officers and directors who appear to have breached their fiduciary duties and otherwise acted improperly and failed to discharge their oversight responsibilities. Plaintiff demanded that the Board take remedial action, including commencing "legal action for breach of fiduciary duty, fraud or other appropriate claims against the persons responsible for the perpetration of the wrongdoing described [therein] and/or failure to detect and prevent it for the purpose of recovering monetary damages for the benefit of the Company" (Am. Cmplt., Ex. A at 9). Plaintiff also demanded that the Board review and overhaul the Company's internal controls and obtain tolling agreements from any potential defendants.

By letter dated May 2, 2013, Floyd Abrams, Esq., a partner at the law firm of Cahill Gordon & Reindel LLP, responded to the 2013 Demand (the "Abrams Letter") (Burnovski Affirm., Ex. C). Abrams advised that the Board had considered the 2013 Demand at its May 1, 2013 meeting, and determined that pursuit of the remedies outlined in the 2013 Demand was not in the best interests of the Company based on the same two reasons that the Board rejected the Teamsters' demand. As an additional basis in rejecting the 2013 Demand, the Board took the position that it identified only wrongs to investors in RMBS and CDO securities, not any wrong done to the Company.

Plaintiff contends that he was not happy with the Board's rejection of his demand, but that due to the pendency of the DOJ Action and other litigation, he took no further action until the settlements of these lawsuits were announced publicly (Am. Cmplt., ¶ 181).

On January 21, 2015, the SEC issued three consent orders against S&P relating to its violations of federal securities laws and regulations: (i) in 2012 concerning its criteria for rating CF CMBS and related research (File No. 3-16346); (ii) S&P's failure to maintain and enforce internal controls regarding changes made to loss assumptions used in surveilling certain RMBS between 2012 and 2014 (File No 3-16347); and (iii) the

publication of eight CF CMBS pre-sale reports between February and July 2011 which failed to describe a changed methodology for calculating the Debt Service Coverage Ratio ("DSCR") of the securities (File No. 3-16348) (Kaufman Affirm., Exs. 2 - 4). As part of its offer to settle these charges, S&P agreed to pay civil penalties of $58 million as well as to take a one year "time out" from rating any new US CF CMBS transactions until January 21, 2016. Also on January 21, 2015, the SEC issued a separate order instituting administrative, and cease and desist proceedings against defendant Barbara Duka, relating to her role in the 2011 CF CMBS ratings (File No. 3-16349) (Id., Ex. 5). S&P also agreed to pay $19 million to settle parallel actions by the states of New York and Massachusetts (Am. Cmplt., ¶ 165).

In January of 2015, S&P settled the CalPERS Action for $125 million (Am. Cmplt., ¶ 156). On February 2, 2015, the Company settled the DOJ Action, thus settling not only with the United States, acting through the DOJ, but with the states of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Maine, Mississippi, Missouri, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Washington and the District of Columbia, through their respective state attorneys general. The settlement provides for the payment

of $1.375 billion in connection with alleged wrongdoing relating to inflated securities ratings.

On February 6, 2015, plaintiff sent a second demand letter to the Board (the "2015 Demand") (Am. Cmplt., ¶ 174 & Ex. B). The 2015 Demand reiterated plaintiff's claims in his 2013 Demand and demanded further action against the following individuals: Harold McGraw, III, Douglas L. Peterson, Deven Sharma, Mark Adelson, Gary T. Carrington, Barbara Duka, Peter Eastham, Francis Parisi, Joanne Rose, Vickie A. Tillman, and Ian Thompson.

Plaintiff also demanded that action be taken against the senior executives and officers of the following S&P departments, groups and/or committees: (i) Structured Finance; (ii) RMBS Group; (iii) CMBS Group; (iv) CDO Group; (v) Structured Finance Criteria Committee; (vi) Compliance Department; (vii) Model Quality Review Group; (viii) Quality Group; (ix) Criteria Group; and (x) RMBS Surveillance Group.

In addition to pursuing damages for breach of fiduciary duty, waste and unjust enrichment, plaintiff demanded that the Company commence suit to "claw back" bonuses, deferred compensation and other payments made to these individuals. The 2015 Demand claimed that the Board had failed to investigate the claims underlying the 2013 Demand or to give any serious consideration as to whether those claims should be pursued in

2013 or at some subsequent date. The 2015 Demand also stated that the Board acted improperly and in its own self-interest by seeking and obtaining the dismissal of the Federal Action, "where many of the same claims had been made" (Am. Cmplt., Ex. B at 2). In addition, the 2015 Demand argued that the Company's settlements with the DOJ and state attorneys general, CalPERS, and the SEC eliminated two of the reasons proffered in the Abrams Letter for rejecting the 2013 Demand, because these settlements brought to a close the most significant litigation facing the Company, and the payments of $1.375 billion, $125 million and $58 million, respectively, represents very real damage to the Company, not just to investors who relied on the corrupted ratings.

Plaintiff further pointed out that the Company's officers were not exculpated from liability by its certificate of incorporation or pursuant to BCL § 402(b), and that its directors are not entitled to absolute immunity because the members of the Board knew about the illegal and improper conduct as early as 2007 and failed to make good faith efforts to remedy such conduct.

On May 4, 2015, Lucy Fato, Esq., then General Counsel of McGraw Hill, responded on behalf of the Board to plaintiff's 2015 Demand (Burnovski Affirm., Ex. E). Fato explained that, while

certain claims had been settled, the Company and S&P continued to defend other actions related to ratings issued during the time period identified in plaintiff's letters and that pursuing litigation against its own directors, officers and employees would disrupt and impair the defense of those litigations. Fato also explained that the Company's officers were entitled to indemnification under the Company's by-laws.

Plaintiff filed this lawsuit on January 28, 2016. The amended complaint asserts four causes of action[2] -- breach of fiduciary duty, contribution and indemnification, aiding and abetting breaches of fiduciary duty, and unjust enrichment. The relief sought is monetary damages against the individual defendants as well as disgorgement of benefits and other compensation. The amended complaint also seeks mandatory injunctive relief directing McGraw Hills's present directors to take all necessary action to reform and improve corporate governance and internal procedures of the Company to prevent a repeat of the damaging events described therein.

The individual defendants are: Harold McGraw III ("McGraw"), who is the Chairman of the Board and was the President and Chief

[2] Although denominated as "counts" in the amended complaint, the CPLR uses the terminology "causes of action" (CPLR 3013, 3014, 3016).

Executive Officer ("CEO") of McGraw Hill from 1998 until November 2013; Douglas L. Peterson ("Peterson"), a director since July 2013 and who succeeded McGraw as President and CEO, and who was also the President of S&P between September 2011 and November 2013[3]; Deven Sharma ("Sharma"), who was the President of S&P from September 2007 until September 2011 and Chairman of the Board of S&P from 2010 to 2011; Andrea Bryan ("Bryan"), who was the Managing Director of S&P's Synthetic CDO Group; Kathleen A. Corbet ("Corbet"), the President of S&P between April 2004 and August 2007; Barbara Duka ("Duka"), the Managing Director of S&P's CMBS Group; Thomas Gillis ("Gillis"), the head of the Research and Criteria Group within S&P's Structured Finance Department; Vickie A. Tillman ("Tillman"), an Executive Vice President and Global Business Head of S&P between 1999 and 2009; Joanne Rose ("Rose"), who was the Executive Managing Director of Global Structured Finance Ratings between 1999 and January 2008, and then the Executive Managing Director for Risk Quality & Policy at S&P between January 2008 and January 2012; David Tesher ("Tesher"), the Managing Director of S&P's Cash CDO Group; and Patrice Jordan ("Jordan"), the Managing Director of S&P's Global CDO Group. No dates of employment are alleged for defendants

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[3]Peterson is named a defendant only because he failed "to cause the Company to take any action to recover its damages" (Am. Cmplt., ¶ 13).

Bryan, Duka, Gillis, Tesher and Jordan; plaintiff alleges only that each of these defendants were employed "at relevant times" (Am. Cmplt., ¶¶ 15, 17, 18, 21, 22).

DISCUSSION

I. McGraw Hill's Motion to Dismiss for Lack of Standing

The Company argues that plaintiff lacks standing to bring this action for three reasons: 1) plaintiff's claims relating to alleged misconduct between 2010 and 2014 were not properly presented to the Board for consideration, and, as such, the relevant demands are inadequate; 2) the amended complaint fails to plead any facts in support of its conclusory assertion that the Board wrongfully refused plaintiff's demands; and 3) the Federal Action determined that the Board did not wrongfully decide not to pursue legal claims against S&P employees for alleged ratings misconduct, and, as such, this determination precludes plaintiff from seeking to relitigate that issue.

A. Adequacy of Plaintiff's Demands Regarding 2010-2014 Alleged Misconduct

McGraw Hill argues that plaintiff's claims relate to alleged misconduct between 2010 and 2014 (Am. Complt., ¶¶ 107-152), that they were never properly presented to the Board for consideration, and, that, as such, the amended complaint fails to plead facts showing that a demand regarding these claims would be futile.

The alleged misconduct concerns the CMBS Group's methodology in rating CF CMBS to produce lower Credit Enhancement ("CE") levels and make S&P more competitive in 2010-2011; the publication of the "Great Depression Article" on June 28, 2012 that failed to disclose certain assumptions underlying its CF CMBS ratings criteria; and the use of improper loss assumptions in S&P's surveillance of RMBS ratings between 2012 and 2014.

BCL § 626(c) requires that the complaint in a shareholder derivative action "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." Although the "[d]emand to sue need not assume a particular form nor need it be made in any special language" (Ripley v International Rys. of Cent. Am., 8 AD2d 310, 317 [1st Dept 1959], affd 8 NY3d 430 [1960]), "it must inform the board 'with particularity' of the complained of acts and the potential defendants" (Stoner v Walsh, 772 F Supp 790, 796 [SD NY 1991], citing Syracuse Tel., Inc. v Channel 9, Syracuse, 51 Misc 2d 188 [Sup Ct, Onondaga County 1966]; see also Teamsters Allied Benefit Funds v McGraw, 2010 WL 882883, at *4). "A demand must fairly and adequately apprise the directors of the potential cause of action so that they, in the first instance, can discharge their duty of authorizing actions that 'in their considered opinion ... [are] in the best

interests of the corporation'" (Stoner v Walsh, 772 F Supp at 796, quoting Barr v Wackman, 36 NY2d 371, 378 [1975]).

The 2013 Demand indicated that the misconduct to which plaintiff was objecting covered "the period beginning on or before September, 2004 and continuing through the present (the 'Relevant Period')" (Am. Cmplt., Ex. A at 1 [emphasis added]). The letter, however, focused on S&P's ratings of mortgage-backed securities between September 2004 and October 2007 because that was the relevant time period being investigated by the DOJ. In addition, the 2013 Demand only sought legal action against "the Board and senior management" or "S&P management" (id. at 8, 9), without identifying any particular acts of misconduct or potential defendants. Although the 2015 Demand named specific individuals who should be sued, four of the Individual Defendants (Bryan, Corbet, Gillis, and Jordan) were not identified, and the 2015 Demand did not indicate who should be held accountable for this later alleged misconduct. In fact, the 2015 Demand contains only two brief sentences regarding the alleged misconduct during the 2010 through 2014 time period. It states that:

> S&P received a so-called "Wells Notice" from the SEC on July 22, 2014 threatening enforcement proceedings based upon alleged violations of federal securities laws with respect to S&P ratings of six commercial mortgage-backed securities issued in 2011 (the "2011 Ratings"). In late October, 2014, McGraw revealed that it would pay $60 million to resolve the SEC's charges.

(Am. Cmplt., Ex. B at 5). Neither of these two demands satisfy the particularity concerns of BCL § 626(c) because they do not indicate with any specificity the causes of action available to the corporation as a result of the Company's settlement of the SEC's investigation or those individuals who were potentially liable (Shenk v Karmazin, 867 F Supp 2d 379, 382 [SD NY 2011] [reference to settlement of prior antitrust suit in demand letter did not "sufficiently identify the factual basis of the wrongful acts" for which the shareholder sought redress]).

Accordingly, the amended complaint fails to set forth sufficient allegations to state that plaintiff tendered an adequate demand on the Board relating to the alleged misconduct during the 2010-2014 time period. Under these circumstances, plaintiff failed to comply with BCL § 626(c). Nonetheless, even if the demand were adequate, for the reasons that follow, plaintiff fares no better.

B. Pleading Wrongful Refusal

The Company argues that the amended complaint fails to plead any facts in support of its conclusory assertion that the Board wrongfully refused plaintiff's demands. This argument is unavailing. Contrary to the Company's argument, pleading deficiency concerning wrongful refusal is not an issue at this juncture of the proceedings:

> Contrary to the decision of the lower court and the decision in Kenney v Immelt (41 Misc 3d 1225[A], 2013 NY Slip Op 51831[U] [Sup Ct, NY County 2013]), under Business Corporation Law § 626(c), there is no pleading standard requiring that a shareholder bringing a derivative action who alleges the efforts he or she made, in making a pre-suit demand on the board to take action, also allege that the board wrongfully rejected the demand, and this Court's decision in Tomczak v Trepel (283 AD2d 229 [1st Dept 2001], lv denied, dismissed 96 NY2d 930 [2001]) should not be read to support such conclusion.

(Culligan Soft Water Co. v Clayton Dubilier & Rice LLC, 139 AD3d 621, 621-622 [1st Dept 2016]). As such, despite the fact that the Board has rejected no less than three different shareholder demands calling for legal action be taken against directors, officers and employees responsible for the alleged misconduct relating to S&P's ratings of mortgage-backed securities, the amended complaint need not set forth particularized allegations that the Board wrongfully rejected plaintiff's demands. Based on the foregoing, dismissal based on this pleading deficiency is not warranted. Nonetheless, although a particularized pleading is not required for wrongful refusal, the absence of that requirement does not end the inquiry. The issue of wrongful refusal must still be addressed given McGraw Hill's contention that plaintiff is collaterally estopped from litigating it.

C. Preclusive Effect of the Federal Action

McGraw Hill argues that the question of whether the Board rightfully or wrongfully determined not to pursue legal claims

against Company personnel arising out of S&P's structured finance ratings business is identical to one of the issues raised, litigated, and decided adversely against the Teamsters in the Federal Action.

As an initial matter, the fact that plaintiff McGraw Hill shareholder herein is different from the plaintiff in the Federal Action is of no consequence. Shareholders in derivative cases "are treated like equal and effectively interchangeable members," because "their claims belong to and are brought on behalf of the corporation, rather than on behalf of themselves" (Levin v Kozlowski, 13 Misc 3d 1236[A], *10 [Sup Ct, NY County 2006], affd 45 AD3d 387 [1st Dept 2007], citing Auerbach v Bennett, 47 NY2d 619, 631 [1979]). Also, the wrongful refusal issue is the same whether it concerns the federal securities law violations or the state law claims for breach of fiduciary duty and unjust enrichment given that the facts underlying these claims arise out of the same series of transactions involving the Board's oversight concerning S&P's credit ratings conduct.

Under federal law, a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted is a dismissal on the merits for purposes of res judicata and collateral estoppel (Federated Dept. Stores, Inc. v Moitie, 452 US 394, 399 n 3 [1981]; Angel v

Bullington, 330 US 183, 190 [1947]; see also McLearn v Cowen & Co., 48 NY2d 696, 699 [1979]; Wietschner v Dimon, 139 AD3d 461, 462 [1st Dept 2016]). Indeed, this legal principle is even more pronounced herein given the fact that the District Court gave the Teamsters an opportunity to replead its complaint, but it declined to do so. As such, the dismissal in the Federal Action was final and the case was closed.

Although federal law determines the preclusive effect of a prior federal judgment on a subsequent state court action (Taylor v Sturgell, 553 US 880, 891 [2008]; Carroll v McKinnell, 19 Misc 3d 1106 [A], *2 [Sup Ct, NY County 2008]; Jerome J. Steiker Co. v Eccelston Props., 156 Misc 2d 308, 313 [Sup Ct, NY County 1992]), New York law on collateral estoppel is virtually the same as federal law in this area (Marvel Characters, Inc. v Simon, 310 F3d 280, 286 [2d Cir 2002]; Carroll v McKinnell, 19 Misc 3d 1106 [A], *2). The doctrine of collateral estoppel applies when:

> (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.

(Conason v Megan Holding, LLC, 25 NY3d 1, 17 [2015] [internal quotation and citation marks omitted]). Likewise, issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination

essential to the prior judgment," as long as the losing party had "a full and fair opportunity to litigate" the issue (Taylor v Sturgell, 553 US at 892 [internal quotation marks and citations omitted]). Accordingly, plaintiff is collaterally estopped from relitigating the same issues that were previously litigated in the Federal Action as long as the issues are identical and essential to the decision in that case (Wietschner v Dimon, 2015 WL 4915597 [Sup Ct, NY County Aug. 14, 2015], affd 139 AD3d 461 [1st Dept 2016]).

Plaintiff argues that the District Court made no ruling with respect to the Teamsters' state law claims or its standing to pursue them because the District Court declined to exercise supplemental jurisdiction over those state law claims. As such, plaintiff did not have a full and fair opportunity to litigate that issue. Plaintiff's argument is unavailing.

"Where a federal court declines to exercise jurisdiction over a plaintiff's state law claims [as here], collateral estoppel can still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims" (Ji Suri Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP, 120 AD3d 18, 23 [1st Dept 2014], citing Sanders v Grenadier Realty, Inc., 102 AD3d 460, 461 [1st Dept 2013]; see also Pinnacle Consultants v Leucadia Natl. Corp., 94 NY2d 426,

432-433 [2000]). In an attempt to demonstrate that the claims and issues in this case are not identical to those in the Federal Action, plaintiff contends that the federal securities law claims that were dismissed in the Federal Action were direct, and not derivative claims, as they are herein.

Although defendants argued that the Teamsters' complaint failed to allege a violation of section 10(b) of the Securities Exchange Act because it did not allege that McGraw Hill, as opposed to the purchasers of the securities that S&P was rating, was damaged by the purchase or sale of securities in reliance on deception by defendants, their argument did not change the fact that the Teamsters actually pleaded the section 10(b) claim as a derivative claim (see Kaufman Affirm., Ex. 7 at 1-2, 49, 55), or that the District Court dismissed that claim as a derivative claim for the following reasons: 1) the Teamsters' demand did not sufficiently apprise the Board of the Teamsters' federal securities law claims; and 2) the complaint failed to state a claim for violations of section 9(b) or 20(a) of the Securities Exchange Act. More importantly, the District Court held that the Teamsters' complaint failed to allege any "facts demonstrating that the Board's rejection of its demand was not made in good faith by disinterested directors" (Teamsters Allied Benefit Funds v McGraw, 2010 WL 882883, at *6). Thus, contrary to plaintiff's

contention, the issue of whether the Teamsters' complaint contained sufficient factual allegations that would show that the Board wrongfully rejected the Teamsters' demand was necessarily raised, argued, and decided against the Teamsters in the Federal Action (<u>see</u> Kaufman Affirm., Ex. 8 at 9-11).

Based on the foregoing, even though there is no requirement to plead wrongful refusal with particularity, plaintiff is collaterally estopped from litigating the core issue of wrongful refusal. To hold otherwise would undermine the collateral estoppel doctrine and may produce inconsistent outcomes on the core issue herein.

Accordingly, McGraw Hill's motion to dismiss the amended complaint is granted, and it is dismissed. Even if inadequate demand and collateral estoppel were not impediments to plaintiff's action, for the following reasons plaintiff's claims against the individual defendants must also be dismissed.

II. Individual Defendants' Motion to Dismiss the Amended Complaint

A. Statute of Limitations

The individual defendants contend that all of plaintiff's claims are time-barred because they all accrued in 2008 or earlier, making this action, which was commenced on January 28, 2016, untimely.

1. Applicable Statute of Limitations

"New York law does not provide a single statute of limitations for breach of fiduciary duty claims" (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 [2009]). The applicable statute of limitations depends upon the substantive remedy sought (Id.). When the relief sought is equitable in nature, the six-year limitations period found in CPLR 213(1) applies (Id.). On the other hand, when lawsuits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging injury to property, to which the three-year statute of limitations found in CPLR 214(4) applies (Id.; Kaufman v Cohen, 307 AD2d 113, 118 [1st Dept 2003]). In addition, CPLR 213(7) extends the limitations period to six years for "an action by or on behalf of a corporation against a present or former director, officer or stockholder ... to recover damages for waste or for an injury to property or for an accounting in conjunction therewith" (CPLR 213(7) [emphasis added]). "If the specific language of CPLR 213(7) encompasses a particular claim, it supplants the general three-year rule of CPLR 214(4)" (Roslyn Union Free Sch. Dist. v Barkan, 16 NY3d 643, 648 [2011]; see also Toscano v Toscano, 285 AD2d 590 [2d Dept 2001]).

The parties agree that six years is the correct statute of limitations for the breach of fiduciary duty claim against the defendants who are directors, i.e., defendants McGraw and Peterson. The individual defendants argue, however, that a three-year statute of limitations applies to the remaining nine defendants, who are merely "employees" of the company.

CPLR 213(7) applies not only to claims against corporate directors, but against corporate officers. With the exception of defendants McGraw and Peterson, the amended complaint does not specifically identify any of the individual defendants as officers of the company. Plaintiff argues, however, that any contention that defendants Sharma and Corbet were not officers would be "highly questionable" because both, at different times, served as the president of S&P (Pls. Mem. of Law in Opp. [NYSCEF Doc. No. 23] at 9).[4] In New York, the officers of a corporation are the president, one or more vice-presidents, a secretary and a treasurer, and such other officers as [the board] may determine, or as may be provided in the by-laws" (BCL § 715). The bylaws attached to the Markley affirmation do not conclusively establish whether either Sharma or Corbett were officers of McGraw Hill, and, thus, for purposes of this motion, the six-year statute of

[4] Deven was also allegedly the "Chairman of the Board of S&P from 2010 to 2011" (Am. Cmplt., ¶ 14).

limitations applies to the breach of fiduciary duty claim against them. Plaintiff concedes the remaining defendants, Bryan, Duka, Gillis, Tillman, Rose, Tesher and Jordan were merely employees of the Company. As such, the claims against them are subject to the three-year limitations period.

Notwithstanding the above-noted applicable statute of limitations based on the individual defendants status with the Company, plaintiff strenuously maintains that a six-year statute of limitations applies to all of the claims in this shareholder derivative action even though the amended complaint seeks only an award of money damages against the employee defendants. For support, plaintiff relies on Otto v Otto, 110 AD3d 620 (1st Dept 2013). There, the Appellate Division held that a derivative breach of fiduciary duty claim was subject to a six-year statute of limitations "since the derivative action is 'equitable in nature,'" quoting Horizon Asset Mgt., LLC v Duffy, 106 AD3d 594, 595 [1st Dept 2013]), which was a case that did not concern the statute of limitations, but the waiver of the right to a jury trial. The Otto case, however, is distinguishable on its facts because a major component of the relief sought in that action against all of the defendants was an accounting of their management of certain real estate entities. Thus, the mere fact that a claim for monetary damages is brought as a derivative

claim does not change the rules regarding the application of the statute of limitations (see e.g. Ingham v Thompson, 88 AD3d 607, 608 [1st Dept 2011]).

In other shareholder derivative cases, where the court applied a six-year statute of limitations, the defendants were either directors, officers or shareholders of the corporation on whose behalf the action was being brought. Thus, the defendants in Rupert v Tigue, 259 AD2d 946 (4th Dept 1999) were the officers and directors of the company. And in Skorr v Skorr Steel Co., Inc., 8 Misc 3d 1021[A] (Sup Ct, Nassau County 2005), while Supreme Court ruled that "[a] shareholder derivative action, regardless of the theory underlying the claim, is governed by the six year statute of limitations provided in CPLR 213(7)," because the respondents in the Skorr case were all shareholders or officers of the company, this ruling merely tracks the language of CPLR 213(7). Indeed, Supreme Court relied on Toscano v Toscano, 285 AD2d 590, which was an action by one of two shareholders against the other shareholder of a closely-held corporation, who was also a director, seeking damages for diversion of corporate assets, misappropriation of corporate assets, and breach of fiduciary duty. Under these circumstances, a breach of fiduciary duty derivative claim seeking only monetary damages against a defendant who is not a "director, officer or

shareholder" of the company is not a claim governed by CPLR 213(7), and thus is subject to a three-year statute of limitations. The same three-year statute of limitations would apply to the third cause of action alleging a claim against any defendant employee for aiding and abetting a breach of fiduciary duty and unjust enrichment (Pomerance v McGrath, 124 AD3d 481, 484 [1st Dept 2015]; Board of Mgrs. of the Chelsea Condominium v Chelsea 19 Assoc., 73 AD3d 581, 582 [1st Dept 2010]).

2. Accrual of Plaintiff's Claims

As usual, the parties disagree on when the plaintiff's claims accrued. "A tort claim accrues as soon as 'the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint'" (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d at 140, quoting Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]; see also Aetna Life & Cas. Co. v Nelson, 67 NY2d 169, 175 [1986]). Given that damage stemming from the misconduct is an essential element of a breach of fiduciary duty claim (Armentano v Paraco Gas Corp., 90 AD3d 683, 684 [2d Dept 2011]), the claim is not enforceable, and thus does not accrue, until damages are sustained (Kronos, Inc. v AVX Corp., 81 NY2d at 94).

The "fiduciary tolling rule" may apply under the circumstances herein. It provides "that the statute of

limitations may be tolled while a relationship of trust and confidence exists between the parties" (<u>Ciccone v Hersh</u>, 530 F Supp 2d 574, 579 [SD NY 2008], <u>affd</u> 320 Fed Appx 48 [2d Cir 2009]). In such cases, the statutory period does not begin to run until the fiduciary relationship is openly repudiated or otherwise ended (<u>Westchester Religious Inst. v Kamerman</u>, 262 AD2d 131, 131 [1st Dept 1999]; <u>Access Point Med., LLC v Mandell</u>, 106 AD3d at 45). This rule, however, applies only to claims seeking an accounting or other equitable relief (<u>Cusimano v Schnurr</u>, 137 AD3d 527, 530-531 [1st Dept 2016]; <u>Stern v Morgan Stanley Smith Barney</u>, 129 AD3d 619, 619 [1st Dept 2015]; <u>Ingham v Thompson</u>, 88 AD3d at 608; <u>Matter of Kaszirer v Kaszirer</u>, 286 AD2d 598, 599 [1st Dept 2001]).

Here, plaintiff seeks monetary damages against the individual defendants, and therefore the fiduciary tolling rule does not apply. Moreover, the open repudiation concept is designed to protect beneficiaries in circumstances in which they would otherwise have no reason to know that their fiduciaries were no longer acting in that capacity (<u>Access Point Med., LLC v Mandell</u>, 106 AD3d at 45). Here, the intended beneficiaries of this lawsuit, which are McGraw Hill, and indirectly, its shareholders, did not lack knowledge of the allegations being asserted. As such, plaintiff cannot avail itself of that concept.

McGraw Hill argues that plaintiff was able to assert allegations regarding all three of the elements of his breach of fiduciary duty claim in 2008 or earlier, well beyond either a six or three-year statute of limitations. The Company cites to the fact that another shareholder, the Teamsters, brought a similar lawsuit in January of 2009, alleging breaches of fiduciary duties in connection with S&P's RMBS and CDO ratings during the July 2006 and March 2008 time period.

On the other hand, in plaintiff's view, the statute of limitations did not accrue until early 2015 when most of the damages that McGraw Hill sustained and will sustain occurred as a result of the $1.375 billion DOJ settlement and other ongoing litigation, well within both a three-year and six-year statute of limitations. Plaintiff also contends that placing accrual of his claims in 2008 or earlier based on the filing of the Federal Action ignores the allegations that the individual defendants continued breaching their duties well into 2014 by being complicit in and failing to stop S&P from pursuing business objectives over ratings integrity (Am. Cmplt., ¶¶ 107-152), and unjustifiably continuing to defend against the DOJ's claims despite the Board members' personal knowledge that such claims were meritorious.

The breach of fiduciary duty claim with respect to any misconduct by S&P officers, directors and/or employees relating to S&P's RMBS and CDO ratings from 2004 to 2007 (Am. Cmplt., ¶¶ 39-106) accrued no later than July 2009 when the CalPERS Action was filed rendering the claims against the individual defendants time-barred under either the three- or six-year statute of limitations. By that point in time, the Company had already received a subpoena from the New York State Attorney General requesting information and documents relating to S&P's RMBS ratings (August 29, 2007); the SEC had issued a report discussing the failings of the rating agencies, including S&P (July 2008); the Wall Street Journal had published an article on August 2, 2008 discussing S&P's woes that included lost business and regulatory inquiries about the independence of its ratings (*see* Am. Cmplt. ¶ 43); another shareholder of the Company made a demand and then brought a shareholder's derivative lawsuit alleging many of the same claims of wrongdoing (January 2009); and, finally, on July 9, 2009, a lawsuit seeking damages against the Company for its AAA ratings of SIVs was brought. At the very least, these initial regulatory inquiries and lawsuits caused the Company to incur legal expenses, and, of course, placed all concerned on notice. The fact that other lawsuits and other regulatory inquiries were brought at a later date or resulted in

large monetary settlements does not toll the statute of limitations (B. Brages Assoc. v 125 W. 21st LLC, 2014 WL 2116093, at *6 [Sup Ct, NY County 2014]) ["[T]he statute of limitations begins to run at the first sign of damage, even when the damage gets progressively worse"]).

Accordingly, that branch of the motion by the individual defendants to dismiss the first, third and fourth causes of action based on the statute of limitations (CPLR 3211[a][5]) is granted only with respect to the claims of misconduct occurring between 2004 and 2007.

As discussed, supra, the amended complaint also alleges certain misconduct by S&P that occurred between 2010 and 2014 (see Am. Cmplt., ¶¶ 107-152). These claims are not time-barred under a six-year statute of limitations. With respect to the seven employee defendants, to which a three-year limitations period applies, these claims are timely since they accrued in October 2014 when the Company announced that it would pay $60 million to resolve the SEC's misconduct charges (see Am. Cmplt., Ex. B at 5). The question that remains is whether the misconduct alleged between 2010 and 2014 relating to the CF CMBS transactions and the use of improper loss assumptions in its surveillance of RMBS ratings sufficiently states a cause of action.

B. Failure to State A Claim For Relief

1. Plaintiff's Reliance on SEC Consent Orders

The individual defendants contend that the post-2011 allegations regarding S&P's attempted re-entry into the CF CMBS market and the use of allegedly improper loss assumptions in surveillance criteria for RMBS ratings (Am. Cmplt., ¶¶ 124-152) are based entirely on the alleged findings of the SEC staff in an administrative proceeding against S&P, as set forth in SEC's orders dated January 21, 2015 (File No. 3-16346, 3-16347, 3-16348) (Kaufman affirmation, Ex. 2, 3, 4). They further contend that the findings in these SEC consent orders cannot be the basis for a derivative claim as they were the result of offers of settlement by S&P.

Plaintiff argues that the legal authority upon which the defendants rely is either distinguishable or wrongly decided, and that, even if the SEC's findings are not admissible evidence, S&P admitted to certain facts which have collateral estoppel value.

Although a SEC consent order of the kind at issue "has no evidentiary value and no collateral estoppel effect" (Leonard Global Macro Fund LLC v North Am. Globex Fund, L.P., 2014 NY Slip Op 32393[U], 2014 WL 4542674, at *13 [Sup Ct, NY County 2014]), factual findings may form the basis of a claim for relief in a subsequent action. As the Appellate Division ruled in J.P.

Morgan Sec. Inc. v Vigilant Ins. Co., 126 AD3d 76 (1st Dept 2015), while the factual findings contained in an SEC consent order are not proven facts, they are allegations that the company specifically reserved the right to contest in subsequent litigation against third parties. Indeed, CPLR 4547 states that while an offer to compromise is inadmissible as proof of liability, "[t]he provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of the compromise negotiations." The Second Circuit's ostensibly contrary ruling that "neither [an SEC] complaint nor references to [an SEC] complaint which results in a consent judgment may properly be cited in the pleadings" (Lipsky v Commonwealth United Corp., 551 F2d 887, 893 [2d Cir 1976]) is distinguishable because that ruling was applying Rule 410(a)(2) of the Federal Rules of Evidence, which deals with evidence in a nolo contendere plea.

Furthermore, the language of the consent order entered in File No. 3-16348 specifically states that the Company was admitting "the facts set forth in Annex A attached hereto," which language did not appear in the SEC order at issue in the Leonard Global Macro Fund case. In Annex A, the Company admitted that the pre-sale reports for eight CF CMBS transactions that S&P rated in 2011 did not accurately disclose that it used the

blended constants to calculate DSCRs (Kaufman Affirm., Ex. 4). At the very least, plaintiff is entitled to rely on these admitted facts in formulating his pleading.

For these reasons, plaintiff's citation to the SEC's Administrative Orders in paragraphs 124-152 of the amended complaint was proper, and may be pleaded for the purpose of stating a cause of action.

2. Breach of Fiduciary Duty and Aiding and Abetting a Breach

"To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" (Pokoik v Pokoik, 115 AD3d 428, 429 [1st Dept 2014], citing Kurtzman v Bergstol, 40 AD3d 588, 590 [2d Dept 2007]). To plead a claim for aiding and abetting breach of fiduciary duty, a plaintiff must allege the existence of a breach by the primary wrongdoer; knowledge of the violation by the defendant; that defendant knowingly induced or participated in the breach; and damages to the plaintiff as a result of the breach (Bullmore v Ernst & Young Cayman Is., 45 AD3d 461, 464 [1st Dept 2007]; see also Kaufman v Cohen, 307 AD2d at 125). "A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)" (Palmetto Partners, L.P. v AJW Qualified Partners, LLC, 83 AD3d 804, 808 [2d Dept 2011]).

a. Defendant Employees

There is no dispute that corporate officers and directors owe a fiduciary duty to a corporation and must perform their duty "in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances" (BCL §§ 715[h], 717[a]; see also Bank of America Corp. v Lemgruber, 385 F Supp 2d 200, 224 [SD NY 2005] [a corporate officer or director generally owes a fiduciary duty to the corporation over which he or she exercises management authority]). Unlike officers and directors, however, employees owe only the duty of "utmost good faith and loyalty" to their employer" (Maritime Fish Prods. v World-Wide Fish Prods., 100 AD2d 81, 87-88 [1st Dept 1984]; see also Rather v CBS Corp., 68 AD3d 49, 55 [1st Dept 2009] ["employment relationships do not create fiduciary relationships"]). Plaintiff fails to distinguish this controlling authority. Instead, he relies on case law involving claims against corporate directors under Delaware law, which is not applicable herein.

To the extent the amended complaint asserts a breach of loyalty claim against the employee defendants, those claims are dismissed. These claims are "available only where the employee has acted directly against the employer's interests -- as in embezzlement, improperly competing with the current employer, or

usurping business opportunities" (Veritas Capital Mgt., L.L.C. v Campbell, 82 AD3d 529, 530 [1st Dept 2011], citing Sullivan & Cromwell LLP v Charney, 15 Misc 3d 1128[A] [Sup Ct, NY County 2007]). The amended complaint contains no allegations that defendant employees acted against the Company's interest, such as competing with McGraw Hill while still an employee, using company resources for non-business purposes, taking bribes from issuers to give higher ratings or diverting corporate opportunities. Indeed, whether rightly or wrongly, defendant employees are accused of merely trying to maximize the revenue and operating profits of McGraw Hill by building market share in the CF CMBS and RMBS markets (Am. Cmplt., ¶¶ 107-152).

Plaintiff also argues that defendant employees breached their duty of good faith and loyalty because they allegedly failed to comply with S&P's Code of Ethics and Code of Practice which required objectivity, independence and freedom of influence from any conflicts of interest of S&P's ratings, but offers no legal support for this novel claim. To the contrary, the "mere failure of an employee to perform assigned tasks does not give rise to a cause of action alleging breach of [the duty of loyalty and good faith]" (Cerciello v Admiral Ins. Brokerage Corp., 90 AD3d 967, 968 [2d Dept 2011]).

Even if these defendant employees did owe duties similar to officers and directors, the amended complaint fails, with the exception of defendant Duka, to make any specific allegations of wrongdoing by these individuals vis-a-vis the 2010-2014 misconduct and instead impermissibly uses "group pleading," which does not comply with the heightened pleading requirement of CPLR 3016(b) (Goldin v Tag Virgin Is., Inc., 2014 WL 2094125, *11 [Sup Ct, NY County May 20, 2014]). The amended complaint alleges that, in connection with S&P's CF CMBS ratings between 2010 and 2011, "all of the Individual Defendants knew or should have known [that] S&P's internal controls ... failed to identify and adequately respond to red flags that the CMBS Group had changed its methodology with the appropriate process or disclosure" (Am. Cmplt., ¶ 123). This allegation attempts to cover defendants like Bryan, Tesher or Jordan, each of whom held positions within S&P relating to its synthetic, cash and global CDO groups (Am. Cmplt., ¶¶ 15, 21 and 22), and had no involvement with the CF CMBS work or the surveillance of RMBS ratings. Apparently, defendant Tillman left the Company in 2009 (Am. Cmplt., ¶ 19), so the complaint completely fails to allege any basis for holding her responsible for conduct occurring after that date.

Accordingly, the first and third causes of action are dismissed against defendants Bryan, Duka, Gillis, Tillman, Rose, Tesher and Jordan.

b. Defendant Directors and/or Officers

With respect to the remaining four defendants (McGraw, Peterson, Sharma and Corbett), as directors and/or allegedly officers of the Company, they admittedly owed a fiduciary duty of due care and loyalty to the shareholders of the Company. BCL § 402(b) provides, however, that a corporation's certificate of incorporation may include a provision protecting its directors from liability unless there is bad faith on the part of the directors, intentional misconduct, a knowing violation of law, a personal financial benefit obtained to which he or she was not legally entitled, or an act that violates BCL § 719. McGraw Hill's certificate of incorporation contains such a provision (Markley 5/23/16 Affirm., Ex. A, Art. XI at 19). In addition, the Company's bylaws provide that any director, officer or employee of the Company shall be entitled to indemnification from civil and criminal actions and proceedings to the fullest extent permitted by law (Markley 7/22/16 Affirm., Ex. A, Art. IV-B).

BCL § 402(b) protects directors against claims for breach of the duty of care (Hamilton Partners, L.P. v Englard, 11 A3d 1180, 1211 [Del Ch 2010][interpreting New York law]). Thus, merely alleging that a director or officer was negligent in managing and administering the affairs of the corporation is not enough; only a "sustained or systematic failure of the board to exercise

oversight" of a corporation's activities by the board of directors or senior officers will establish a lack of good faith sufficient to impose personal liability (In re Caremark Intl. Inc. Derivative Litig., 698 A2d 959, 971 [Del Ch 1996]).

The amended complaint fails to allege any wrongdoing by McGraw, Peterson, Sharma or Corbet that would rise to the level of bad faith, intentional violations of law, or personal gain arising from the 2010-2014 misconduct. The amended complaint merely alleges that defendant McGraw's compensation was based in part on the Company's performance (Am. Cmplt., ¶ 12), a very common scenario for chief executive officers; that he publicly touted the integrity of S&P ratings in 2003 (id., ¶ 33); that McGraw commented that S&P's mortgage-backed securities and structure finance business were revenue leaders in 2004-2006 (id., ¶ 45, 47); that McGraw had intimate knowledge of and involvement in S&P's structured-finance business (id., ¶ 51); and that he must have known that there was an inherent conflict in the issuer-pays rating model leading to a "race to the bottom" (id., ¶ 58). Defendant Peterson's only supposed wrongdoing was in failing to commence this litigation (Am. Cmplt., ¶ 13). Sharma apparently stepped down as President of S&P in September 2011 (id., ¶ 14), while defendant Corbet left the Company in 2007 (id., ¶ 16). Indeed, the only individual defendant identified in

connection with the 2010-2014 misconduct is defendant Duka (id., 109, 116, 118), who was not an officer or director of the Company and owed only a duty of loyalty. Collectively, all these allegations are insufficient to plead a claim for breach of fiduciary duty.

Accordingly, the first and third causes of action are dismissed in their entirety against the remaining four defendants, McGraw, Peterson, Sharma and Corbet.

3. Unjust Enrichment

The fourth cause of action alleges that the individual defendants "were unjustly enriched through the payment of substantial bonuses and other compensation tied directly to their wrongful conduct at the expense of and to the detriment of the Company" (Am. Cmplt., ¶ 208).

"'The essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011], quoting Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 [1972]). As the Court of Appeals further clarified:

> In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not

> breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled.

(Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012] [citations omitted]).

Here, there are no allegations that defendants Bryan, Corbett, Duka, Gillis, Tillman, Rose, Tesher, or Jordan received remuneration from the Company, by the way of salaries, bonuses, or director compensation, to which they were not otherwise entitled to by virtue of their job functions. Only McGraw, Peterson and Sharma[5] are alleged to have received "undue compensation" (Am. Cmplt., ¶¶ 6, 12-14), and even then, the amended complaint fails to allege any causal relationship between this compensation and the 2010-2014 misconduct (see In re Pfizer Inc. Shareholder Derivative Litig., 722 F Supp 2d 453, 465-66 [SD NY 2010]). Plaintiff's reliance on In re Viacom, Inc. Shareholder Derivative Litig., 2006 WL 6663987 (Sup Ct, NY County 2006) does not compel a different result. There, the unjust enrichment claim against three corporate officers was upheld because the corporate misconduct that formed the basis of the

[5]The amended complaint only reports Sharma's compensation in 2004, 2005 and 2006 (Am. Cmplt., ¶ 14).

plaintiff's derivative claims was the payment of excessive compensation to those very same officers (Id.).

Accordingly, the fourth cause of action is dismissed for failure to state a claim for relief.

4. Contribution and Indemnification

Having dismissed plaintiff's tort claims against the individual defendants as either time-barred or legally insufficient, there is no basis to hold them liable to the Company for part of all of its settlements with the DOJ, CalPERS, the SEC and others pursuant to a contribution or indemnification theory. Accordingly, the second cause of action is dismissed for failure to state a claim for relief.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant McGraw Hill Financial, Inc.'s motion to dismiss the amended complaint (mtn seq. no. 001) is granted, and it is dismissed; and it is further

ORDERED that defendants', Harold McGraw III, Douglas L. Peterson, Deven Sharma, Andrea Bryan, Kathleen A. Corbet, Barbara Duka, Thomas Gillis, Vickie A. Tillman, Joanne Rose, David Tesher and Patrice Jordan, motion to dismiss the amended complaint (mtn seq. no. 002) is granted, and it is dismissed; and it is further

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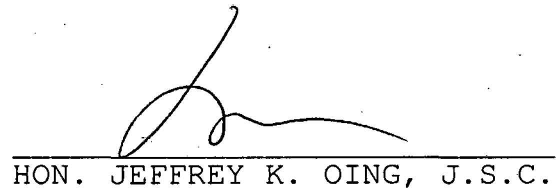
ORDERED that the Clerk is respectfully directed to enter judgment of dismissal accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12|21|16



HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.