RICHARD STRUB, *et al.*	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
COLE HOLDINGS CORPORATION, *et al.*	*	BALTIMORE CITY
Defendants.	*	Case No.: 24-C-13-001563

* * * * * * * * * * * *

MEMORANDUM OPINION

I. INTRODUCTION

This putative class action shareholder litigation stems from a merger (the "Merger") between a wholly owned subsidiary of Cole Credit Property Trust III, Inc. ("CCPT III" or the "Company"), a real estate investment trust ("REIT"), and Cole Holdings Corporation, a real estate investment management firm. The class of Plaintiffs includes Sandra Leahman, The Sandra Leahman Irrevocable Trust, Gloria P. Scaffer, Marcia Scheuner, Rosemarie Schirrmacher, Richard Strub, Gaye Fortner Villerreal, Cheryl Vortner, and Dennis Weiss. Plaintiffs' Consolidated Amended Complaint ("Consolidated Complaint") names CCPT III as a nominal defendant. The Consolidated Complaint further names as defendants the five members of the CCPT III Board of Directors, Christopher H. Cole, Marc T. Nemer, Thomas A. Andruskevich, Scott P. Sealy, and Leonard W. Wood (collectively, the "Individual Defendants," the "Board of Directors" or the "Board") as defendants. The final group of defendants includes Cole Capital Advisors, Inc., Equity Fund Advisors, Inc., Cole Capital Corporation, Cole Realty Advisors, Inc. (Collectively, the "Cole Holdings Entities") and Cole Holdings Corporation ("Cole Holdings"), Cole REIT Advisors III, LLC ("CR III Advisors") and CREInvestments, LLC ("CREInvestments").

Defendants have filed a Motion to Dismiss the Consolidated Amended Complaint, which is now before the Court. For the following reasons, the Court grants Defendants' Motion and dismisses Plaintiffs' Consolidated Complaint with prejudice.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts set forth in this Opinion are as alleged in Plaintiffs' Consolidated Amended Complaint and as stated in the CCPT III March 5, 2013 Form 8-K, filed with the United States Securities and Exchange Commission ("SEC").[1] [2]

a. The Entities And Persons Involved

The aforementioned REIT and nominal defendant, CCPT III is a Maryland corporation with its principal place of business in Arizona. CCPT III owns a diverse portfolio of commercial real estate, including single and multi-tenant retail properties, as well as single-tenant office properties throughout the United States. The Company leases a portion of its real estate portfolio to well-known commercial vendors such as Albertson's, Kohl's, L.A. Fitness, and Walgreens. CCPT III has no paid employees and, prior to the Merger, was managed externally by CR III Advisors. CCPT III held its initial public offering on September 30, 2012. Although the Company was not listed on a public exchange when Plaintiffs initiated this action, it had

[1] During the August 15, 2013 hearing before this Court, Defendants asked the Court to take judicial notice of the March 5, 2013 Form 8-K, which also appears as Exhibit 1 of Defendants' Motion to Dismiss. As Judge Berger noted in *In re Nationwide Health Properties, Inc.*, 2011 WL 10603183 (Md. Cir. Ct. 2011), "A court may take judicial notice of 'additional facts that are either matters of common knowledge or capable of certain verification.'" *Id.* at *1, n. 4 (*quoting Faya v. Almaraz*, 329 Md. 435, 444 (1993)). Because this Form 8-K represents a document accepted by the SEC and is of public record, this Court takes judicial notice of the facts it includes.

[2] This summary of the Case's factual background also includes undisputed factual representations Defendants present in their Motion to Dismiss and that Plaintiffs present in their Motion in Opposition filed thereto, but only to the extent those facts are undisputed and consistent with the well-pleaded allegations of Plaintiff's Consolidated Complaint and the CCPT III March 5, 2013 Form 8-K.

instituted a share redemption program. CREInvestments, a Maryland limited liability company, is a wholly owned subsidiary of CCPT III. Cole Holdings was a real estate investment management firm that, prior to its merger with CREInvestments, managed real estate assets through its subsidiary, CR III Advisors.

At the time of the Merger, CCPT III had five members on its Board of Directors: Defendants Christopher Cole, Marc Nemer, Thomas Andruskevich, Scott Sealy, and Leonard Wood. Defendant Christopher Cole has served as the Chairman of the Board, Chief Executive Officer, and President of CCPT III from the time of the Company's founding in January 2008. Before the Merger, Defendant Christopher Cole was also the sole owner of Cole Holdings. Defendant Christopher Cole further served as the chief executive Officer of Defendant CR III Advisors until the entity's parent company, Cole Holdings, merged with CREInvestments.

Defendant Marc Nemer is the President and Chief Executive Officer of CCPT III. Defendant Nemer also served as the chief executive officer of Cole Holdings from June 2011 until the Merger, and as the president of Cole Holdings from April 2010 until the Merger. At various times Defendant Nemer further served as an executive officer, the president, and the executive vice president and managing director of capital markets for Defendant CR III Advisors. Plaintiffs' Consolidated Complaint lists the numerous other positions Defendant Nemer has held with various Cole Holdings Entities.

Because Defendants Cole and Nemer held positions with both CCPT III and Cole Holdings at the time of the Merger, the other three members of the CCPT III Board, Defendants Andruskevich, Sealy, and Wood, comprised a "Special Committee" appointed by the CCPT III Board of Directors to review the Merger between CREInvestments and Cole Holdings. The Special Committee was also charged with evaluating a series of offers made by a competing

REIT to purchase CCPT III. After the Merger between CREInvestments and Cole Holdings closed, Defendants Sealy and Wood resigned from their positions as Directors for Cole Credit Property Trust IV and Cole Corporate Income Trust, Inc.

b. The Merger between Cole Holdings And CREInvestments

On March 5, 2013, the CCPT III Board of Directors announced in its Form 8-K that its wholly owned subsidiary, CREInvestments, would merge with Cole Holdings. The Form 8-K captions the Merger as a "transformational transaction" that CCPT III expected to combine "a leading real estate investment management firm with tremendous growth potential with CCPT III's highly attractive real estate investment portfolio." *Cole Credit Property Trust III, Inc. March 5, 2013 Form 8-K, Exhibit 99.1.* According to the Form 8-K, CCPT III also expected the Merger to close in either April or May of 2013. Further through its Form 8-K, CCPT III announced plans to pursue a listing of its common stock on the New York Stock Exchange following its annual shareholder meeting, scheduled to begin on June 19, 2013.

Under the terms of the Merger, CCPT III was to acquire Cole Holdings and change its name to Cole Real Estate Investments, Inc. In turn, CCPT III agreed to pay $20 million in cash and deliver 10,711,225 shares of its common stock to Defendant Cole Holdings upon the Merger's completion. Plaintiffs' Consolidated Complaint further identifies and explains the "Contingent Consideration," the "Listing Consideration," and the "Incentive Consideration" attached to the Merger. Pltfs.' Cons. Amend. Compl. 25 and 26.

Following the announcement of the Merger, the three-person CCPT III Special Committee comprised of Defendants Andruskevich, Sealy, and Wood reviewed the deal's proposed terms. Defendants Christopher Cole and Marc Nemer, who also served as executives for CR III Advisors, abstained from the Special Committee's review of the Merger. Further,

because the Merger involved the CCPT III subsidiary CREInvestments but not CCPT III itself, CCPT III shareholders were not given the opportunity to review Cole Holding's financials, or vote to approve the Merger.

After completing its review, the Special Committee unanimously recommended approval of the Merger to the full CCPT III Board of Directors. On April 5, 2013, the Merger closed and CCPT III, through its surviving subsidiary, CREInvestments, internalized Cole Holdings. CCPT III described the Merger as a unique opportunity that would "yield substantial financial benefits to CCPT III stockholders," because the Company expected "to achieve significant overhead cost savings over time while also benefiting from new income streams." Pltfs.' Cons. Amend. Compl. 41.

Between the Company's March 6, 2013 announcement of the Merger and the deal's April 5, 2013 close, a competitor of CCPT III, American Realty Capital Properties, Inc. ("ARCP") announced publicly its proposal to buy CCPT III. This initial offer was made by ARCP on March 20, 2013. ARCP revised its purchase proposal on March 27, 2013, and again on April 2, 2013. The three-member CCPT III Special Committee reviewed and rejected each of these ARCP purchase proposals.

c. Plaintiffs' Consolidated Amended Class Action And Derivative Complaint

On March 20, 2013, Plaintiff Richard Strub filed a Complaint in the Circuit Court for Baltimore City on behalf of himself and the putative class of all public CCPT III shareholders against the abovementioned Defendants. Plaintiff Strub opposed the Merger and sued to prevent CCPT III from internalizing Cole Holdings. Two similar complaints were filed shortly thereafter in this Court and were docketed as Case Nos. 24-C-13-001461 and 24-C-13-001643. On May 8,

2013, and in response to this Court's May 7, 2013 Order consolidating the three pending cases, Plaintiffs filed the Consolidated Complaint.

Plaintiffs allege in their Consolidated Complaint that that Defendants, through their participation in the Merger, breached their fiduciary duties, aided and abetted the breach of those fiduciary duties, received unjust enrichment, committed corporate waste, breached the CCPT III Charter and advisory agreement, and breached the duty of candor. Under these counts, Plaintiffs seek (i) injunctive relief that would delay the June 19, 2013 shareholder vote until Defendants fully disclose details of the Merger, (ii) compensatory damages together with pre- and post-judgment interest, and (iii) rescissory damages for the losses and damages Plaintiffs allege to have sustained.

d. Defendants' Motion To Dismiss The Consolidated Amended Complaint

On June 7, 2013, Defendants CCPT III, its Board of Directors, Cole Holdings, the Cole Holdings Entities, CR III Advisors, and CREInvestments filed their Motion to Dismiss Plaintiffs' Consolidated Complaint. In their Motion, Defendants present four arguments as to why dismissal of the Consolidated Complaint is proper. These four arguments include (i) Plaintiffs' failure to demand review from the CCPT Board of Directors, (ii) Plaintiffs' failure to overcome the business judgment rule, (iii) Plaintiff's failure to plead any cognizable direct claim for the breach of the duty of candor, and (iv) Plaintiffs' failure to plead any cognizable claim against CR III Advisors, Cole Holdings, CREInvestments, or the Cole Holdings Entities. Following the August 20, 2013 hearing, this Court held Defendants' Motion to Dismiss sub curia to consider the arguments presented by counsel.

III. STANDARD OF REVIEW

In considering Defendants Motion to Dismiss under *Maryland Rule 2-322(b)(2)*, this Court's review is limited to the well-pleaded, relevant and material facts found within the four corners of Plaintiffs' Consolidated Complaint. *Waserman v. Kay*, 197 Md. App. 586, 607 (2011) (*citing Pittway Corp. v. Collins*, 409 Md. 218, 234 (2009)). The Court must conduct such review without making any findings of fact on its own. *Young v. Medlantic Lab. P'ship*, 125 Md. App. 299, (1999). The Court will not consider any included affidavits of fact, as such consideration "will operate to convert a motion to dismiss into a motion for summary judgment." *Worsham v. Ehrlich*, 181 Md. App. 711, 723 (2008). Instead, the Court must assume the truth of those facts included in the Consolidated Complaint and all reasonable inferences drawn therefrom in a light most favorable to Plaintiffs. *Bobo v. State*, 346 Md. 706, 708 (1997).

When considering a motion to dismiss, this Court is mindful that the facts comprising the Consolidated Complaint "must be pleaded with sufficient specificity." *Id*. "Bald assertions and conclusory statements by the pleader will not suffice." *Id*. at 708-09. "Further, while the words of a pleading will be given reasonable construction, when a pleading is doubtful and ambiguous it will be construed most strongly against the pleader[.]" *Id*. at 709. Dismissal is therefore proper if the allegations included in Plaintiffs' Consolidated Complaint and the permissible inferences drawn therefrom do not facially disclose a legally sufficient cause of action. *Lubore v. RPM Assoc.*, 109 Md. App. 312, 322 (1996), *cert. denied*, 343 Md. 565 (1996).

IV. ANALYSIS

Defendants, in their Motion to Dismiss, argue that Plaintiffs "have neither a legal right nor a justifiable cause to bring this litigation" because the Merger involved "a straightforward corporate acquisition negotiated and approved by a special committee of independent directors comprising a majority of the Board[.]" Defs.' Mem Supp. Mot. Dismiss 1. Defendants argue

that the Consolidated Complaint should be dismissed because Plaintiffs' failed to make a demand on the Board. Two subparts comprise this initial argument for dismissal: First, Defendants argue that Plaintiffs' claims are all derivative and that none are direct. Second, Defendants argue that Plaintiffs have not adequately alleged that the futility exception to the pre-suit demand requirement applies. Defs.' Mem Supp. Mot. Dismiss 10 and 15.

a. Plaintiffs' Allegation That A Pre-Suit Demand Would Have Been Futile

Plaintiffs argue in response to Defendants that the Consolidated Complaint sufficiently alleges both derivative and direct claims. In their Opposition to Defendants' Motion to Dismiss, Plaintiffs assert that their direct claims arose from

> Defendants' breach of fiduciary duties owned to the shareholders contractually under the Charter and under Maryland law with respect to (i) the Merger, (ii) the rejection of the ARCP proposals without the required due diligence, and (iii) the material misstatements and missions in the Proxy.

Pltfs.' Mem. Opp. Defs.' Mem Supp. Mot. Dismiss 22. Under the first of these reasons, Plaintiffs argue that the economic impact felt from the issuance of CCPT III stock to Christopher Cole, pursuant to the Merger's terms, constituted a direct harm to CCPT III shareholders. *Id*. at 23. Second, Plaintiffs allege to have suffered injuries directly from the Board's failure to conduct sufficient due diligence before rejecting the ARCP purchase offers. *Id*. at 25.

i. Derivative versus Direct Claims

Although Plaintiffs have alleged to plead Counts I, II, VII, and VIII of their Consolidated Complaint directly as opposed to derivatively, and have alleged to plead Counts V and VI both directly *and* derivatively, this Court notes the directives issued by the Court of Special Appeals in *Paskowitz v. Wohistadter*, 151 Md. App. 1 (2003): "Whether a claim is derivative or direct is not a function of the label the plaintiff gives it." *Id*. at 10. "Rather, the nature of the action is determined from the body of the complaint." *Id*. The Court of Special Appeals in *Paskowitz*

further clarified that "[w]hen a shareholder's complaint states a cause of action that is both direct and derivative, the shareholder may proceed with the direct action." *Id*.

The difference between derivative and direct claims exists in the type of injuries plaintiffs allege to have sustained. As Defendants note, Maryland law provides that a shareholder "may bring a direct action against the corporation, its officers, directors, and other shareholders to enforce a right that is personal to him." *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672, (2007). A direct action therefore requires the shareholder to "allege that he has suffered an injury that is *separate and distinct* from any injury suffered either directly by the corporation or derivatively by the stockholder because of the injury to the corporation." *Id*. (internal citation omitted) (emphasis added). The Court of Special Appeals has described a direct claim as one in which the plaintiff has suffered a "special injury," or an injury "involving a contractual right of a shareholder[.]" *Paskowitz*, 151 Md. App. at 9-10 (internal citations omitted).

In comparison, a derivative claim is one "asserted by a shareholder plaintiff on behalf of the corporation to redress a wrong against the corporation." *Id*. at 9. "The action is 'derivative because it is brought for the benefit of the corporation, not for the shareholder plaintiff.'" *Id*. (*quoting Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348, 351 (Del. 1988)). For these reasons, the shareholder in a derivative claim is only a nominal plaintiff, and the substantive claim belongs to the corporation. *Werbowsky*, 362 Md. at 599.

The Court finds that Plaintiffs' Consolidated Complaint includes only derivative claims. Although Plaintiffs assert in their Opposition to Defendants' Motion to Dismiss that Defendants' actions caused direct harm to the class of plaintiff-shareholders, the Consolidated Complaint does not articulate how the Merger directly harmed Plaintiffs separately and distinctly from the alleged harm it caused CCPT III to suffer. *Paskowitz*, 151 Md. at 10; *Mona*, 176 Md. App. at

697. The Court instead finds that the diminished value of CCPT III represents the body of Plaintiffs' Consolidated Complaint, which Plaintiffs allege to have resulted from the Company's overpayment for Cole Holdings and the CCPT III Board's failure to evaluate the ARCP purchase offers sufficiently**.** *Paskowitz*, 151 Md. App. at 10. Support for this Court's finding comes from several instances within Plaintiffs' Consolidated Complaint, which identify "CCPT III and its shareholders" as the combined victims of CCPT III's diminished value**.** Pltfs.' Cons. Amend. Compl. at 4 ("Defendants rejected ARCP without any serious efforts to negotiate with ARCP, to the detriment of the *CCPT III and its shareholders*. . . . [T]he one certainty is that Defendants, at the expense of *CCPT III and its shareholders,* have lined their pockets and preserved their corporate positions"), 5 ("*CCPT III and its shareholders* are not receiving fair or equivalent value in exchange for the exorbitant cost of the Merger."), 6 ("[I]n pursuing and consummating the Merger, CCPT III's Officers, Board of Directors and Advisor utterly failed in their contractual and fiduciary obligations to consider or explore whether there was a less costly, more desirable, alternative for *CCPT III and its shareholders*[.]"), and 7 ("CCPT III's Board of Directors, Cole Holdings and CR III Advisors failed to demonstrate any basis as to why and how the Merger and the amount of the Merger consideration are justified or fair to *CCPT III and its shareholders*, and are not an utter waste of corporate assets.") (emphasis added in each citation). At no point, however, does the Consolidated Complaint specify the harm suffered by Plaintiffs separately and distinct from either the harm suffered directly by CCPT III or derivatively by the stockholders of CCPT III. Plaintiffs' Consolidated Complaint, in its entirety, is therefore derivative.

ii. The Demand/Futility Rule

Before commencing a derivative action, a shareholder, in most cases, must first make written demand upon the corporation's board of directors to "act directly and explain to the court why such effort either was not made or did not succeed." *Werbowsky*, 362 Md. at 619. This demand requirement enables the board of directors to re-examine and possibly correct the act complained of, before devoting the time and expense necessary to defend the act in court. *Id*. at 613. An exception to this demand requirement exists where:

> the allegations or evidence clearly demonstrate, in a very particular manner, either that (1) a demand, or a delay in awaiting a response to a demand would cause irreparable harm to the corporation, or (2) a majority of the directors are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule.

Id. at 620. Plaintiffs admit that no demand was made on the CCPT III Board before commencing this action, and proceed under the second tenet of *Werbowsky*, asserting specifically that demand would have been useless because

> a majority of the Director Defendants were so personally conflicted and committed to the completion of the Merger that they could not reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule.

Pltfs.' Cons. Amend. Compl. 46. To succeed in this argument, Plaintiffs' Consolidated Complaint must identify "clearly," and in "a very particular manner" the personal and direct conflicts of three of the five CCPT III Board members. *Werbowsky*, 362 Md. at 620.

As part of this conflicted majority, Plaintiffs' Consolidated Complaint alleges that Defendants Cole and Nemer "have and will receive hundreds of millions of dollars' worth of consideration from the Merger and Employment Agreements." Pltfs.' Cons. Amend. Compl. 49. "As a result," Plaintiffs continue, Defendants Cole and Nemer "are so personally conflicted by the financial gain they derive from the Merger that they cannot reasonably be expected to

respond to a demand[.]" *Id*. In support of this allegation, Plaintiffs list in their Consolidated Complaint the various executive positions Defendants Cole and Nemer have occupied. Pltfs.' Cons. Amend. Compl.15 and 16.

As to Defendants Andruskevich, Sealy, and Wood, Plaintiffs allege that demand would have similarly been futile because the Merger ensured that each member of the Special Committee would maintain their CCPT III directorship, permitting them to "continue to earn hundreds of thousands of dollars in fees." Pltfs.' Cons. Amend. Compl. 49 and 50. Plaintiffs further cite to the fact that Defendants Sealy and Wood also held positions as Directors for another Christopher Cole-founded REIT while considering the Merger in March 2013. Plaintiffs acknowledge, however, that Defendants Sealy and Wood resigned from the Board positions when the Cole Holdings-CREInvestments Merger closed.

To buttress their futility argument levied against the CCPT III Board, Plaintiffs identify § 9.1(g) of the Merger Agreement, which required the CCPT III Board to use its "reasonable best efforts to contest and resist" litigation "challenging any transaction contemplated" by the Merger Agreement. Additionally, Plaintiffs claim demand would have been futile because the Board's commitment to the Merger remained intact even after (i) the filing of the initial complaints in this litigation, (ii) ARCP's efforts to purchase CCPT III, and (iii) "the uniform condemnation of the proposed Merger by the financial and investment community." Pltfs.' Cons. Amend. Compl. 47 and 48. Plaintiffs allege that these "clarion calls" were overlooked because of the personal financial benefits Defendants Andruskevich, Sealy, and Wood stood to retain as CCPT III Board members by approving the Merger, and the personal financial benefits Defendants Cole and Nemer stood to receive from the Merger's Completion.

In their Motion to Dismiss, Defendants argue that Plaintiffs have failed to plead futility. Relying on *Werbowsky* and *Sekuk Global Enters. Profit Sharing Plan v. Kevenides*, Defendants allege that Plaintiffs' Consolidated Complaint fails to allege clearly and particularly that a majority of the CCPT III Board, *i.e.* at least one member of the Special Committee together with Defendants Cole and Nemer, were personally and directly conflicted. 362 Md. at 620; 2004 WL 1982508 (Md. Cir. Ct. May 25, 2004). Defendants refute Plaintiff's argument that any member of the Special Committee was personally and directly conflicted because the Merger ensured their retention of directorship positions and the earnings such positions provided, stating Plaintiffs "do not support this allegation with any detail other than the amount of fees that the Independent Directors received for their service on the Board[,]" an argument that, according to Defendants, the Court of Appeals rejected in *Werbowsky* under similar facts. Defs.' Mem Supp. Mot. Dismiss 19 (*citing* 362 Md. at 618).

Defendants also argue that § 9.1(g) of the Merger Agreement "could not operate to prevent the directors from appropriately fulfilling their fiduciary duties [which] trump contractual rights when the two conflict." Defs.' Mem Supp. Mot. Dismiss 18 (*citing In re Topps Co. S'holder Litig.*, 926 A.2d 58, 88 n.25 (Del. Ch. 2007)). Finally, Defendants assert that this Court should eschew consideration of ARCP's purchase offers at this stage of the Case because such consideration effectively "goes to the merits of the lawsuit – the exercise of care by the directors – not futility." Defs.' Mem Supp. Mot. Dismiss 19 (*citing Weinberg ex rel. BioMed Realty Trust, Inc. v. Gold*, 838 F. Supp. 2d 355, 361 (D. Md. 2012); *Sekuk Global*, 2004 WL 1982508 at *3).

As stated, Plaintiff's futility argument requires this Court to find within the Consolidated Complaint that a majority of the Board was both personally and directly conflicted with the

Merger, and therefore that a demand on the CCPT III Board would have been futile. In *Werbowsky*, the Court of Appeals held that it was

> not willing to excuse the failure to make demand simply because a majority of the directors approved or participated in some way in the challenged transaction or decision, or on the basis of generalized or speculative allegations that they are conflicted or are controlled by other conflicted persons, or because they are paid well for their services as directors, were chosen as directors at the behest of controlling stockholders, or would be hostile to the action.

362 Md. at 618. Under this holding, and in a light most favorable to Plaintiffs, the Court finds that the Consolidated Complaint properly sets forth with sufficient specificity, and in a clear and particular manner, how Defendants Cole and Nemer were personally and directly conflicted in terms of the Merger and that a demand, if made on these two individuals, would have been futile. This finding rests on the Consolidated Complaint's description of the numerous and conflicting executive positions that Defendants Cole and Nemer held at the time of the Merger, as well as the Consolidated Complaint's explanation of the financial incentives Defendants Cole and Nemer received from the Merger and its Employment Agreements.

Plaintiffs' Consolidated Complaint must be dismissed, however, because it fails to sufficiently specify how Defendant Andruskevich, Defendant Sealy, or Defendant Wood was similarly conflicted.[3] Plaintiffs' allegation that these three Defendants were personally and directly conflicted because the Merger would permit them to "continue to earn hundreds of thousands of dollars in [director] fees" is insufficient under the Court of Appeal's holding in *Werbowsky*, 362 Md. at 618. Pltfs.' Cons. Amend. Compl. 17-19. Plaintiffs' Consolidated Complaint omits any additional source of conflict Defendant Andruskevich, Defendant Sealy, or

[3] This Court again notes that although Plaintiffs Consolidated Complaint identifies the fact that Defendants Sealy and Wood both held director positions with other Cole REITs as a potential source of conflict, the Consolidated Complaint acknowledges that Defendants resigned from these positions "upon consummation of the Merger[.]" Pltfs.' Cons. Amend. Compl. 17 and 18.

Defendant Wood faced in their review or recommendation of the Merger. Because Plaintiffs have failed to properly allege under Maryland common law that one of these three Defendants was conflicted, the Consolidated Complaint fails to identify a conflicted majority within the CCPT III Board. Demand could not be excused pursuant to the futility exception, as Plaintiffs allege, and their Consolidated Complaint therefore fails to establish a legally sufficient cause of action. *Lubore*, 109 Md. App. at 322.

b. Plaintiffs' Allegations In Light Of The Business Judgment Rule

Defendants argue in their Motion to Dismiss that even if Plaintiffs could maintain their direct and demand futility claims, their allegations cannot rebut the presumptions afforded to the CCPT III Board under the business judgment rule. The argument arrives in response to Plaintiffs' allegation that, through the Merger, the Individual Defendants, Cole Holdings, and the Cole Holdings Entities breached their fiduciary duties of loyalty, good faith, due care, and independence they owed to CCPT III and its shareholders. Within this argument, Plaintiffs allege that Cole Holdings and the Cole Holdings Entities represent the alter egos of Defendant Christopher Cole, and therefore also owed fiduciary duties to CCPT III and its shareholders. Although this Court finds dismissal of Plaintiffs' Consolidated Complaint proper because of Plaintiffs' failure to demand review from the CCPT III Board before filing its derivative Consolidated Complaint, it continues to address Defendants' alleged breaches of their fiduciary duties in light of the business judgment rule.

The Corporations and Associations Article of the Maryland Code assigns the following standard of care to corporate directors:

> A director shall perform his duties as a director, including his duties as a member of a committee of the board on which he serves: (1) In good faith; (2) In a manner he reasonably believes to be in the best interests of the corporation; and

> (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.

MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(a). Under the business judgment rule, there is a presumption that a corporation's director has met these codified standards when performing his or her managerial duties. *Wittman v. Crooke*, 120 Md. App. 369, 376 (1998). "Thus, the business judgment rule shields corporate directors from liability for such [managerial] conduct, notwithstanding a demonstration that they acted fraudulently, in self-interest, or with gross negligence." *In re Nationwide Health*, 2011 WL 10603138 (*citing* MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(c); MD. CODE ANN., CTS & JUD. PROC. § 5-417; *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) ("[T]here is no single blueprint that a board must follow to fulfill its duties . . . . Rather, a board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith. If no breach of duty is found, the board's actions are entitled to the protections of the business judgment rule.")). Only disinterested directors, however, are afforded this rule's protections. *Werbowsky*, 362 Md. at 609.

Plaintiffs' Consolidated Complaint does not include allegations of fraud or gross negligence against the CCPT III Board. Therefore, this Court need only determine whether Plaintiffs have alleged "particularized facts" that call into question the interests and independence of Defendants in their consideration and approval of the Merger under the business judgment rule. *In re Nationwide Health*, 2011 WL 10603138; *Hudson v. Prime Retail, Inc.*, 2004 WL 1982383 at *12 (Md. Cir. Ct. May 27, 2011) (*quoting Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002)). "From the standpoint of interest, 'this means that directors can neither appear on both sides of a transactions nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all

stockholders generally." *Werbowsky*, 362 Md. at 609 (*quoting Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). "Accordingly, if that kind of director interest is present and the transaction is *not approved by a majority consisting of disinterested directors*, the business judgment rule has no application." *Werbowsky*, 362 Md. at 609 (emphasis added).

This Court finds that Plaintiffs have failed to rebut the presumptions afforded to the CCPT III Board under the business judgment rule. *See* MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(a). Although Plaintiffs have sufficiently alleged in their Consolidated Complaint that Defendants Cole and Nemer appeared interested in the Merger, Plaintiffs have failed to include particularized facts indicating that Defendant Andruskevich, Sealy, or Wood stood on both sides of the Merger, or expected to derive any personal financial benefit from it "in the sense of self-dealing[.]" *Werbowsky*, 362 Md. at 609. Without such "particularized facts," Plaintiffs have failed to plead with sufficient particularity how the Merger lacked the approval of "a majority . . . of disinterested directors[.]" Plaintiffs' Consolidated Complaint therefore fails to rebut the presumptions applicable to Defendants under the business judgment rule. *Id.*[4]

V. CONCLUSION

[4] The Court additionally notes that Count VIII of Plaintiffs' Consolidated Complaint, entitled "Shareholders' Direct Claim Against Director Defendants for Breach of the Duty of Candor," alleges that the Director Defendants breached the duty by filing "false and misleading statements . . . including but not limited to seeking the re-election of themselves and pursuing the Company's listing on a nationally traded exchange." Pltfs.' Cons. Amend. Compl. 63. The Court of Appeals has limited the duty of candor's applicability rigidly to cases involving "a cash-out merger transaction, where the decision to sell the corporation already has been made." *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 342 (2009). Although the Court finds dismissal of Plaintiffs' entire Consolidated Complaint proper for Plaintiffs' failure to make a demand and under the business judgment rule, the Court finds that dismissal of Count VIII of Plaintiffs' Consolidated Complaint would also be proper both because this Case does not involve a cash-out merger transaction and because Plaintiffs have failed to plead direct claims for the reasons stated *supra*.

Defendants' Motion to Dismiss the Consolidated Amended Complaint is hereby granted with prejudice for the reasons set forth above.