SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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SYMBOL TECHNOLOGIES, INC.,	:	Appellate Division
Plaintiff-Appellant,	:	Docket No: 2008-06642
– against –	:	
DELOITTE & TOUCHE LLP,	:	
Defendant-Respondent.	:	

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MEMORANDUM OF LAW OF
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
IN SUPPORT OF ITS MOTION TO APPEAR AS AMICUS CURIAE
IN SUPPORT OF DEFENDANT-RESPONDENT'S MOTION
FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Lori A. Martin
Philip D. Anker
Alyshea Austern
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022
(212) 230-8800

Paul R.Q. Wolfson
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Attorneys for Securities Industry and Financial Markets Association

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INTRODUCTION

The Securities Industry and Financial Markets Associates ("SIFMA") respectfully submits this brief as *amicus curiae* in support of the Motion of Defendant-Respondent Deloitte & Touche LLP ("Deloitte"), for leave to appeal to the Court of Appeals from this Court's decision of October 27, 2009, insofar as this Court held that non-specific, formulaic claims that a corporate agent's actions should not be imputed to the corporation are sufficient to plead the narrow "adverse interest exception" to the *in pari delicto* defense. This Court's decision would have a far-reaching impact for SIFMA's members, who provide a broad range of financial services to companies. To the extent that the Court's decision can be read to mean that a company that ultimately suffers harm as a result of the misconduct of its own managers may look to third parties such as underwriters and banks, based on non-particularized assertions that the managers were self-interested, then the Court's decision will impose significant costs on companies, investors, and the economy at large, for it will require underwriters and banks to insure against this new cost of business.

New York law has long held that such litigation could not proceed except under very limited circumstances, where the plaintiff company could properly plead (and ultimately prove) facts establishing that the company insiders who perpetrated the fraud had not done so for the benefit of the company *at all*, but rather had acted *solely* to enrich themselves *at the expense* of the company—in other words, that they had sought to steal *from* the company and not *for* it. This Court's decision significantly undermines the forcefulness of New York's *in pari delicto* defense by allowing litigation to proceed against third parties whenever a plaintiff alleges in conclusory fashion that the company insiders acted out of self-interest. Moreover, the complaint in the instant case is somewhat typical of recent litigation, in which plaintiffs have alleged in rote fashion, and without any specific factual support, that corporate managers who engaged in wrongdoing were motivated by their desire to benefit themselves personally. If that is all that is required to survive a motion to dismiss, then the adverse interest exception (at least at the pleading stage) is anything but the narrow exception that the case law describes, and the cost of litigation such as this case will be considerable.

The need for clarification of the governing legal standards is underscored by the recent decision of the United States Court of Appeals for the Second Circuit to certify closely related legal questions to the New York Court of Appeals. *See Kirschner v. KMPG LLP*, No. 09-2020-cv, 2009 WL 4981206 (2d Cir. Dec. 23, 2009) (slip opinion attached as Exhibit C). *Kirschner*, like the instant case, involves allegations that third parties such as banks and auditors failed to prevent a fraud that senior management of a public company had committed to hide the corporation's financial losses from investors so that it could survive and raise more capital. The plaintiff in *Kirschner*, representing the interest of the bankrupt corporation, sued the banks and auditors, and, like Symbol here, sought to plead the adverse interest exception in order to defeat the imputation of the fraud committed by the corporation's insiders to the corporation itself. The district court in *Kirschner* dismissed the complaint, holding that the adverse interest exception did not apply as a matter of law because, as the complaint made clear, the managers—while no doubt motivated in part by desire to benefit personally through their stockholdings in the company—had sought to raise capital for the company, rather than to steal from it. On appeal, the Second Circuit certified several questions regarding the adverse interest exception to the New York Court of Appeals. Seeking an unequivocal statement by New York's highest court on the issue, the Second Circuit noted that "the recent frequency of insider misconduct in the corporate world underscores the virtue of using certification" to clarify New York law on the adverse interest exception. *Kirschner*, slip op. 17.

The *Kirschner* certification order thus recognizes the overarching importance of the legal issues presented in that case and in this one. Nonetheless, the Court of Appeals may well prefer to resolve those legal issues in a case such as this one, which would arrive at the Court of Appeals by the more customary route of direct appeal from the state appellate courts. *See Rufino v. United States*, 69 N.Y.2d 310, 312 (1987) (per curiam) (declining to accept certification from Second Circuit because "it is unquestionably preferable in the resolution of significant State law issues to secure the benefit afforded by our normal process—the considered deliberation and writing of our intermediate appellate court in a pending litigation"). *Kirschner*, moreover, arises in a distinctive context—a lawsuit brought by the trustee of a liquidating trust established in a federal court bankruptcy proceeding—and raises issues of standing that are particular to the federal courts. The instant case, by contrast, arises outside of the context of a federal bankruptcy proceeding, does not present standing issues, and raises issues central to disputes involving New York state law. Leave to appeal the instant case would provide the Court of Appeals with a complementary case to *Kirschner* and would give the Court of Appeals a comprehensive view of the circumstances in which the adverse interest exception is alleged to apply.

INTEREST OF PROPOSED AMICUS CURIAE

SIFMA brings together the shared interests of more than 600 securities firms, banks, and asset managers locally and globally through offices in New York, Washington, D.C., and London. SIFMA's mission is to champion policies and practices that benefit investors, issuers, expand and perfect global capital markets, and foster the development of new products and services. Fundamental to achieving this mission are earning, inspiring and upholding the public's trust in the industry and the markets.

SIFMA's members assist companies with the capital formation activity essential to economic growth, including the preparation and dissemination of prospectuses, the issuance of public offerings of securities, and the acquisition of appropriate equity and debt financing. SIFMA's members help raise capital for new companies, facilitate access for existing companies to working capital, execute trades for institutional and retail clients, and provide advice on such key transactions as acquisitions and divestitures. The breadth of participation by SIFMA members in the capital markets is significant. In 1999, for example, initial public offerings of securities totaled $69.1 billion.[1] In light of the breadth of their support of public companies, the proper application of the *in pari delicto* defense and the narrow "adverse interest" exception to that defense is of substantial importance to SIFMA's members.

Although SIFMA's members proceed with care and diligence when carrying out these functions, they cannot always detect misstatements or outright fraud by the companies that they are engaged to assist. Increasingly, companies like Symbol, which were dominated by individuals who used their company positions to cause their companies to make false statements to the marketplace, have brought litigation against SIFMA's members (or had claims asserted on their behalf by trustees and creditors), alleging that financial institutions engaged to assist the companies in financial transactions should have detected misstatements by their own company insiders. This kind of litigation represents an effort to shift responsibility for fraud away from the companies who employed the individuals directly responsible for the misrepresentations to third parties who were allegedly unable to detect the fraud perpetrated by company management.

Such litigation, if allowed to proceed, exacts considerable and unwarranted costs on the defendants and on the capital markets more generally. The high cost and high stakes of the litigation, if it is allowed to proceed past the pleading stage, inevitably places inordinate pressure on the third-party defendants to settle, even when they have confidence in the merits of their

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1 Arvin Ghosh, *The IPO Phenomenon in the 1990s*, 43 Soc. Sci. J. 487, 489 (2006).

defense. And by shifting the cost of corporate fraud away from the company whose management and senior employees were directly responsible for the misconduct to third parties such as SIFMA's members, this Court's decision will inevitably make capital formation and other valuable transactions less efficient, more costly, and less beneficial to the economy as a whole. Third parties such as banks, auditors, and lawyers facing the prospect of litigation such as that brought by Symbol will be increasingly chary of offering their services and will be compelled to charge increased fees in light of that increased risk—a development that would be anything but beneficial to investors, New York (or other) companies seeking to raise capital, or the economy generally.

ARGUMENT

I. THE ISSUES IN THIS CASE ARE RECURRING AND HAVE IMPORTANT IMPLICATIONS FOR THE RAISING OF CAPITAL

Recent years have seen a significant increase in litigation brought by companies implicated in financial fraud and other misconduct in which those companies allege that professional-services firms such as accounting firms, lawyers, and investment bankers should have detected the misconduct while it was being perpetrated by the company's own insiders.[2] The issues in many of those cases are governed by New York law, given New York's central role in financial markets. Even in cases pending outside the New York state courts, therefore, New York law will often govern whether such litigation can proceed.

In such cases, a critical issue is whether the misconduct of the company's insiders should be imputed to the company itself—in which case the rule of *in pari delicto* would prevent the

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[2] *See, e.g.*, *Cobalt Multifamily Investors I, LLC v. Shapiro*, No. Civ. 6468, 2009 WL 4408207 (S.D.N.Y. Dec. 1, 2009); *OHC Liquidation Trust v. Credit Suisse (In re Oakwood Homes Corp.)*, No. 08-4445, 2009 WL 4829835 (3d Cir. Dec. 16, 2009); *Kirschner v. KPMG LLP*, No. 09-2020-cv , 2009 WL 4981206 (2d Cir. Dec. 23, 2009) (certifying questions of law to the New York Court of Appeals).

company from shifting the costs to third-party providers of professional services. The Court of Appeals' decision in *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782 (1985), underscores how difficult it should be for a case seeking to shift costs to third parties in that fashion to proceed even past the pleading stage. In *Center*, the plaintiff contended that stock that was supposed to have been transferred to him had wrongfully been transferred instead to the defendant corporation. The defendant corporation, seeking to portray itself as a bona fide purchaser that bought the shares without knowledge of the plaintiff's claims, argued that the knowledge and actions of its agent, who might have been aware that the transfer to the corporation was wrongful, should not be imputed to the company. But the Court of Appeals firmly turned aside that contention, ruling that "[t]o come within the [adverse interest] exception, the agent must have *totally abandoned* his principal's interests and be acting *entirely* for his own or another's purposes. It cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal." *Id.* at 784-85 (emphasis added). The Court of Appeals also stressed that a litigant cannot avoid the fundamental agency-law principle of imputation through speculation and boilerplate assertion that the agent's true purpose was to enrich himself at the expense of the principal. The Court thus found insufficient "Defendants' moving papers [that] contain only conclusory allegations that [the attorney/agent] was seriously conflicted throughout these transactions and that he and [the original owner of the stock] tried to defraud the corporation." *Id.* at 785.

The decision in *Center* thus emphasized that the "adverse interest" exception is very narrow and that the requirements for pleading that exception are stringent. Nonetheless, courts outside the New York state court system have not applied the principles articulated in *Center* with complete consistency, suggesting that further clarification of the relevant legal principles is needed. The United States Court of Appeals for the Second Circuit, in particular, has had the lion's share of recent litigation involving efforts to invoke the adverse interest exception and has reached somewhat divergent results. In *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 119-20 (2d Cir. 1991), the Second Circuit, applying New York law, held that the trustee of a bankrupt corporation may not sue a third party for allegedly aiding and abetting a fraud committed by the company itself. The Second Circuit invoked the same principle to dismiss similar actions in *Mediators, Inc. v. Manney (In re Mediators, Inc.)*, 105 F.3d 822 (2d Cir. 1997), and *Breeden v. Kirkpatrick & Lockhart LLP (In re Bennett Funding Group, Inc.)*, 336 F.3d 94 (2d Cir. 2003). But in one case, the Second Circuit concluded that a complaint alleging that the corporate insiders had totally abandoned their company's interest was sufficient to survive dismissal, *see Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000), and in another case, the Second Circuit upheld, as not clearly erroneous, a bankruptcy court's factual finding that the corporate insiders' misconduct should not imputed to the corporation because the insiders were acting for their own interest and had totally abandoned that of the company for which they worked, *see Bankruptcy Servs., Inc. v. Ernst & Young (In re CBI Holding Co.)*, 529 F.3d 432 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1998 (2009).

Although amici believe that *Wight* and *CBI* are distinguishable from a case such as this one—where the complaint alleges nothing other than labels and conclusions in support of the plaintiff's contention that the corporate insiders totally abandoned the interests of their company—the Second Circuit has recently concluded that it would be "appropriate to seek authoritative guidance from the New York Court of Appeals" on the proper scope of the adverse interest exception to the *in pari delicto* defense, and, in particular, on whether a complaint had pleaded that exception in a manner sufficient to survive a motion to dismiss. *Kirschner*, slip op. 17; *see also id.* 18-19.

The Second Circuit's apparent conclusion that New York case law does not speak with precision to the scope of the adverse interest exception makes the need for clarification of the law by the New York Court of Appeals even more pressing. These issues frequently arise in federal bankruptcy proceedings, once the fraud perpetrated by the corporate insiders is discovered, earnings statements are restated, and investors lose confidence in the company that issued the false statements to the marketplace.[3] The bankruptcy courts (and, on appeal, the federal district and circuit courts) are obliged to follow state law in deciding whether a corporate insider's misdeeds should be imputed to his employer. *See Bennett Funding Group*, 336 F.3d at 100; *Mediators, Inc.*, 105 F.3d at 825. The Second Circuit's recent certification order does present one avenue by which the New York Court of Appeals might clarify the governing legal principles. Amici submit, however, that granting leave to appeal this case would provide the Court of Appeals with an alternative, and perhaps superior, vehicle for the needed clarification. In particular, the Second Circuit has addressed the *in pari delicto* issue in a context distinctive to the federal courts, namely, the limited standing of a bankruptcy trustee to sue. *See, e.g.*, *Wagoner*, 944 F.2d at 118. Although that "standing" question turns ultimately on state law, *see Bennett Funding Group*, 336 F.3d at 100; *Mediators, Inc.*, 105 F.3d at 825, the Court of Appeals

[3] Indeed, the majority of recent reported cases addressing the adverse interest exception under New York law are from, or originated in, federal bankruptcy courts. In addition to the Second Circuit cases discussed in the text, the issues have arisen in cases such as *Cobalt Multifamily Investors I, LLC* v. *Shapiro*, No. Civ. 6468, 2009 WL 4408207 (S.D.N.Y. Dec. 1, 2009); *O'Connell v. Arthur Andersen LLP (In re Alphastar Insurance Group Ltd.)*, 383 B.R. 231 (Bankr. S.D.N.Y. 2008); *Grubin v. Rattet (In re Food Management Group, LLC)*, 380 B.R. 677 (Bankr. S.D.N.Y. 2008); and *Official Committee of Unsecured Creditors of Grumman Olson Industries, Inc. v. McConnell (In re Grumman Olson Industries, Inc.)*, 329 B.R. 411 (Bankr. S.D.N.Y. 2005).

may prefer not to address the state-law issues in a context in which its decision would affect matters of standing of federal bankruptcy trustees or the jurisdiction of the *federal* courts. The instant case would present the issues in a more straightforward context—whether the plaintiff's complaint states a claim under New York state law—without any complications about the jurisdiction of coordinate courts.

Left unreviewed by the Court of Appeals, this Court's decision in *Symbol* will create unintended but significant impediments to the ability of companies—including those based in New York—to raise capital and engage in other beneficial economic transactions. Economists previously have documented that financial constraints increase the probability that companies will fail and that access to finance is critical to the survival of new firms.[4] To the extent that SIFMA's members face new and expansive litigation risk for assisting companies in raising needed revenue and providing other valuable financial services, SIFMA's members will have to increase the pricing of their services to issuers and the market. Self-insurance, of course, increases the cost of raising capital for new issuers and imposes greater costs on investors. In dramatic circumstances, SIFMA's members may have little choice but to refuse to assist some new firms in accessing the capital markets.

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4 Patrick Musso and Stefano Schiavo, *The Impact of Firm Financial Constraints on Firm Survival and Growth*, 18 J. Evol. Econ. 135, 136 (2008) ("First of all, we find that financial constraints significantly increase the probability of exiting the market. In addition, access to external financial resources has a positive effect on the growth of firms in terms of sales, capital stock and employment."); George Saridakis, et al., *New Small Firm Survival in England*, 35 Empirica 25, 32 (2008) ("We also found that firms, which reported being financially constrained in their first year of operation have less chances of survival.... [W]hat is clear is that access to finance is critical for the survival of new firms."); Philippe Aghion, et al., *Credit Constraints As a Barrier to the Entry and Post-Entry Growth of Firms*, Econ. Policy 731, 770 (Oct. 2007) ("[F]inance matters most for the entry of small firms, especially in sectors that are more dependent upon external finance. This should not come as a big surprise: small firms are those who face the largest financial constraints .... [O]ur findings also imply that finance helps improve the selection process by allowing small firms to compete on a more equal footing with large firms.").

II. THIS COURT'S DECISION DEPARTS FROM FUNDAMENTAL PRINCIPLES OF COMMERCIAL AND AGENCY LAW ON WHICH SIFMA'S MEMBERS RELY

This case arises at the intersection of two doctrines that are fundamental to commercial law: *in pari delicto* and the principal's responsibility for its agent's actions undertaken to carry out the principal's affairs. Those issues are also of fundamental importance to SIFMA's members, whose ability to enter into agreements that are beneficial to commercial activity and to the economy at large depends on stability and clarity in commercial law.

First, the doctrine of *in pari delicto* holds that a plaintiff who was a wrongdoer cannot recover against a defendant for assisting or failing to prevent the commission of the wrong when the plaintiff was itself at least equally at fault. *In pari delicto* reflects a deeply-seated principle of equity that the courts should not assist a wrongdoer in benefiting from its own wrong. *See Miltenberg & Samton, Inc. v. Mallor*, 1 A.D.2d 458, 461 (1st Dep't 1956). It also promotes deterrence of wrongdoing by making accountable those who should have been best situated to prevent the wrongdoing, rather than turning deep-pocketed third parties into insurers against fraudulent or other tortious conduct. *See Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 455-56 (7th Cir. 1982). Third-party professionals and other service providers such as SIFMA's members rely on this principle when they provide and price professional services to others, for they understand that the costs of their services will ordinarily not include the cost of paying their clients for their clients' own torts and frauds.

Also at issue in this case is the fundamental principle of agency law that a principal is responsible for the actions of its agent when the agent was employed to carry out the principal's affairs. *See generally Restatement (Second) of Agency* § 140 (1958). Virtually all significant commercial activity has this principle of agency law as its premise. Because all commercial firms act through agents, those who enter into contracts must be able to assume that their counterparties will be accountable for the conduct of those avowedly acting within the scope of their actual or apparent authority. Although agency law has long recognized exceptions to this principle, those exceptions have always been construed very narrowly, and properly so: a rule that allowed principals to escape responsibility for the conduct of their agents would make contracting—indeed, all commercial activity—extraordinarily cumbersome and expensive.

The "adverse interest" exception is a very narrow departure from the usual rule that an agent's actions are imputed to the principal. The exception reflects the judgment that, in highly extraordinary cases, it would be neither fair nor practicable to require a principal to be responsible for a faithless agent who has *totally abandoned* his principal's interests and acts, instead *entirely* for his own or another's purposes. *See Center*, 66 N.Y.2d at 784-85. A company that is being deceived and looted by its own employees may be effectively unable to prevent their fraud. By contrast, a company whose highest-level managers use their positions to commit fraud that benefits both themselves and the company (at least until the misconduct is discovered) has no equitable claim that would insulate it from accountability for the deception carried out in its name. Thus, the adverse interest exception does not apply where the agent committed tortious or fraudulent conduct that, at least in the short run, benefited (or, whether it succeeded or not, was intended to benefit) the principal, even if the agent also stood to (and desired to) benefit himself derivatively as an employee or shareholder of the company that took to benefit directly.

The principles articulated by the Court of Appeals in *Center* should be dispositive of this case. Although Symbol, much like the defendant in *Center*, makes "conclusory allegations" that the former Symbol insiders were "seriously conflicted" and "tried to defraud" Symbol, those assertions do not amount to a sufficient allegation that the insiders "totally abandoned" Symbol's interests and were acting "entirely" for their own purposes and to the detriment of Symbol's. *Cf. Center*, 66 N.Y.2d at 785-86. To the contrary, Symbol's complaint is replete with factual allegations that Symbol's interest and the insiders' interests were, at least in the short term, closely aligned, for they both stood to benefit from the company's falsified figures showing increased revenues and net earnings. *See* Compl. ¶ 16 (Symbol's fraudulent statements overstated the company's revenue and net earnings); *id.* ¶ 26 (insiders' bonuses were awarded "as *performance bonuses* based on the inflated and false financial results they created through their inflation of revenue and earnings results" (emphasis added)). Symbol benefited from those false statements when its stock price increased, and its insiders, whose bonuses were tied to Symbol's reported performance, benefited derivatively when they were awarded sizeable bonuses. This is thus not a case in which insiders looted or otherwise stole money or other property from the company, but rather a case in which they made misrepresentations, on the company's behalf, to third-party investors—the paradigmatic situation for application of *in pari delicto*. *See Bullmore v. Ernst & Young Cayman Islands*, 20 Misc. 3d 667 (Sup. Ct. 2008).

Leaving aside paragraphs in the complaint that merely recite the courts' statements of the law of the "adverse interest" exception (*e.g.*, Compl. ¶¶ 160-162, *quoted in Symbol Techs., Inc. v. Deloitte & Touche, LLP*, 888 N.Y.S.2d 538, 543 (App. Div. 2d Dep't 2009)), the only paragraph of the Complaint identified in this Court's opinion that even arguably alleges any facts pointing towards invocation of the exception is paragraph 26, where Symbol asserts that, during the relevant period, Symbol insiders "'engaged in actions to defraud [Symbol] of over $100 million in monetary and stock option bonuses awarded to them as performance bonuses based on the inflated and false financial results they created through their inflation of revenue and earning results.'" *Symbol*, 888 N.Y.S.2d at 543 (quoting Compl. ¶ 26). But as was true in *Center*, this allegation amounts to nothing more than an assertion that the insiders had a conflict of interest—that they were using their corporate position in part to benefit themselves. The allegation that corporate insiders orchestrated bonuses for themselves by inflating their company's reported results does not establish that the insiders acted *solely* for themselves or that they acted at the *expense* of their employer; rather, it is entirely consistent with the conclusion that the company's and the insiders' interests were congruent—albeit both fraudulent. The cooking of Symbol's books benefitted, at least in the short run, both the managers (who obtained larger bonuses) and the company (which was able to raise more capital). *Center* makes clear that much more is required for application of the adverse interest exception—at a minimum, specific factual allegations demonstrating that the insiders sought to steal from the company's coffers rather than to deceive third-party investors—and that Symbol's pleading is not sufficient to withstand a motion to dismiss. *See also Grubin v. Rattet (In re Food Management Group, LLC)*, 380 B.R. 677, 696 (Bankr. S.D.N.Y. 2008) ("The exception does not apply simply because the agent has a conflict of interest or does not act primarily for his principal.").

This Court's decision warrants review by the Court of Appeals because it suggests that normal agency rules of imputation do not apply when the agent and principal *both* stand to benefit from the agent's wrongdoing, and indeed when the agent's benefit (here, increased bonuses) is derivative of the principal's benefit (here, inflated reported performance results and increased share prices). That ruling departs from the Court of Appeals' articulation of agency law principles in *Center*, and the Court of Appeals should decide whether such a significant innovation in New York's law of agency is warranted. Review by the Court of Appeals is all the more necessary because, as Deloitte has explained, the First Department has adhered much more closely to the decision in *Center*, ruling that, under the principle of *in pari delicto*, a company cannot sue based on fraud caused by its own insiders where that fraud has benefited the company to any degree. *See 546-552 W. 146th St. LLC v. Arfa*, 54 A.D.3d 543 (1st Dep't 2008); *see also Bullmore*, 20 Misc. 3d at 672 ("[W]here a corporation benefits to any extent from the alleged wrongful acts of its agents, the agents cannot be said to have 'totally' abandoned the corporation's interests.").

III. NON-PARTICULARIZED, FORMULAIC PLEADING OF THE ELEMENTS OF THE ADVERSE INTEREST EXCEPTION SHOULD BE INSUFFICIENT TO DEFEAT A MOTION TO DISMISS

From the perspective of SIFMA's members, a particularly troubling aspect of this Court's decision is that it allows Symbol to proceed on its complaint in the absence of specific allegations to support the assertion that Symbol's insiders acted entirely contrary to Symbol's interests in carrying out the fraud (and, indeed, pleads specific facts that undermine such a contention). The entirety of the allegations relevant to the adverse interest exception are found in four paragraphs in Section IV of the Complaint (¶¶ 158-162). For example, paragraph 160 of the Complaint alleges that "[t]he Identified Managers' actions in inflating Symbol's reported revenues and in manipulating Symbol's earnings and earnings per share were not in the interest of the Company and were done solely to advance the personal interests of the Identified Managers and for their personal financial benefit." Similarly, paragraph 161 recites that "[t]he misconduct of the Identified Managers was entirely outside the scope of their employment, and in enriching themselves at the expense of the Company the Identified Managers had totally abandoned the interests of the Company." And paragraph 162 states that "[t]he misconduct of the Identified Managers did not inure to the benefit of the Company but instead harmed the Company."

These boilerplate allegations are not well-pleaded facts but are simply formulaic recitations of the elements of the adverse interest exception, deployed to echo the courts' decisions articulating the legal standards governing the exception. *Compare, e.g.*, *Center*, 66 N.Y.2d at 785, *with Symbol*, 888 N.Y.S.2d at 543 (ruling that "[t]he adverse interest exception applies only when the agent has 'totally abandoned' the principal's interests"). As such, these allegations should not be presumed as true for the purpose of adjudicating Deloitte's motion to dismiss. As the New York courts have held on many occasions, while a court must accept well-pleaded facts alleged in a complaint as true on a motion to dismiss, "a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence." *Ozdemir v. Caithness Corp.*, 285 A.D.2d 961, 963 (3d Dep't 2001); *see also Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999) (same); *Doherty v. N.Y. Tel. Co*, 202 A.D.2d 627, 628 (2d Dep't 1994) (affirming dismissal of defamation complaint because "the alleged defamatory statements were clearly entitled to a qualified privilege, which is not overcome by the plaintiff's conclusory allegations that the statements were published with actual malice").

When there is a substantial question regarding the sufficiency of a pleading, "such question should be resolved at the threshold in order to obviate the possibility of needless time consuming litigation." *Sharapata v. Town of Islip*, 82 A.D.2d 350, 362 (2d Dep't 1981) (rejecting proposed amendments to the pleadings).

The United States Supreme Court has applied similar prudential concerns to its interpretation of the Federal Rules of Civil Procedures. In the federal context, for example, the Supreme Court has explained that even though well-pleaded *facts* must be accepted as true, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and brackets omitted).

Here, the allegations in paragraphs 158-162 provide nothing more than "labels and conclusions," and the rest of the Complaint pleads no underlying facts that would support (for example) Symbol's bald assertion that "the Identified Managers had totally abandoned the interests of the Company." Compl. ¶ 161. To the contrary, the Complaint pleads facts that contradict that assertion and support a conclusion that the insiders' actions promoted both their own interests and that of the company. The Complaint alleges, for example, that Symbol's fraudulent statements substantially overstated the company's revenue and net earnings (*id.* ¶ 16), and that the insiders' bonuses were awarded "as *performance bonuses* based on the inflated and false financial results they created through their inflation of revenue and earnings results" (*id.* ¶ 26 (emphasis added)). In other words, the Complaint itself alleges that the insiders reaped their personal benefit of increased bonuses as a byproduct of the benefit they achieved for the firm (its increased ability to raise capital from third-party investors) by reporting overstated revenues and earnings, and not, for example, by acting in a way that could only have harmed the firm and benefitted themselves at its expense (for example, by skimming cash that should have been included as firm revenues but instead was diverted to their personal account, *see Prudential-Bache Sec., Inc. v. Citibank, N.A.*, 73 N.Y.2d 263 (1989)).

The adverse interest exception likewise cannot be invoked merely by alleging, as Symbol has done here, that the managers were motivated by self-interest or that the misconduct of the managers did not "inure to the benefit of the" corporation. *See* Compl. ¶ 162. Very few corporate managers are entirely altruistic. Like virtually all persons, they are motivated, at least in part, by the desire to benefit personally. If all that is required to plead the adverse interest exception is the statement that the managers sought to perpetrate a corporate fraud out of self-interest, then the adverse interest exception will be anything but the "narrow" exception to the general rule of imputation, applicable only where the insiders have engaged in a "total abandon[ment]" (*Center*, 66 N.Y.2d at 785) of the corporation's interests that *Center* and other New York cases state it is meant to be.

To allow a case to go forward to discovery based on such a bare-bones and defective pleading is to overlook the enormous costs that are inherent in modern-day litigation—costs that may well induce a defendant to settle a case despite its lack of merit. *See Sharapata*, 82 A.D.2d at 362; *cf. Twombly*, 550 U.S. at 557-58 (stressing the need for a complaint to show more than "the mere possibility" of establishing an essential element of a claim, "lest a plaintiff with a largely groundless claim" be allowed to consume massive resources and induce a settlement to avoid those costs (internal quotation marks omitted)). In the experience of SIFMA's members, the costs of litigating a malpractice or fiduciary-duty case such as this one may well run into the tens of millions of dollars, even where the case is eventually dismissed on a motion for summary judgment because the company's agents were working on behalf of the company—an expense that represents a deadweight loss to investors, corporations seeking to raise capital, and society at large.

Thus, whether Symbol's complaint sufficiently pleads the adverse-interest exception has implications well beyond the dispute between the parties to this particular case. That question holds great significance for the broad array of firms represented by SIFMA, many of which are located in New York, which raise capital for or otherwise provide services to New York companies, or which enter into professional-services contracts governed by New York law, and which may well find themselves named as a defendant after previously undetected corporate malfeasance is exposed. Given the increasing incidence of litigation against professional-services firms arising out of corporate misstatements to the market, the Court of Appeals should be afforded the opportunity to clarify the circumstances under which such firms may be subject to suit when the misstatements were made by, and with the full knowledge of, corporate insiders with the purpose and effect of inflating reported corporate revenues and net earnings.

CONCLUSION

The Court should grant the Motion to Appear as Amicus Curiae in Support of Defendant-Respondent's Motion for Leave to Appeal, and should also grant Defendant-Respondent's Motion for Leave to Appeal.

Respectfully submitted,

Lori A. Martin

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Lori A. Martin
Philip D. Anker
Alyshea Austern
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022
(212) 230-8800

Paul R.Q. Wolfson
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Attorneys for Securities Industry and Financial Markets Association