IN THE SUPREME COURT OF THE STATE OF DELAWARE

CLARE C. MARSHALL, Plaintiff Below, Appellant, v. CHARLES H. SALIGMAN, PATRICK C. RICHMOND, YVONNE M. CRAIG, MARTIN R. ROTHSCHILD, ELAINE A. LASATER, WILLIAM M. LEWIS, GILBERT W. COULSON, RACHEL N. LIEBERMAN, TIMOTHY M. STOCKDALE AND CARLOS B. HUELVA, Defendants Below, Appellees, and SECURIAN INCORPORATED, Nominal Defendant Below, Appellee.	No. 27, 2009 Court Below—Court of Chancery of the State of Delaware Chancellor Siegel C.A. No. 3892-CS

ANSWERING BRIEF OF DEFENDANTS BELOW, APPELLEES

FIRM X

Attorneys for Defendants Below, Appellees

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NATURE OF PROCEEDINGS

This is an appeal from a decision of the Court of Chancery (Siegel, Ch.) dismissing a complaint that asserts a breach of loyalty claim against the seven members of the board of directors ("Board" or "Director Appellees") and three non-director senior officers ("Officer Appellees") of Securance Incorporated ("Securance"), a Delaware corporation.

Plaintiff below, Appellant Clare C. Marshall ("Marshall" or "Appellant")—a purported Securance shareholder—filed the complaint ("Complaint") on July 3, 2008 without making a pre-suit demand on Securance's Board.

The Court of Chancery ruled in January 2009 that plaintiff failed to adequately plead that such demand would have been futile and dismissed the complaint under Rule 23.1. In addition, the Court of Chancery dismissed the claims against the Officer Appellees for failure to state a claim under Rule 12(b)(6).

Appellant then filed this appeal on January 16, 2009.

SUMMARY OF ARGUMENT

This Court should affirm the Court of Chancery's order dismissing the Complaint against Director and Officer Appellees for failure to adequately allege demand futility under Rule 23.1. The Complaint should be dismissed because Appellant failed to plead facts with particularity which connect the fraud which occurred at Securance in the year 2005 through 2007 with the Director or Officer Appellees' alleged breach of their fiduciary duty of loyalty.

Appellant has made numerous conclusory allegations which are insufficient to survive a motion to dismiss under Rule 23.1. Additionally, Appellant has made several allegations of events occurring prior to the fraud committed in 2005 through 2007 which Appellant contends should have put the Director Appellees on notice of compliance issues at Securance. However, these events do not constitute "red flags" for purposes of demand futility and were not pled with particularity.

This Court should affirm the Court of Chancery's order dismissing the Complaint against Officer Appellees for failure to state a claim under Rule 12(b)(6). In reviewing a breach of fiduciary duty claim alleging oversight liability against non-director officers, this Court should adopt the *Stone* test. In applying the *Stone* test, Appellant failed to state specific facts that show Officer Appellees "consciously failed to

monitor" Securance's operations. Appellant has made numerous conclusory allegations which are insufficient to survive a motion to dismiss under Rule 12(b)(6).

STATEMENT OF FACTS

Appellant owns 1,000 shares of Securance Incorporated ("Securance") common stock and has allegedly owned such shares at all times relevant to this action. Compl. ¶3.[1] Director Appellees are the seven members of the Board, and have been at all times relevant to this action. *Id.* at ¶4. Officer Appellees have been senior officers at all times relevant to this action and have not held positions on the Board. *Id.* at ¶6. Nominal Appellee Securance is a Delaware corporation with headquarters in Frederick, Maryland. *Id.* at ¶7.

In 2003, the Board approved a Senior Officer Performance Compensation Plan ("Incentive Compensation Plan") which provided for bonus compensation based on the operating profit yielded by each of Securance's business segments. *Id.*

In 2004, after purported wrongdoing, Securance entered into consent decrees which required it to pay $100,000 to each of two states. *Id.* at ¶¶41-42. None of the alleged wrongdoing involved allegations of fraud or false overstatement of medical loss ratios. *Id.* at ¶43. Each consent decree stipulates that the decree is entered into "upon the consent and agreement of the parties without adjudication or admission of any issue of fact or law." *Id.* at ¶42.

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[1] References to the Complaint are designated as "Compl." followed by the corresponding paragraph number.

In 2005-2007, three former senior managers ("Senior Managers") (none of whom is a party to this case) overstated medical loss ratios to four states regulators. *Id.* at ¶11. During this time, no Director Appellees had any direct supervisory interaction with the Senior Managers. *Id.* at ¶31. The Senior Members eventually pled guilty to falsifying that data, voluntarily resigned their positions with Securance, and are all currently serving prison sentences. *Id.* at ¶30. The plea agreements which the Senior Members entered into did not specifically identify any Securance officers who supported their illegal activities. *Id.* at ¶31.

On June 3, 2008, Securance pled guilty to mail fraud and stipulated to an order imposing $520 million in criminal and civil penalties. *Id.* at ¶33. Additionally, Securance agreed to be disqualified from doing business in these jurisdictions for three years. *Id.* Finally, Securance agreed to establish a new and separate compliance committee of the Board. *Id.* at ¶34. Prior to the settlement agreement, compliance matters were handled by the Board's audit committee. *Id.*

On June 3, 2008, Securance announced that it was restating its earnings for 2005-2007. *Id.* at ¶37. As of June 5, 2008, Securance's common stock traded for $37 per share, down from its record high of $110 per share on December 14, 2007. *Id.* at ¶7.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY GRANTED DIRECTOR APPELLEES' MOTION TO DISMISS THE COMPLAINT AGAINST APPELLEES FOR FAILURE TO ADEQUATELY ALLEGE DEMAND FUTILITY.

A. Question Presented

Whether the Court of Chancery correctly dismissed the Complaint for failure to adequately plead demand futility in the absence of particularized allegations sufficient to show that a majority of Director Appellees confront a substantial likelihood of personal liability that renders them interested in the outcome of the decision on whether to pursue the claims asserted in the Complaint.

B. Standard and Scope of Review

The dismissal of a derivative suit under Rule 23.1 is reviewed *de novo* and plenary. *Stone v. Ritter*, 911 A.2d 362, 371 (Del. 2006); *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). "The Court should draw all *reasonable* inferences in the [appellant's] favor." *Beam,* 845 A.2d at 1048. However, to be *reasonable,* such "inferences must logically flow from particularized facts alleged" by the appellant. *Id.* "[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences. Likewise, inferences that are not objectively reasonable cannot be drawn in the [appellant's] favor." *Id.* (quoting *White v. Panic*, 783 A.2d 543, 549 (Del. 2001)).

C. Merits of Argument

1. The Complaint Fails To Plead With Particularity That Director Appellees Systematically Or Consciously Breached Their Duty Of Loyalty At The Board Level By Failing To Act In Good Faith To Fulfill Their Oversight Responsibilities.

A fundamental principle of Delaware General Corporation law is that "[t]he business and affairs of every corporation...shall be managed by or under the direction of a board of directors..." *Stone*, 911 A.2d at 366 (citing DEL. CODE ANN. tit. 8, § 141(a) (2006)). Therefore, a stockholder's right to bring a derivative suit is "limited to situations where either the stockholder has demanded the directors pursue a corporate claim and the directors have wrongfully refused to do so, or where demand is excused because the directors are incapable of making an impartial decision regarding whether to institute such litigation. *Stone*, 911 A.2d at 366-67 (citing CT. OF CH. R. 23.1). Accordingly, a shareholder's right to bring a derivative action does not arise until he or she has made a demand on the board of directors to institute such an action directly, such demand has been wrongfully refused, or until the shareholder has demonstrated, *with particularity*, the reasons why pre-suit demand would be futile. CT. OF CH. R. 23.1 (emphasis added). *See Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996).

In the oversight context, where specific board action is not challenged, the applicable standard for determining demand

futility is the "*Rales*" test; most recently adopted by *Stone v. Ritter*. *Stone*, 911 A.2d at 367 (citing *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). As the Court of Chancery properly ascertained, the court must determine whether the particularized factual allegations of a derivative stockholder complaint (if hypothetically filed), "create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to [the] demand." *Rales*, 634 A.2d at 934. This determination ultimately turns on whether the complaint alleges particularized facts to show that Director Appellees face "a substantial likelihood of liability" that renders them "personally interested in the outcome of the decision on whether to pursue the claim asserted in the complaint." *Stone*, 911 A.2d at 367 (quoting *Rales*, 634 A.2d at 934). As the Court of Chancery pointedly observed, the Complaint, although long on conclusory rhetoric, is far too short on substantive particularized facts to survive a motion to dismiss under Rule 23.1. MO 22-23.[2]

Appellant first claims that Director Appellees were consciously aware or recklessly disregarded that Securance's Medicaid reports to state agencies in 2005, 2006, and 2007

[2] References to the Court of Chancery's Memorandum Opinion are designated as "MO" followed by the corresponding page number.

fraudulently overstated Securance's actual medical expenses. Compl. ¶51. However, Appellant acknowledges that during the years in question, Securance had in place a form of compliance system that was ultimately overseen at Board level by an audit committee. Compl. ¶34. There are no particularized facts in the Complaint which directly link the fraud committed by the Senior Managers to any inadequacy of the audit committee or the Board.

The Complaint's inadequacy is not for Appellees to defend. It is Appellant's burden to use the "tools at hand" to "develop the necessary facts for pleading purposes," including the books and records of a corporation under the summary procedure embodied in DEL. CODE ANN. tit. 8, § 220 (2006). *White*, 783 A.2d at 550 n.15 (quoting *Brehm v. Eisner,* 746 A.2d 244, 266-67 (Del. 2000)). In this case, these materials could potentially extrapolate on the Board's interaction with the audit committee. However, Appellant has failed to make any such inquiry here. Therefore, Appellant's claim should be dismissed for failing to plead with particularity how each individual Director Appellee was personally liable for the fraud which occurred at Securance during 2005-2007. As the Court of Chancery properly concluded, the Complaint suffers the same defect as that in *Stone*, where "[w]ith the benefit of hindsight," the Complaint sought "to equate a bad outcome with a bad faith." MO 23-25 (quoting *Stone*,

911 A.2d at 373).

2. Appellant's Conclusory Assertions About The Existence Of "Red Flags" Are Insufficient To Excuse Demand.

Under Delaware law, red flags "are only useful when they are either waved in one's face or displayed so that they are visible to the careful observer." *Wood v. Baum*, 953 A.2d 136, 143 (Del. 2008) (citing *In re Citigroup Inc. S'holders Litig.*, 2003 WL 21384599, at *2 (Del. Ch. June 5, 2003)). Appellant has purported to identify several "red flags" which she contends were ignored by the Board. Compl. ¶52. However, the implementation of an incentive compensation plan, the 2004 consent decree, and Securance's improving earnings during the time in question do not constitute "red flags" for purposes of demand futility and were not pled with particularity.

(a) Incentive Compensation Plan

Appellees concede that a profits-based incentive compensation plan was enacted at Securance in 2003. This plan was applicable to senior corporate executives, including three of the seven Director Appellees. Compl. ¶38. Appellant claims that this system of compensation "provided specific incentives for senior executives to inflate the results of their business segment[s]." Compl. ¶38. However, this conclusory allegation would implicate every corporate board that is currently employing incentive-based compensation plans for its senior

managers and employees for breach of fiduciary duties to the corporation. In an effort to stimulate profits and excel in the marketplace, many "businesses today rely on incentive pay to motivate managers and employees to excel." *Litt v. Wycoff*, 2003 WL 1794724, at *9 (Del. Ch. March 28, 2003). Even if empirical evidence was to the contrary, Appellant's failure to plead with particularity facts which link the compensation plan to Director Appellees' alleged failure to exercise adequate oversight is fatal to Appellant's claim under Rule 23.1.

(b) Consent Decrees

Appellant next contends that the consent decree entered into by Securance in 2004 should have prompted Securance to comprehensively reform its compliance system. Compl. ¶52. Director Appellees concede that the Board was aware of the 2004 consent decrees. However, those decrees do not amount to red flags for oversight liability purposes. Appellant admits in her complaint that "the regulatory problems that led to the consent decrees...did not involve allegations of fraud, or false overstatement of medical loss ratios, and further did not involve any formal admission of wrongdoing..." Compl. ¶43. Without positing any meaningful nexus between the 2004 consent decrees and the fraud which occurred in 2005-2007, Appellant again attempts to equate a bad result with bad faith. Without particularized facts showing how the 2004 consent decree should

have put Director Appellees on notice of any potential, much less impending fraud, this is not a "rare case where the circumstances are so egregious that there is a substantial likelihood of liability." *In re Baxter Intern, Inc. S'holder Litig.*, 654 A.2d 1268, 1271 (Del. Ch. 1995) (citing *Aronson v. Lewis,* 473 A.2d 805, 815 (Del. 1984)).

An example of such a "rare case" is *In re Abbott Laboratories*. *In re Abbot Labs. Derivative S'holder Litig.*, 325 F.3d 795 (7th Cir. 2003). In *Abbott*, the 7th Circuit Court of Appeals, interpreting Delaware law, concluded that the directors of Abbot Laboratories did not act in good faith by failing to properly exercise their oversight duties. *Id.* at 809. Specifically, the court held that:

> six years of noncompliance, inspections, 483s, Warning Letters, and notice in the press, all of which then resulted in the largest civil fine ever imposed by the FDA...indicate that the director's decision to not act was not made in good faith and was contrary to the best interest of the company.

Id. In comparison, the consent decrees in this case are a far cry from the blatant indications of oversight failure in *Abbot*.

(c) Improving Earnings

Finally, Appellant claims Director Appellees committed actionable oversight failure by not acting with a "critical eye" in examining and validating Securance's improving earnings results during the year 2005 through 2007. Compl. ¶51.

However, this allegation is not accompanied by any particularized facts to put the Board on notice of actual or probable employee misconduct. Appellant has not posited any facts which show that the increase in business results were not explained or justified to the Board by facially valid business reasons. Again, in stockholder derivative suits, it is Appellant's burden to use the "tools at hand" to develop the necessary facts for pleading purposes through, among other things, the summary procedure embodied in DEL. CODE ANN. tit. 8, § 220 (2006). *White*, 783 A.2d at 550.

The claim in this case has been referred to as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996). Appellant's failure to make use of the "tools at hand" to fully develop the record and present particularized facts is fatal to her claim. The Court should affirm the order dismissing the complaint for failure to adequately allege demand futility under Rule 23.1.

II. THE COURT OF CHANCERY CORRECTLY USED THE TEST STATED IN *Stone* AND DIMISSSED THE BREACH OF FIDUCIARY DUTY CLAIM ALLEGING OVERSIGHT LIABILITY AGAINST OFFICER APPELLEES FOR FAILURE TO STATE A CLAIM.

A. Question Presented

Whether the Court of Chancery correctly determined that the Complaint failed to state a claim for breach of fiduciary duty against Officer Appellees.

B. Standard and Scope of Review

This Court reviews *de novo* a decision to dismiss a complaint for failure to state a claim under Rule 12(b)(6). *Feldman v. Cutaia*, 951 A.2d 727, 730 (Del. 2008). On a motion to dismiss under Rule 12(b)(6), the truth of well-pleaded facts in the complaint are assumed and inferences are drawn in favor of appellant. *Id.* However, "conclusory allegations need not be treated as true, nor should inferences be drawn unless they truly are reasonable." *Id.* (citing *White*, 783 A.2d at 549). Dismissal is appropriate when it appears "with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the [appellant] would not be entitled to relief." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 610–11 (Del. 2003). This standard is based on the Rule 8(e) "notice pleading" requirement and is "less stringent than the standard applied when evaluating whether a pre-suit demand has been excused" under Rule 23.1. *Malpiede v. Townson*,

780 A.2d 1075, 1083 (Del. 2001).

C. Merits of Argument

1. This Court Should Adopt The Test Stated In *Stone* For Analyzing Oversight Liability Claims Against Non-Director Officers.

This issue comes before this Court as a matter of first impression. Delaware case law has yet to articulate a test to analyze oversight liability claims against non-director officers. Although Appellant argues for a less deferential standard of ordinary negligence, this argument, among other things, is unsupported by precedent in other jurisdictions and against the majority of legal commentary. This Court should adopt the test stated in *Stone* that applies to a director when reviewing a breach of fiduciary duty claim alleging oversight liability against an officer.

Under the test stated in *Stone*, oversight liability will arise if "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone*, 911 A.2d at 370 (referencing *Caremark*, 698 A.2d at 971).

The arguments and policy justifications that support applying the test stated in *Stone* to analyze oversight liability claims against officers are analogous in many respects to those

that support applying the deferential treatment of the business judgment rule to officer decisions. MO 27. *See, e.g.*, Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers And The Business Judgment Rule: A Reply To Professor Johnson*, 60 BUS. LAW 865, 865 (2005); STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 6.4, at 285-86 (2002); Charles Hansen, *The Business Judgment Rule: Is There Any Doubt It Applies To Officers?*, CORP., at 15 (Aspen Law & Bus. Sept. 1, 2001).

(a) Officers Directly Implement Board Policy

Officers are entrusted with the responsibility of implementing board policy. Placing a higher standard of liability on officers than directors will discourage undertaking risky but valuable corporate activities in order to avoid potential liability for oversight claims for activities that are unsuccessful. *See* Hamermesh, 60 BUS. LAW at 870-71. Officers will be encouraged to take unnecessary precautions that will increase costs and limit activity. *See id.* at 872. "[W]here an officer is simply attempting to implement board policy and exercise delegated corporate authority, imposing a more demanding standard of liability...seems unfair in that it would shift to officers the burden of legal liability for risk-taking activity that the directors themselves encouraged." *Id.*

(b) Courts Are Limited In Their Ability To Analyze Business Decisions

The courts' limited competence to analyze oversight activity of a director is equally limited to evaluate the same activity of an officer. The oversight activities of directors and officers overlap in many respects. As one scholar stated:

> given the typical involvement of both directors and officers, and the typical overlap of roles and communications, it is likely to be fiendishly complex for a court, let alone a jury, to sort out when and where any given defendant is acting (or failing to act) in a distinct capacity as a director or officer.

Id. Also, limiting judicial deference to officer activities will present the problems of hindsight bias, which are evident in this case. *See id.* If hindsight bias presents a sufficient concern to initially defer to a director's activities, these concerns should equally apply to officer activities. *See id.*

(c) Boards Delegate Authority To Officers

Managerial power of officers, including authority to oversee operations, comes from delegated authority from the board. Officers should receive the same deferential treatment accorded to directors for actions made within the scope of delegated authority. *See id.* at 875. If officers are not accorded the same deferential treatment as directors, officers will be encouraged to leave more authority in the hands of the board to limit potential liability. *See id.* This result would

"substantially impair the ability of the board of directors to delegate its decision-making authority to officers." *Id.*

(d) Other Jurisdictions And Authority Support Identical Standards

Other jurisdictions that have addressed similar issues have held that officer and director activities should be reviewed under the same standards. *See id.* at 868 (analyzing cases that have applied the business judgment rule to officers). It does not appear that any jurisdiction has held that officer activities should be reviewed under a different standard than directors. *See id.* at 868–69. This position is also supported by sources such as the ABA Committee on Corporate Laws, the American Law Institute, as well as other respected legal commentaries. *See* ABA Comm. on Corporate Laws, *Changes in the Model Business Corporation Act Pertaining to the Standards of Conduct for Officers; Inspection Rights and Notices—Final Adoption*, 54 BUS. LAW 1229, 1231 (1999); AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 cmt. a (1994). *See also* WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 1029-39 (1975); 2 MODEL BUS. CORP. ACT ANN. § 8.42 at 8-265 (3d ed. Supp. 1998/99).

An officer acting under delegated authority in furtherance of board policy should be given the same deferential treatment as directors. This Court should adopt the test stated in *Stone*

when reviewing claims alleging officer oversight liability.

2. Appellant Failed To State A Claim Against Officer Appellees For Breach Of Fiduciary Duty Alleging Oversight Liability.

This Court should affirm the Court of Chancery's order dismissing the Complaint for failure to state a claim against Officer Appellees. The same conclusory factual allegations alleged against Director Appellees are used against Officer Appellees. In reviewing the allegations against the Officer Appellees under the test stated in *Stone*, Appellant failed to allege specific facts that show Officer Appellees breached their fiduciary duty of loyalty by failing to act in good faith to fulfill managerial oversight responsibilities.

In applying the test stated in *Stone*, part (a) does not apply as Appellant admits in the Complaint that Securance implemented a compliance program as early as 2004, before Senior Managers committed fraud. Compl. ¶43. Part (b) of the two-pronged test requires a showing that Officer Appellees "consciously failed to monitor" Securance's operations. Part (b) emphasizes a lack of good faith as a predicate to liability in oversight cases. *Stone*, 911 A.2d at 369.

(a) Senior Managers' Fraud

Here, the Complaint contains a long discussion about fraud committed by three Senior Managers and the resulting harm to Securance. Compl. ¶33. All three Senior Managers admitted to

wrongdoing, pled guilty to commit fraud, resigned, and are currently serving prison sentences. *Id.* at ¶30. The Complaint states that after pleading guilty, the three Senior Managers stated they acted with express or implied support of certain unidentified officers. *Id.* at ¶31.

The Complaint makes conslusory allegations that the harm to Securance must be the result of a lack of good faith by Officer Appellees to oversee Securance's operations. *Id.* at ¶¶56-57. The Complaint fails to link any actions or inactions by the Officer Appellees to the harm committed by the Senior Managers. Once again "[w]ith the benefit of hindsight, the [appellant's] complaint seeks to equate a bad outcome with bad faith." *Stone*, 911 A.2d at 373.

(b) Incentive Compensation Plan And Consent Decrees

The Complaint alleges that the Incentive Compensation Plan, and the consent decrees, amounted to "red flags" that should have put Officer Appellees on notice. Compl. ¶59. However, as the Court of Chancery held below, incentive compensation plans do not create a presumption of likely fraud. MO 24. In addition, the consent decrees entered into in 2004 disavowed any admission of wrongdoing, and represented a mere fraction of Securance's net profits that year. Compl. ¶¶41-43; MO 25 (stating that the consent decrees resulted in fines of $200,000,

and that Securance earned net profits of $49 million in 2004).

(c) Improving Earnings

The Complaint alleges that Officer Appellees breached their fiduciary duties by failing to act with a critical eye in monitoring the reasons for Securance's increase in profits and stock price from 2005 through 2007. Compl. ¶58. However, as the Court of Chancery stated below, "the complaint contains no allegations that such dramatic improvements to business results were not explained or justified...by facially valid business reasons." MO 25.

The Complaint is based on a list of conclusory allegations. Conclusory allegations are insufficient to survive a motion to dismiss. *See Feldman*, 951 A.2d at 730 (citing *White*, 783 A.2d at 549). Appellant failed to allege specific facts necessary to draw a reasonable inference that Officer Appellees breached their duty of good faith and "consciously failed to monitor" Securance's Operations. *See Stone*, 911 A.2d at 369. Appellant failed to establish a link between the harm caused, and a breach of duty by Officer Appellees. This Court should affirm the Court of Chancery's order dismissing the Complaint against Officer Appellees for failure to state a claim under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Court of Chancery's order dismissing the Complaint for failure to adequately allege demand futility under Rule 23.1, and for failure to state a claim against the Officer Appellees under Rule 12(b)(6).

February 17, 2009

/s/ Firm X
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