IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

BOLAND TRANE ASSOCIATES, INC, et al.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 273284-V
v.	:	
	:	
SEAN F.X. BOLAND, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

In *Boland v. Boland*, 423 Md. 296 (2011), the Court of Appeals announced new standards to be used when Maryland trial courts review the decisions of a Special Litigation Committee ("SLC") in a stockholder derivative case. This case was assigned to me due to the retirement of the circuit judge who issued the order that was the subject of the Court of Appeals' review.

Pursuant to the directions of the Court of Appeals, I must consider the evidentiary materials of record which demonstrate how the SLC members were chosen, the business, personal or social relationships, if any, among the SLC members and its counsel, on the one hand, and the boards of the corporations, on the other hand. *Boland*, 423 Md. at 353-56. In addition, I am to evaluate the methodologies and procedures of the SLC's investigation, the issues it reviewed, the factual basis for its conclusions and determine whether there was a reasonable basis for its ultimate conclusions. *Boland*, 423 Md. at 356-62. At this juncture, the burden is on the SLC to prove both its independence and the reasonableness of its investigation and conclusions. *Boland*, 423 Md. at 340-41. If the SLC meet this burden, "then the burden shifts to the derivative plaintiffs to come forward with evidence regarding these issues sufficient to survive summary judgment." *Boland*, 423 Md. at 341.

Derivative Litigation Generally

In the most basic terms, a stockholder derivative suit is an action brought by a stockholder not for his own benefit for some wrong done to him but, instead, a suit on behalf of the entity to recover damages for harm done to the business entity. *Kamen v. Kemper Fin. Servs*., 500 U.S. 90, 95 (1991); *Burks v. Lasker*, 441 U.S. 471, 477 (1979); *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991). Procedurally, a derivative suit can be brought either as a demand-futility case or as a demand refused case. If demand on the board of directors is futile the stockholder can proceed to litigate the claims on behalf of the corporation (or other business entity). If demand either is not futile, or demand is made and refused, the stockholder can litigate the board's refusal of his demand to rectify the perceived ills or to pursue litigation. In Maryland, the making of a pre-suit demand, or pleading facts sufficient to show that a demand would be futile, is both a procedural requirement and a matter of substantive law. *Werbowsky v. Collomb*, 362 Md. 581, 601 (2001); *Danielewicz v. Arnold*, 137 Md. App. 601, 627-29 (2001); *see Levine v. Smith*, 591 A.2d at 201; *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984).

This case is a demand-refused case because the complaining stockholders in this case, John Boland and Kevin Boland, made a demand on the boards of the corporations, Boland Trane Associates, Inc. ("BTA") and Boland Trane Services, Inc. ("BTS"). The options available to a board of directors in responding to a stockholder demand range from taking the action urged by the demanding stockholder, including initiating litigation, to adopting other measures short of litigation designed to address the matters underlying the demand, to refusing the demand in its entirety.

Ordinarily, if a demand is made, the board is presumed to be disinterested and capable of properly considering a demand. *Bennett v. Damascus Community Bank*, 2006 MDBT 6, 2006

WL 2458718, (April 6, 2006); *see Grimes v. Donald*, 673 A.2d 1207, 1215 (Del. 1996); *Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990); *Stotland v. GAF Corp.*, 469 A.2d 421, 422-23 (Del. 1983). The board then may choose to act as a whole in reviewing a stockholder's demand or it may appoint a committee to investigate the facts underlying a demand and make a report and recommendation to the independent and disinterested members of the board. The committee may consist of a subset of the existing directors or the board may appoint new directors to serve on the committee. *Abbey v. Computer & Commc'ns Tech. Corp.*, 457 A.2d 368 (Del. Ch. 1983). However, by delegating full authority to respond to a demand to an SLC at the outset of the process, as opposed to delegating the authority merely to investigate and report to the full board, a board may concede that it lacks sufficient independence or disinterestedness to respond to the demand. *See Abbey*, 457 A.2d at 373; *Peller v. Southern Co.*, 911 F.2d 1532, 1536 (11th Cir. 1990). *Cf. Spiegel v. Buntrock*, 571 A.2d at 777 (discussing the circumstances under which the board may not have conceded its lack of independence when appointing an SLC).

As discussed more fully below, the boards in this case elected to form an SLC, consisting of directors who played no part in the challenged actions, to review the demands of John and Kevin and decide what action, if any, to take, effectively conceding the existing boards' lack of independence. Two new directors -- neither of which were board members at the time of the disputed transactions -- were elected to the boards and appointed to the SLC. An outside counsel was hired to assist the SLC in its investigation.

Although rebuffed by the Court of Appeals in their broadside attack that SLCs are little more than a sham, *see Boland*, 423 Md. at 351-52, John and Kevin nevertheless continue to press this theme on remand. Aside from the fact that their argument in this regard was rejected by the Court of Appeals, I am constrained to observe that committees of a board of directors,

including SLCs, are specifically authorized by Maryland statutory law. MGLC §2-411(a); *see* J. Hanks, *Maryland Corporation Law* §§ 6.16, 7.21(c) (2010)(comprehensive discussion on the appointment and use of board committees, including SLCs); *see also Werbowsky v. Collomb*, 362 Md. 581, 619 (2001)(referring to the appointment of a special litigation committee as a "common practice."); *Rosengarten v. Buckley*, 613 F. Supp. 1493, 1498-99 (D. Md. 1985)(applying Maryland law and approving the decision of an SLC not to pursue derivative litigation).[1]

More to the point, this court agrees that "[s]pecial litigation committees serve a valuable and useful role." *Houle v. Low*, 556 N.E.2d 51, 57 (Mass. 1990). "Structural bias in special litigation committees has been widely discussed and analyzed, and courts have 'almost universally determined' that the standards of review developed for derivative suits are designed to overcome the effects, if any, of structural bias." *Strougo v. Padegs*, 27 F. Supp. 2d 442, 448-49 (S.D.N.Y. 1998). Accordingly, subject to the restraining hand of judicial review, an SLC "can have the ability and expertise to decide whether a given derivative suit is in the corporation's best interest." *Houle v. Low*, 556 N.E.2d at 57. After all, that, and only that, is the proper purpose of derivative litigation. *Kramer v. West Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988). The reason is, or should be, obvious: "In a derivative action, any recovery belongs to the corporation, not the plaintiff shareholder." *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 344 (2009).

[1] *See also Boland*, 423 Md. at 375-76 n.3 (Battaglia, J., dissenting)("A matter of 'common practice,' a special litigation committee of independent directors ('SLC') is formed to review a shareholder's demand and then recommend to the board of directors whether pursuit of the shareholder derivative action is in the best interest of the corporation."); *Auerbach v. Bennett*, 393 N.E.2d 994, 1001 (NY 1979)("The contention of Wallenstein that any committee authorized by the board of which defendant directors were members must be held to be legally infirm and may not be delegated power to terminate a derivative action must be rejected."); *Bender v. Schwartz*, 172 Md. App. 648, 666 (2007)("The board may appoint a committee of disinterested directors to conduct this investigation.")

Facts and Procedural Background

The twists and turns of this protracted litigation are summarized thoroughly in the detailed opinion of the Court of Appeals, as well as the equally detailed opinion of the Court of Special Appeals, 194 Md. App. 477 (2010). As a consequence, only those facts necessary to comply with the remand order of the Court of Appeals, and for the appellate courts to assess the work of this court, will be set out in any detail. Familiarity with both published appellate opinions is assumed.

BTA and BTS are related, closely held Maryland subchapter S corporations located in Montgomery County, Maryland. They were formed in the early 1960s by Louis Boland, Sr. when he obtained an exclusive franchise to sell and service heating and air conditioning products manufactured by the Trane Company in the Washington Metropolitan Area. Initially, Louis, Sr. and his wife, Maureen, owned all of the stock of both companies. Over time, stock was issued to the eight Boland children, and a few long-term employees. However, each recipient was required to execute a Stock Purchase Agreement ("SPA"), which limited their rights of transfer. Under each SPA, the children were required to offer the stock to the corporations before selling to anyone else. The SPA also allowed the corporations to repurchase the stock upon each child's death. Louis, Sr. died in 2003 and, thereafter, certain of the Boland children, Sean, James, and Louis, Jr., ran the companies and served on the boards.

In 2004, after her husband's death, Maureen Boland negotiated a corporate repurchase of her stock in exchange for an annuity. This, in turn, was followed by a series of stock sales to some but not all of the Boland children and to one grandchild, Sean, Jr. John and Kevin, who did not participate in these transactions, learned about them in June 2005, and, to say the least, were unhappy. After the death of their sister, Colleen, in June 2006, the personal representative

of her estate resisted the corporations' attempt to repurchase her stock under the SPA, which he believed was too low of a valuation. As a consequence of that dispute, in July 2006 the corporations brought a suit for a declaratory judgment seeking to enforce the SPA against Colleen's estate. All Boland siblings were named as interested parties. On May 1, 2007, John and Kevin filed a counterclaim in the declaratory judgment action advancing purportedly direct claims against the board members of each corporation.

Earlier, on March 8, 2007, John and Kevin sent a demand letter to the boards of BTA and BTS alleging various acts of self-dealing, including the 2005 stock sales in which they did not participate, and threatening to file a derivative action. Before the board could act on their demands, they made good on their threat and filed their derivative complaint on May 1, 2007. As noted above, on that same day, they filed a cross-claim in the declaratory judgment action, purportedly as direct claims, but based on the same factual allegations that were outlined in their contemporaneously filed derivative complaint. On May 1, 2007, John and Kevin moved to consolidate the two actions. On June 7, 2007 the Administrative Judge consolidated the cases.

On June 7, 2007, BTA and BTS moved to dismiss or, in the alternative, to stay the derivative action, advising the court that on May 25, 2007, the boards of both corporations had voted to form an SLC comprised of two newly elected directors who did not participate in any of the actions complained of by John and Kevin. The two-member SLC also hired an outside counsel to assist it in reviewing the demand. This attorney had no prior dealings with either corporation or involvement with the disputed transactions.[2] On August 2, 2007, the circuit court stayed the derivative action pending the investigation and report of the SLC.

[2] Interestingly, one of the demands contained in the March 8, 2007 letter to the boards of BTA and BTS was that they "take immediate steps to retain independent counsel for the corporations, answerable to the remaining shareholders directly, to prosecute the Board members for their breach of duties, investigate other self-serving transactions, and pursue all appropriate remedies, including but not limited to removal

The SLC issued its report on February 1, 2008, and recommended that the derivative action, commenced by John and Kevin, be terminated. After extensive briefing and hearings, the circuit court, on December 12, 2008, granted summary judgment on the derivative claims and the direct claims, which had been pled as a counterclaim in the declaratory judgment suit. These decisions were affirmed by the Court of Special Appeals, 194 Md. App. 477 (2010). However, the circuit court's grant of summary judgment on the derivative claims was reversed, and remanded with instructions, by the Court of Appeals. The Court of Appeals also reversed the grant of summary judgment on John and Kevin's direct claims, holding that the circuit court incorrectly applied the doctrine of *res judicata* to resolve those claims on summary judgment. *Boland*, 423 Md. at 364-65. However, the Court of Appeals affirmed the grant of summary judgment as to the general validity and enforceability of the Stock Purchase Agreements. *Boland*, 423 Md. at 365-70. The Court of Appeals specifically left open for the circuit court's further consideration the viability of any remaining direct claims, including whether the SPA had been used to oppress John and Kevin. *Boland*, 423 Md. at 369 n. 53, 370-72.[3]

The First Remand Hearing

The Clerk of the Circuit Court received the mandate of the Court of Appeals on December 22, 2011. Thereafter, this consolidated case was re-assigned to me due to the retirement of the original judge, and I held a status hearing on February 22, 2012. Counsel for the corporations and the individual directors requested the opportunity to file new motions for summary judgment, on both the derivative and direct claims, so that the court could review the

---

of all breaching parties from the Boards of the companies." Thus, John and Kevin seemed to accept the notion of an SLC guided by an outside counsel, but wanted any report and recommendation to be made to them directly, and not to any members of the corporate boards.

[3] The circuit court on March 11, 2010, had granted summary judgment in favor of the defendants on Count II and IV of the Second Amended Counterclaim. (Docket Entry # 303). It is not entirely clear whether this ruling was specifically addressed by the Court of Appeals.

summary judgment record and apply the new rules announced by the Court of Appeals in *Boland*.[4]

Counsel for John and Kevin objected to this procedure, contending that the Court of Appeals in *Boland* had rejected outright the decision of the SLC to terminate the derivative suit finding it to be fatally flawed.[5] Alternatively, John and Kevin's counsel suggested that I stay further consideration of the derivative claims, and proceed with discovery and a trial upon their direct claims, which they conceded were based on the same facts as their derivative claims.[6] Under this scenario, counsel for John and Kevin posited that the trial result (*i.e.*, a jury verdict) on the direct claims then would be *res judicata* on the derivative claims.[7] The reason counsel desired this procedure was transparent -- to enable his clients, if successful on any of their direct claims to recover their attorney's fees and costs from the corporations as a consequence of a "successful" result in the derivative litigation. In such an event, John and Kevin potentially could accomplish something they could not accomplish if successful solely on their direct claims because there is no applicable fee-shifting mechanism in this case apart from a stockholder's success on the derivative claims.[8]

The February 22, 2012, hearing concluded with the court setting a tight briefing schedule on motions for summary judgment on both the derivative claims and the direct claims, and a two-hour hearing on these motions was scheduled for April 30, 2012.

---

[4] Hearing of February 22, 2012; Tr. 7-8, 36-40, 44, 46.

[5] Tr. 12-13, 15-16.

[6] Tr. 18-19, 30-31, 33.

[7] Tr. 19.

[8] Tr. 22, 26-27.

The Second Remand Hearing

On March 5, 2012, the corporations and the SLC filed motions for summary judgment. John and Kevin promptly filed oppositions to those motions. All parties filed comprehensive briefs, along with supporting evidentiary materials. Reply briefs also were filed. In response to my supplemental order of April 23, 2012, all parties filed additional written submissions to specifically address the concerns outlined by Judge Atkins in her opinion for the Court of Appeals in *Boland*.

At the conclusion of the summary judgment hearing on April 30, 2012, the Court took all motions under advisement. All submissions have been reviewed and the motions are now ripe for decision. No further hearing is necessary. *Phillips v. Venker,* 316 Md. 212, 219 & n. 2 (1989).

Applicable Legal Standards

In Maryland, summary judgment may only be granted if two conditions are met. First, the moving party must establish there is no genuine dispute as to any material fact. Second, the moving party must establish that it is entitled to judgment as a matter of law. Maryland Rule 2-501(f). *David A. Bramble, Inc. v. Thomas,* 396 Md. 443, 453-54 (2007); *Remsburg v. Montgomery*, 376 Md. 568, 579-80 (2003). Absent the concurrence of both elements, the motion must be denied. *Okwa v. Harper*, 360 Md. 161, 177-78 (2000); *Warner v. German*, 100 Md. App. 512, 516-17 (1994). Under Maryland Rule 2-501, I review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the evidentiary materials of record against the moving party. *Tyler v. City of College Park*, 415 Md. 475, 498-99 (2010).

Facts are material for summary judgment purposes only if they "somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111 (1985). "Facts that do not pertain to the core questions involved are not 'material' and, consequently, are insufficient to avert a proper motion for summary judgment." *Warner*, 100 Md. App. at 517. "When the moving party has provided the court with sufficient grounds for summary judgment, the opposing party must demonstrate that there is a genuine dispute of material fact by presenting facts that would be admissible in evidence." *Gross v. Sussex, Inc.*, 332 Md. 247, 255 (1993); *see Educ. Testing Serv., v. Hildebrant*, 399 Md. 128, 139-40 (2007).

With proper regard for these principles, the court has considered the pending summary judgment motions. For the reasons that follow, I conclude that there are no genuine issues of material fact and that the corporations and the directors are entitled to judgment, both as to the derivative and the direct claims, as a matter of law.

John and Kevin's Derivative and Direct Claims

The derivative claims asserted against BTA and BTS by John and Kevin in their May 1, 2007 complaint can be distilled as follows.[9]

According to John and Kevin, the defendants, Sean Boland, James Boland, Louis J. Boland and Lawrence Cain, Jr., controlling stockholders who also control the management of both corporations, breached their fiduciary duties to the minority stockholders and engaged in self-dealing by:

[9] Some of the factual allegations of the derivative complaint do not seem to have anything to do with the management of the corporations or improper corporate activities, such as the allegation that John and Kevin have been deprived of free home heating and air-conditioning services (¶ 84), refusing to allow John to use a beach house (¶ 87), an alleged physical assault against Kevin while at the beach (¶ 88), the resignation of Michael Boland as co-trustee of Colleen's trust (¶ 96) and the hiring of counsel in connection with the declaratory judgment action (¶ 102). These matters merit no further comment.

- Engaging in the 2004 transaction with Maureen Boland by exchanging her stock, at a below fair value price, in exchange for an annuity.
- Depriving Maureen's heirs of the right to receive her stock upon her death as a result of the annuity transaction.
- Using the stock obtained from Maureen to benefit some but not all of the existing stockholders by allowing James, Louis and Cain to purchase additional stock from the treasury at below market prices.
- Allowing Sean, Jr. to purchase some of the treasury stock, at a below market price, that the companies received in the annuity exchange with Maureen.
- Failing to offer a similar "below market" opportunity to John and Kevin, or to the children of John and Kevin.
- Invoking the SPAs to prevent John and Kevin from transferring their stock to their children.
- Threatening to expropriate John and Kevin's stock in BTA and BTS if they did not go along with certain transactions proposed for two separate limited liability companies, Boland Properties, LLC and Boland Properties II, LLC.
- Withholding and/or threatening to suspend dividends in order to coerce stockholders in going along with management generally.

As relief, among other items, John and Kevin asked that BTS be dissolved and a receiver appointed to operate the company "until oppressive conduct ceases" (Count I), that BTA be dissolved and a receiver be appointed (Count II), that all SPAs be voided (Counts I and II), that an award of compensatory damages of $5,000,000 and punitive damages of $1,000,000 be entered against Sean, James, Louis Boland, and Lawrence Cain, jointly and severally, for breach

of fiduciary duty (Count III), and the same dollar amounts, against the same defendants, for corporate waste (Count VI). John and Kevin also asked that the SPAs be rescinded or not enforced against them by the corporations.[10]

The factual allegations of the direct claims, which are set forth in the counterclaim (as amended)[11] to the declaratory judgment action, track those set forth in the derivative complaint. In short, the factual basis asserted, and the claims for relief requested, by John and Kevin directly are, for all practical purposes, identical to the claims for relief made in their derivative complaint.

It is important to consider whether the claims asserted by John and Kevin are direct claims, which can be brought by the stockholder on his own behalf (often as a class action for breach of fiduciary duty) or derivative claims (asserting the right to sue the board and officers on behalf of the corporation.) Some of their claims, even if arising out of the same operative fact pattern, might properly be brought either directly or derivatively depending on the nature of the relief sought or the harm incurred. *See Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006); *Grimes v. Donald*, 673 A.2d at 1212. Although there is no *per se* rule against stockholders pursuing both direct and derivative claims in the same lawsuit, *see Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 860-70 (Del. 2009), doing so presents perils under certain circumstances, such as when a plaintiff's individual claims against or interests in suing the corporation predominate, thus raising questions about whether the

[10] *See* Docket Entry # 254.

[11] After the derivative action had been pending for nearly a year, John and Kevin on March 14, 2008, filed a counterclaim advancing a direct claim against the corporations (as compared with their earlier suit against the directors), for breach of contract, in connection with the 2005 issuance of stock to persons other than themselves. (Docket Entry # 142). This pleading was amended on January 16, 2009, to include an oppression claim against the corporations. (Docket Entry # 254). Later, in May 12, 2009, they filed a second amended Counterclaim and an Amended Cross claim re-alleging all of the same matters, purportedly as direct claims, against both corporations and the individual defendants. (Docket Entry # 254).

plaintiff can properly represent the interests of *all* stockholders in the derivative case. *See, e.g.*, *Owen v. Modern Diversified Indus., Inc.*, 643 F.2d 441, 443 (6th Cir. 1981); *Horowitz v. Pownall*, 582 F. Supp. 665, 666 (D. Md. 1984); *Robinson v. Computer Servicenters, Inc.*, 75 F.R.D. 637, 641-44 (N.D. Ala. 1976).

The basic legal differences between derivative claims and direct claims were outlined by the Court of Special Appeals, as follows:

> A "derivative" action is a claim asserted by a shareholder plaintiff on behalf of the corporation to redress a wrong against the corporation. The defendant in a derivative action may be a corporate fiduciary, such as a director, who committed a wrong against the corporation. The action is "derivative" because it is brought for the benefit of the corporation, not for the shareholder plaintiff. *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988). For that reason, ordinarily, damages recovered in a derivative suit are paid to the corporation. *Id*.
>
> By contrast, a "direct" action is a claim asserted by a shareholder, individually, against a corporate fiduciary, such as a director, to redress an injury personal to the shareholder. *Kramer*, 546 A.2d at 351 (quoting R. Clark, *Corporate Law* 639-40 (1986)). Because damages recovered in a direct action are to remedy the shareholder plaintiff individually, they are payable to him, not to the corporation.

Paskowitz v. Wohlstadter, 151 Md. App. 1, 9 (2003). *See also Shenker*, 411 Md. at 345-47 (focusing on who was harmed, the corporation or the individual stockholder, and who would get the benefit of any relief or recovery should the stockholder prevail on the merits of the claim); *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)(same).

Under the analytical framework approved in *Shenker* and *Paskowitz* the relevant inquiry is basically two-fold: (1) who suffered the alleged harm, the corporation or the stockholders suing individually; and (2) who would receive the benefit of any recovery or other remedy. If the corporations suffered the harm and would receive the requested relief, the claim is derivative. *See Tooley*, 845 A.2d at 1036; *Paskowitz*, 151 Md. App. at 9-10. On the other hand, the claim is

direct if John and Kevin have suffered harm "independent of any injury to the corporation[s] that would entitle [them] to an individualized recovery." *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008). As noted, the same transaction may inflict both derivative and direct harm on a stockholder as long as the plaintiff stockholders "suffered a harm that was unique to them and independent of any injury to the corporation." *Gentile*, 906 A.2d at 102-03; *see Shenker*, 411 Md. at 345. The court is not bound by the labels attached to the claims. *Paskowitz*, 151 Md. App. at 10. Instead, the court must look to the nature of the wrong alleged, taking into account all of the facts alleged in the complaint, and determine for itself whether the claims are direct, derivative, or both. *Id*. In any event, in this case, the labels attached to the claims are not particularly helpful because John and Kevin have labeled the exact same conduct, in its entirety, as both direct and derivative.

The principal thrust of John and Kevin's claims (whether asserted directly or derivatively) are that the defendants improperly redeemed Maureen's stock for insufficient consideration and subsequently re-sold it to themselves at a price below fair value or fair market value. Further, John and Kevin alleged that they were precluded by the defendants from participating in this "sweet deal." Although artfully presented as a fraud on the rights of John and Kevin, *see Shenker*, 411 Md. at 346 (citing *Llewellyn v. Queen City Dairy, Inc*., 187 Md. 49, 61 (1946)), the real harm in this case (if any) that resulted from these transactions is to BTA and BTS. The alleged *underpayment to the corporations for this stock*, if true, harmed the corporations by causing them to receive less money for the stock than should have been received. This is not harm to any specific stockholders individually. *See Gentile*, 906 A.2d at 99. Accepting these allegations as true, they simply do not spell an injury to John and Kevin that is distinct from that suffered by all other stockholders. Indeed, all stockholders of BTA and BTS

suffered from the alleged underpayments. Stated differently, the discriminatory treatment alleged in this case resulted in harm to the corporations, not harm to John and Kevin. At most, their claims in this regard are thinly disguised claims for dilution or waste, which are derivative in nature and cannot be brought directly. *See Feldman*, 951 A.2d at 732-34.

Fairly read, everything else asserted by John and Kevin in any of their pleadings (as amended) falls generally under the rubric of stockholder oppression, which is a direct claim. *See Boland*, 423 Md. at 370-72.

The Independence of the SLC and Its Counsel

Although it eschewed the second step of the Delaware Supreme Court's *Zapata* test,[12] the Court of Appeals did refer for guidance to the first part of the *Zapata* inquiry, "the inquiry into the independence, good faith, and procedures of an SLC." *Boland*, 423 Md. at 350-51 n. 40. As a consequence, Delaware decisional law on the independence or disinterestedness of SLC members remains instructive. *See Boland*, 423 Md. at 355-56.

John and Kevin issued their demand letter to the boards of BTA and BTS on March 8, 2007. Although they were twice advised (first on March 22, 2007, and again on April 23, 2007) that their demands would be considered at the next regularly scheduled board meeting on May 21, 2007, John and Kevin nevertheless, filed their derivative complaint on May 1, 2007, without waiting for the boards to consider their demands at their next regularly scheduled meeting.

At the board meeting of BTA and BTS, held on May 21, 2007, the board decided to create an SLC, consisting of two directors not currently serving on the boards of either corporation. According to the minutes, the boards decided to select as new board members "a respected local business person and an attorney with expertise in corporate law." Further, the boards delegated to the SLC "the full authority to investigate and act authoritatively on the

[12] *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

Boards behalf in investigating the claims" of John and Kevin. The SLC was vested with the authority "to select and retain its own independent counsel to assist in its investigation." Counsel for John and Kevin were notified of this decision by letter dated May 25, 2007.

The process by which the members of the SLC were selected is detailed in the thirteen-page affidavit of Sean F. Boland, dated February 23, 2012, which was submitted in support of the defendants' renewed motions for summary judgment.[13] The undisputed facts show that the boards regularly discussed the selection of the SLC members from May 2007 until July 23, 2007, and considered a number of candidates before making the final selection. On July 23, 2007, the creation of the SLC, the identities of the new directors, and the identity of the SLC's outside counsel were disclosed to the circuit court and to counsel for John and Kevin. The two new directors appointed to the SLC were Charles J. Wolf, II and James J. Cromwell, Esquire.

Mr. Wolf is a certified public accountant. Along with other CPAs, he formed Hughes Computer Systems, Inc. in 1967, which merged with Automatic Data Processing, Inc. ("ADP"), a publically traded corporation, in 1994. Thereafter, Mr. Wolf served for twelve years as a Vice President of ADP.

Mr. Cromwell is a graduate of the University of Virginia School of Law and a former partner or principal in two distinguished law firms, Frank Bernstein Conaway & Goldman and Miles & Stockbridge, P.C. Mr. Cromwell was president of the Bar Association of Montgomery County, Maryland (1981-1982), is a Fellow of the American College of Trial Lawyers and a

[13] According to the Court of Appeals, the prior summary judgment record was insufficiently developed regarding how the SLC members were chosen and the prior relationships, if any, among the SLC members and the existing boards. *Boland*, 423 Md. at 352-53. On remand, the record was supplemented and is now sufficiently developed under Md. Rule 2-501(a) & (c); *see* P. Niemeyer & L. Schuett, *Maryland Rules Commentary* 354-55 (3d ed. 2003)(discussion of the types of materials a trial court my consider on summary judgment). Notably, counsel for John and Kevin have not filed any affidavit under Md. Rule 2-501(d) in response to any of the renewed motions for summary judgment.

member of the American Law Institute. He also served as a director for Mercantile Safe Deposit and Trust Company and as a trustee for Suburban Hospital.

The SLC selected Albert D. Brault, Esquire, as its outside counsel. Mr. Brault, who was admitted to practice in 1958, has served on and chaired scores of professional boards and committees in Maryland. He has lectured extensively on Maryland law and federal practice. Mr. Brault has never done business with, provided services to or been employed by either corporation. There are no prior social relationships of any kind between or among Mr. Brault and the directors of BTA or BTS.

Mr. Wolf was selected because of his business experience and knowledge regarding board procedures, the compensation of officers and directors, and experience in finance. He had been a high level executive with both large and small corporations for decades. Mr. Wolf had never done business with either BTS or BTA and has no consequential social relationships with any defendant.[14]

Mr. Cromwell was selected because he was one of the "deans" of the Maryland bar with extensive trial experience in complex and commercial litigation. No board member had even met Mr. Cromwell prior to his selection, with the possible exception of John I. Heise, Jr., who was not one of the directors sued by John and Kevin. Mr. Heise, who died on October 6, 2009, was not a social friend or business associate of Mr. Cromwell.

Before selecting Mr. Wolf and Mr. Cromwell, the board considered other candidates, including Robert S. Parker, Dean Emeritus, McDonough School of Business, Georgetown

[14] Affidavit of Charles J. Wolf, II, ¶¶ 1-7, dated, April 30, 2012; Affidavit of Sean F. Boland, ¶¶ 17-21, dated, February 23, 2012.

University, retired Court of Appeals judges Lawrence F. Rodowsky and John F. McAuliffe, and Michael Kelly, former Dean of the University of Maryland Law School.[15]

The current summary judgment record, which is uncontroverted, shows that the SLC members and their counsel were never business, professional or social friends with any of the directors.[16] There simply are no ties (or even threads) between the members of the SLC (and its counsel), and the defendants, disabling or otherwise. *See Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985).[17] Each was selected, after a thoughtful, searching process, based on their credentials, their records and their reputations. There is no legally sufficient evidence in the record before me, and the plaintiffs' have raised no genuine factual issue, with respect to the propriety of the selection of the SLC, its counsel, or the independence and disinterestedness of Messrs. Wolf, Cromwell or Brault.[18] Any implication to the contrary is fatuous. In the words of the Court of Appeals of New York: "Notwithstanding the vigorous and imaginative hypothesizing and innuendo of [plaintiffs'] counsel there is nothing in this record to raise a triable issue of facts as to the independence and disinterestedness of [the SLC members and their

[15] Other former judges also were considered.

[16] John submitted an undated affidavit, on "information and belief," in opposition to summary judgment, in an effort to show that Mr. Wolf is not disinterested, and could give in to social pressure. Among the matters recited are that Wolf and Louis Boland both are members of "exclusive" religious societies, the John Carroll Society and the Knights of Malta. He also notes that Wolf, like all of the Boland children, is a member of Congressional Country Club. Aside from the fact that the affidavit is not in proper form to be admissible in evidence, its averments are at best inconsequential and raise no legitimate question regarding directorial independence.

[17] In contrast with *Fuqua*, which involved a single-member SLC, there are no payments, direct or indirect, flowing in any direction, beyond ordinary compensation for work on the SLC.

[18] The court also has considered the American Law Institute's Principles of Corporate Governance. *See Harhen v. Brown*, 730 N.E.2d 859, 864-65 & n.5 (Mass. 2000). The SLC and its counsel are fully compliant with these standards of conduct. *See also Abella v. Universal Leaf Tobacco Co., Inc*., 546 F. Supp. 795, 799-800 (E.D. Va. 1982)(holding that there was no triable issue on the independence of the special committee.)

counsel]." *Auerbach v. Bennett*, 393 N.E.2d 994, 1001 (NY 1979). As a consequence, there is no need to further consider these points. *See Boland*, 423 Md. at 353 ("Then, *if* the plaintiff raises a genuine issue of material fact, the court should complete a thorough investigation.")(Emphasis added).

The Reasonableness of the SLC's Investigation and Conclusions

At the summary judgment hearing held on April 30, 2010, John and Kevin argued that the legal standard by which the court should review the SLC's conclusions is that of "entire fairness." *See Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001); *Kahn v. Lynch Commc'ns Sys.*, 638 A.2d 1110 (Del. 1994). I reject that contention for several reasons. First, that standard is inapplicable in the context of an SLC where none of its members were involved in or personally benefitted from the challenged transactions. In other words, this is not an instance in which the directors, whose work is being evaluated, stood on both sides of the transaction. *See Bender v. Schwartz*, 172 Md. App. 648, 670-71 (2007).

Second, nowhere in *Boland* did the Court of Appeals adopt that standard either for use in this case or in this context. Although the Court of Appeals held that the SLC's decision in this case was not entitled to any presumptions,[19] the Court also held: "[T]he SLC's substantive conclusions are entitled to judicial deference, provided that the SLC was independent, acted in

[19] *But see* MGCL § 2-405.1(e), enacted in 1999, which states that "[a]n act of a director of a corporation is presumed to satisfy the standards of subsection (a) of this section." Subsection (a), enacted in 1976, essentially codified "the duty of care owed by directors when acting in their managerial capacities." *Shenker*, 411 Md. at 339. If the SLC is independent or disinterested, it is not altogether apparent or obvious why the business decisions of a corporate board, when acting as the entire board, should be cloaked with the presumption of business judgment but the decisions of that same board, when acting through an SLC, should not. This seems particularly so when the members of the SLC were not on the board at the time of the transactions complained of, did not participate in the transactions, and did not personally benefit from those transactions. *See Grimes v. Donald*, 673 A.2d at 1219; *Spiegel v. Buntrock*, 571 A.2d at 775-78.

good faith, and made a reasonable investigation and principled, factually supported conclusions." *Boland*, 423 Md. at 350.

My next step is to consider the SLC's investigation, including the reasonableness of the SLC's methodologies. Although a SLC has a duty to act on an informed basis in responding to a demand there is no set procedures it must follow. *See Levine*, 591 A.2d at 214. As in any investigation, the choice of people to interview or documents to review is one on which reasonable minds may differ. Inevitably, there will be potential witnesses, documents and other leads that the SLC will decide not to pursue. As such, there is no rule of general application that an SLC must interview every possible witness who may shed light on the conduct that is the subject of the demand, or the sources of information that must be examined. *See Bender v. Schwartz*, 172 Md. App. at 676. Of course, the SLC must investigate the theories of recovery asserted in the plaintiffs' derivative complaint, *see Lewis v. Fuqua*, 502 A.2d at 967, and obtain and review information that is relevant and material to the subject matters of its inquiry. *See Kaplan v. Wyatt*, 499 A.2d 1184, 1190-91 (Del. 1985). Further, the SLC cannot simply accept the defendants' version of disputed facts without consulting independent sources to verify the defendants' assertions. Finally, the SLC must understand and properly apply the relevant case law.

The SLC in this case began its five-month investigation by reviewing the documents that had been provided by the corporations and requesting all parties to submit memorandum outlining their legal and factual positions. Counsel for BTA and BTS submitted such a memoranda; counsel for John and Kevin did not, simply referring the SLC to their derivative complaint and a letter previously sent to another attorney.[20] The SLC also requested additional

[20] Report at 3 n.4. At the SLC's request, counsel for John and Kevin met with the SLC to outline his clients' views. *Id.*

documents as its investigation progressed. Copies of all documents provided to the SLC, approximately 1,700 pages, also were provided to counsel for Kevin and John. Among the key items disclosed and scrutinized by the SLC were prior stock appraisals, audited financial statements, stock ledgers, and board minutes.

The SLC interviewed eleven witnesses,[21] including each corporate director, each stockholder who benefited from the transactions complained of, corporate counsel, counsel for Maureen Boland and the stockholders whose letter prompted the creation of the SLC. The SLC members attended every interview, and counsel for each witness interviewed was allowed to attend, including counsel for John and Kevin, when they were interviewed. Counsel for John and Kevin have not identified a single witness who was not, but should have been, interviewed by the SLC. My review of the summary judgment record persuades me that no genuine issue is presented in this regard.

Although the sheer number of documents reviewed or number of interviews conducted is not alone indicative of any particular degree of diligence, *see Boland*, 423 Md. at 357-588, the matter is contextual. What is reasonable and sufficient in one context, may be unreasonable or insufficient in another. The complexity of the issues (or lack of complexity), and the nature and sources of evidence the SLC considered, or should have considered, is relevant to my appraisal.

The SLC members spent at least 160 hours investigating and considering John and Kevin's claims. They met with their counsel on eight occasions before issuing their Report. Mr. Brault provided legal advice and guidance to the SLC, but the record is uncontroverted that decisions of the SLC were made by the directors themselves.

The SLC issued its thirty-page Report along with the 35 exhibits to the Report on February 1, 2008, recommending that the plaintiffs' derivative action be terminated. The Report

[21] Report at 5-6.

was filed with the circuit court and delivered to counsel for John and Kevin. The plaintiffs then deposed Mr. Cromwell on May 5, 2008 and deposed Mr. Wolf on May 19, 2008.

The court has reviewed both depositions in their entirety, as well as the twelve-page affidavit of Mr. Brault.[22] The Report correctly identifies the issues to be reviewed, albeit in a distilled form from the plaintiffs' 155 paragraph complaint.[23] I am satisfied that both directors correctly understood their role, the matters to be investigated, employed proper methods of investigations and focused on the correct legal and factual issues.

I also have reviewed the stock valuation methodologies, and sources of information pertinent to those methodologies, used by the SLC and find them to be in accord with generally accepted practices and procedures. *See* S. Pratt, *The Lawyer's Business Valuation Handbook* Chapters 8, 9, 10, 13 & 20 (2000 American Bar Association). As part of its work, the SLC considered four independent appraisals that previously had been performed for BTA and BTS stock in 1997, 2003 and 2004. It was unquestionably proper for the SLC to review such materials. It would have been improper to ignore them. John and Kevin also cite to a one-page letter from defendant Cain, dated May 25, 2000, to a mortgage broker that was issued in support of Kevin's home loan application, which suggests, potentially, a higher value for BTS stock than the price at which the disputed sales took place. The SLC was entitled to give little weight to this "back-of-the envelope" estimate as compared with the more recent (2003 and 2004) independent, formal appraisals of BTA and BTS stock on which they relied in reaching their conclusions. *See* Report at 21-22; SLC Exhibits 9 & 10. There is no genuine issue that the SLC

[22] Affidavit of Albert D. Brault, Esquire, dated, March 5, 2012.

[23] Report at 3-4.

correctly considered the disputed stock sales to persons other than John and Kevin, or from Colleen.

John and Kevin also point to the SLC's analysis regarding the stock grant to Sean Jr. in January 2005 as evidence of its unsound methods and conclusions. John and Kevin also contend that the SLC's conclusion that the stock sale to Sean, Jr. was proper, lacked a factual foundation. I disagree. The SLC expressly based its conclusion on Sean Jr.'s previous full-time employment with the companies and his graduation in 2004 from the Trane graduate engineering program, all of which occurred before the stock grant. Additionally, Sean Jr. was required to execute an employment agreement and SPA (just like the ones signed by John and Kevin) when he received his stock, which documents were submitted to and reviewed by the SLC. Although Sean Jr. had not yet obtained his MBA (from Georgetown) at the time of the stock grant in January 2005, *see* Report at 21 & n. 42, it was understood by management that he would be applying for admission to an MBA program following his graduation from the Trane graduate engineering program. *See* Report at 20.

It also is clear that the SLC thoroughly considered the plaintiffs' claims regarding improper compensation to the director defendants, reviewed in detail the disputed compensation packages, and compared them to compensation paid by similarly sized businesses.[24] Report at 13-16; Affidavit of Albert D. Brault, Esquire at 7-9. The SLC was of the view that an additional reason justifying the compensation paid was the financial performance of the companies, including the fact that $27.2 million in dividends were declared and paid between 2002 and 2007, further evidencing that all stockholders' reasonable expectations were being met, including

[24] The SLC also considered the compensation rates on an internal basis, comparing the disputed packages to what other key employees inside the corporations earned during the relevant time period. Report at 15; Exhibit 25. This is a reasonable methodology.

those who provided no services to either corporation. Mr. Wolf, a certified public accountant, independently prepared charts to compare compensation packages before and after Louis Sr.'s death,[25] and analyzed dividend payments to stockholders using audited financial statements.[26] The SLC independently evaluated these claims and did not simply go along with, much less defer to, the positions of the board members in this, or in any other regard. The SLC's ultimate conclusion that the boards of BTA and BTS "exercised sound business judgment"[27] in approving the compensation packages is not unreasonable.[28]

I also disagree with the plaintiffs' that the SLC imposed unnecessarily restrictive confidentiality agreements, thereby impairing unduly the transparency of the proceedings.[29] Although the franchisee with Trane is exclusive, it remains subject to cancellation on thirty days notice.[30] As noted by Mr. Brault in his affidavit, the "SLC reviewed the essential pleadings from two litigations (Denver, Colorado and Toledo, Ohio) where Trane exercised its option to cancel and sued the franchise holders in 2005 and 2007." Mr. Brault also noted that Trane was

---

[25] SLC Exhibit 15.

[26] SLC Exhibit 16.

[27] Report at 16.

[28] The SLC simply did not, as John and Kevin contend, simply defer to the decision that had been made by the individual defendants. The SLC, correctly, reviewed the disputed transactions "from the standpoint of the Corporation and not from the standpoint of the individual litigants." Affidavit of Albert D. Brault, Esquire, at 5. That is its proper focus because the claims (and recovery), if any, belong to the corporations not to any of the individual stockholders.

[29] John and Kevin were supplied with copies of every document given to or reviewed by the SLC except for any notes that were taken by the SLC members or its counsel during witness interviews. These notes also were not provided to the defendants or to the corporations. In the context of this case, especially when most of the interviewees are siblings, I conclude that such a decision was reasonable. Further, it in no way hampered this court's review of the SLCs work. *See* Affidavit of Albert D. Brault, Esquire, at 4. Contrary to John and Kevin's contention at oral argument, the procedures followed by the SLC in this case bear no resemblance to those criticized by the district court in *Peller. v. Southern Co.*, 707 F. Supp. 525, 529 (N.D. Ga. 1988), *aff'd*, 911 F.2d 1532 (11th Cir. 1990).

[30] Report at 8-9.

purchased by Ingersoll-Rand plc in June 2008 for over $10 billion, which gave the SLC the additional concern that unnecessary disclosure of the details of this high conflict, intra-family fight might result in the cancellation of franchise agreements by a new parent corporation which might develop its own distributorship network. Given these undisputed and legitimate business considerations, it was reasonable for the SLC to require confidentiality of all participants, including Kevin and John, in this process.[31]

In arguing that the methods and procedures followed by the SLC in this case were inadequate, John and Kevin rely heavily on *In re Oracle Corp. Derivative Litig*., 824 A.2d 917 (Del. Ch.), *rev. denied sub nom*. *Oracle Corp. v. Barone*, 829 A.2d 141 (Del. 2003). The defect identified by Vice Chancellor Strine (now Chancellor) in *Oracle* was not the scope of the substantive investigation undertaken by the SLC into the merits of the plaintiff's claims but, instead, the fact that the SLC either missed or disregarded substantial disqualifying economic relationships between the SLC members, Stanford University and the Oracle defendants accused of trading on insider information.[32] It was largely for that reason -- serious doubt about the independence of the SLC, *not the substantive work of the committee* -- that the SLC's decision to terminate the lawsuit was not approved by the Vice Chancellor. 824 A.2d at 946-47.[33] As noted above, in this case, the record is devoid of such concerns.

---

[31] Report at 8-9.

[32] Ultimately, summary judgment was granted in favor of the Oracle defendants. *In re Oracle Corp. Derivative Litig*., 867 A.2d 904 (Del. Ch. 2004).

[33] *See Beam v. Stewart*, 845 A.2d 1040, 1054-55 (Del. 2004)(Noting that "*Oracle* involved the issue of the independence of the Special Litigation Committee (SLC) appointed by the Oracle board to determine whether or not the corporation should cause the dismissal of a corporate claim by stockholder-plaintiffs against directors" and that "[t]he Vice Chancellor concluded, after considering the SLC Report and the discovery record, that those relationships were too close for purposes of the SLC analysis of independence.")(footnote omitted).

In summary, John and Kevin argued at the hearing on the motions for summary judgment that the SLC did not have a principled basis for its conclusions, applied improper methods and that its findings either misstated or were not supported by the record. Their contentions simply are incorrect. I have reviewed the Report, all of the exhibits thereto, and all of the other evidentiary matters of record in these consolidated cases. Without indulging the defendants' in any presumptions, and having conducted the "enhanced *Auerbach* review" as mandated by the Court of Appeals, I conclude that the SLC reached a reasonable, good faith business decision, in a reasonable and fair manner, and I accept its recommendation to terminate the derivative litigation.

Inadequate Derivative Plaintiffs

The issue of adequacy of John and Kevin as derivative plaintiffs was not, as suggested by the Court of Appeals in *Boland*, 423 Md. at 353 n. 41, raised *sua sponte* by the SLC in its report. The issue was raised early with the circuit court when, on June 27, 2007, the corporations moved to dismiss or, alternatively, to stay the derivative action.[34] In the legal memorandum accompanying that motion, BTA and BTS argued: "The Derivative Action is fatally flawed due to *inadequacy of representation*."[35] The corporations further argued on that same date: "John and Kevin have utilized their Derivative Action to air all manner of personal grievances, whether related to the business of the corporations or not. *Because most of these assertions have no place in a derivative action and furthermore, they contradict an argument that John and Kevin are*

[34] My review of the court file demonstrates quite clearly that this issue, the adequacy of John and Kevin as derivative plaintiffs, was raised by the corporations on June 27, 2007, over seven months before the SLC issued its report. Docket Entry # 70, Civil No. 273284-V.

[35] Memorandum of Law at p. 13.

sufficiently representative of the other shareholders to maintain an action on their behalf."[36] Manifestly, this issue was raised early in the litigation by BTA and BTS, not *sua sponte* by the SLC and, therefore, was properly before the SLC as part of its work. The fact that it commented in its Report upon a matter placed in issue by the litigating parties does not in any way detract from either its independence or the reasonableness of its decisions.

I turn now to the question of how this issue bears upon the resolution of this case. "A plaintiff in a derivative action must be qualified to serve in a fiduciary capacity as a representative of [the other shareholders], whose interest is dependent upon the representative's adequate and fair prosecution." *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983). This principle in the derivative context is grounded in notions of due process and is akin to the adequacy of representation test by a class plaintiff in a class action. *See* Md. Rule 2-231(a)(4)(requiring a finding that "the representative parties will fairly and adequately protect the interests of the class.")[37] Such a principle is necessary because "a shareholder may bring a derivative action to gain leverage by which to settle an unrelated dispute, *to advance the shareholder's primary interests as an employee, creditor*, or hostile bidder in a tender offer, *or for other reasons not shared by the holders as a class*." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949)(Emphasis added).

[36] *Id*. at pp. 13-14.

[37] In a class action, the adequacy of representation is a fundamental element of due process. Both the named plaintiffs and the class counsel must meet the tests of adequacy. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 740-743 (2000); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)(conflicts between class members, possible subclasses and conflicts between the class and class counsel are frequently a problem). Before certifying a class, the trial court has an independent duty to assure the adequacy of the named class representatives, as well as counsel. *Philip Morris, Inc. v. Angeletti*, 358 Md. at 742-43 & nn.23 & 24.

If a derivative plaintiff has interests materially different from those held by the other stockholders, such as distinct personal claims against the corporation, he may not be a proper derivative plaintiff. *Bennett v. Damascus Community Bank, supra*; *Davis v. Comed, Inc.*, 619 F.2d 588, 592-97 (6th Cir. 1980); *Baron v. Strawbridge & Clothier*, 646 F.Supp. 690, 695-96 (E.D. Pa. 1986); *Recchion v. Kirby*, 637 F.Supp. 1309, 1315 (W.D. Pa. 1986).

Also, a plaintiff ordinarily cannot bring both a direct claim and a derivative claim when he is in direct competition with his fellow shareholders for monetary damages that arise out of the same core set of operative facts. *Horowitz v. Pownall*, 582 F. Supp. 665, 666 (D. Md. 1984); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §1833 at 393 (2005). In this case, John and Kevin are in direct competition with the corporations for any monetary recovery from the individual director defendants. As well, as demonstrated by the summary judgment record, John and Kevin's interests "are actually, not merely hypothetically, in acute conflict with the interests" of the other BTA and BTS stockholders. *Robinson v. Computer Servicenters, Inc.*, 75 F.R.D. at 641.

An important practical consequence of and difference between a derivative action and a direct action is that a successful derivative plaintiff is eligible to recover his costs and attorneys fees from the corporation. A plaintiff that brings a direct claim (absent a contractual fee-shifting provision, which is not present in this case), is not. *Boland*, 423 Md. at 317. Their desire to recover legal fees, not the correction of any wrong to the corporations, seems to be the only reason at least at this juncture, that John and Kevin want to keep the derivative claim alive. For this separate reason, they cannot properly maintain a derivative action against the corporations.

The Remaining Direct Claims

Pursuant to the *Boland* opinion, on remand, "John and Kevin will have an opportunity to have their direct claims, alleging oppression and requesting dissolution, heard." 423 Md. at 370-71. In that context, "they may raise their claims regarding improper threats to use the corporate repurchase right contained in the SPAs." *Id*. The parties disagree over which "direct" claims are left after the *Boland* appellate decision, apart from the overall oppression claims. In my review, I have considered all of the direct claims advanced by John and Kevin that are viable as direct claims on the current state of the pleadings and the record.[38]

In their amended counter- and cross-claims, John and Kevin sought the judicial dissolution of BTA and BTS, or the appointment of a receiver to operate the companies until the defendants cease their allegedly oppressive conduct. The judicial dissolution of a corporation under MGCL § 3-413(b)(2) is an extraordinary event. *See Lerner v. Lerne*r, 306 Md. 771, 789-90 (1986). Absent an enabling statute, "a court of chancery has no jurisdiction to decree the dissolution of a corporation on application of a shareholder." *Turner v. Flynn & Emrich Co*., 269 Md. 407, 410 (1973). Thus, the power to dissolve is granted solely by statute (absent some extraordinary circumstance), and the Court of Appeals has made it quite clear that the circumstances under which a court will dissolve a corporation are limited. *Renbaum v. Custom Holding, Inc*., 386 Md. 28, 47-51 (2005). There is no genuine dispute of fact that grounds for the

[38] For example, John and Kevin maintain on remand that the stock sale to Sean Jr., was in fact a gift, and is part of their direct oppression claim. *See Boland*, 423 Md. at 369 n.53 ("To the extent that John and Kevin can prove these allegations [regarding an improper gift of stock to Sean Jr. or that the SPAs were breached by oppression], the [sic] may have a remedy in their derivative or direct actions.") The defendants have submitted admissible evidence showing that it was a bona fide sale. The evidence supporting this is summarized in the SLC *See* Report at 19-21. John and Kevin have failed to adduce any admissible evidence to the contrary. *Gross v. Sussex, Inc.*, 332 Md. at 255. Hence, there is no genuine factual dispute precluding the grant of summary judgment on this claim which, in any event, is derivative and not direct.

dissolution of two successful, solvent corporations simply do not exist in this case. The materials of record do not generate extraordinary circumstances. As a consequence, summary judgment will be granted on the dissolution claims.

John and Kevin also asked for lesser equitable relief, *see Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 254-61 (2005)(circuit court may consider and impose equitable remedies not mentioned in the dissolution statute), cited with approval in *Boland*, 423 Md. at 371-72, in respect of what they term oppression by the defendants. However, as shown below, no genuine factual issue has been generated sufficient to warrant such relief.

The SPAs in this case allow the corporations to redeem a stockholder's stock on thirty days notice.[39] According to John and Kevin: "It is that provision of the agreements, which underlies the continuing dispute between the parties. The defendants have, and continue, to use that provision to threaten and oppress the other shareholders."[40] On the current record, therefore, the only specific instance of oppression pressed by John and Kevin on remand is in connection with Boland Properties, II, LLC.[41] No other instances, that are not clearly derivative in nature, have been identified by John and Kevin.[42]

---

[39] This redemption period in the SPAs was designed, quite sensibly, to mirror Trane's right to cancel the franchise agreement on thirty days notice. Report at 12.

[40] John and Kevin Boland's Opposition to the Defendants' Four Motions for Summary Judgment, at p. 5 (Docket Entry # 333).

[41] John and Kevin also make general allegations that the defendants have threatened to withhold dividends. The SLC's Report identified the dividends that were paid from 2002 through 2007, averaging $3.9 million per year. Report at 9-10. John and Kevin have not provided any additional factual information in this respect. Although they presumably know what they received from 2008 forward, without explanation, they have failed to submit any affidavits in that regard. *See* Md. Rule 2-501(d).

[42] According to the Opposition (Docket Entry # 333) filed by John and Kevin on the direct claims: "The evidence of the defendants' oppression of the plaintiffs is overwhelming and continuing. It is even evidenced in defendants' papers." Opposition at p. 21. However, no evidentiary details, other than repeated references to the pleadings, which is insufficient, *Lynx, Inc. v. Ordnance Products, Inc*., 273 Md. 1, 7-8 (1974), or the appellate opinion in *Boland*, which is not "evidence" of anything, were provided.

In addition to co-ownership of BTA and BTS, the eight Boland children (and Lawrence Cain), co-owned a separate real estate limited liability company, Boland Properties II, LLC, that owned improved real property in Rockville, Maryland. Management control of the LLC was by majority. The five Boland children who were not on the boards of either corporation (Colleen, John, Michael, Kevin and Eileen) held a majority of the membership interests in this LLC. According to John and Kevin, after the director defendants refused to explain the stock transactions that are at the heart of the derivative complaint, the majority LLC members voted to take control of Boland Properties II, LLC and replace James as the managing member. A meeting of the LLC members was called, but it is alleged that the defendants refused to attend. Instead, John and Kevin allege that the directors threatened to redeem their corporate stock if they did not change course. John and Kevin also allege that BTA and BTS dividends were suspended as part of this act of oppression. According to John and Kevin, their non-director siblings, fearful of the defendants' threats, voted to reinstate James as the managing member.

Michael Boland testified at his deposition on November 11, 2009, that he voluntarily changed his mind, was not himself threatened with the redemption of his stock, and that he ultimately was persuaded to side with the defendants regarding the LLC matters. Michael further testified that he was not threatened or coerced into making such a decision. John Shooshan's deposition testimony, taken on November 19, 2009, confirmed Michael's account. Once Michael switched sides, the defendants had the five votes needed to take the actions they proposed. The majority of the members of the LLC in fact voted against John and Kevin.

The court has read all of the exhibits John and Kevin attached to their Opposition. Many of the exhibits are not admissible in evidence because they are simply statements made by or on behalf of John or Kevin, and are hearsay because they are offered on behalf of, and not against, the declarant. Md. Rule 5-803(a). The others, while admissible in evidence, simply do not raise genuine factual questions. *See Bagwell v. Peninsula Reg'l Med Ctr.*, 106 Md. App. 470, 488 (1995), *cert. denied*, 341 Md. 172 (1996)("[T]he party opposing summary judgment must present admissible evidence demonstrating the existence of a material [factual] dispute.")

According to the record before me, neither the individual nor the corporate defendants to date have attempted to redeem John or Kevin's stock in either corporation, or even voted on (much less passed) a board resolution authorizing such a redemption. *See Rusyniak v. Gensini*, 629 F. Supp. 2d 203, 225 (N.D.N.Y. 2009)(actual forced redemption of minority stockholders interest stated a claim for oppression). There is no evidence in the summary judgment record of any actual coercive financial pressure that has been placed on John and Kevin, whether authorized by the SPA (or any other source). *See Della Ratta v. Larkin*, 382 Md. 553, 579-80 (2004)(actual issuance of a capital call, combined with the timing of its issuance plus the failure to explore other financing options supported finding of oppression); *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. at 256 (noting that oppression is "conduct that substantially defeats the 'reasonable expectations' held by minority stockholders in committing their capital to the particular enterprise")(*quoting Matter of Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (NY 1985));[43] J. Hanks, *Maryland Corporation Law* §11.7[b] (discussing conduct that may constitute oppressive conduct).

On this record, their allegations,[44] even if true -- that they might have been "redeemed out" of BTA and BTS if they did not vote with the defendants in the LLC transaction -- are legally insufficient (at the very least as to causation) for their oppression claim.[45] John and

[43] In *Matter of Kemp & Beatley, Inc*., 473 N.E.2d at 1180-81, the majority was found to have changed a long-standing policy from one of paying dividends to all stockholders based on the percentage of stock ownership to one based on services rendered to the corporation. The minority stockholders, not being employees, rendered no services and thus received no further distributions. The majority stockholders, who were employees, continued to receive historical distributions.

[44] John Shooshan, who mediated this dispute among the members of the LLC, testified at his deposition that no such threat ever was made. Nov. 19, 2009, at 46:16-47:12.

[45] There is no evidence before me that either board voted to redeem these shares, passed a resolution to that effect, or took any steps in that regard, either pursuant to the SPA, or otherwise. In short, John and Kevin have not adduced any admissible evidence of the actual use of financially coercive tactics.

Kevin simply have not generated a material factual question on their claim of oppression sufficient to defeat summary judgment.

In summary, it certainly is true as a general matter that one cannot use (or misuse) contractual rights, even if expressly authorized to do so, to oppress another party to the agreement or otherwise violate fiduciary duties. *See Boland*, 423 Md. at 372 n. 54 (discussing limits on contractual stock redemption rights, especially if triggered involuntarily); *see also Clancy v. King*, 405 Md. 541, 565-71 (2008); *Alloy v. Wills Family Trust*, 179 Md. App. 255, 301-07 (2008). The question before me at this juncture, however, is not this general principle but whether there are genuine issues of material fact on the oppression claim.[46] The movants have properly supported their motion in this regard. John and Kevin have not shown that there is a genuine issue of material fact. *See Educational Testing*, 399 Md. at 141-43.

I have considered all of the other claims that John and Kevin contend are direct claims and conclude that they are similarly lacking at this juncture. Md. Rule 2-501(f).

For the reasons set forth above, all pending motions filed by the defendants for summary judgment are granted. All complaints filed by John and Kevin (however denominated) are dismissed, with prejudice, and without leave to amend. This is a final order. SO ORDERED this 6th day of June, 2012.

_____

Ronald B. Rubin, Judge

[46] John and Kevin have not referred me to a single reported decision which has held that a single threat to take some action, *without more*, constituted oppression. *Cf. Alloy v. Wills Family Trust*, 179 Md. App. at 301-07 (citing multiple instances of actual conduct with financial consequences which, taken together, a jury could find to be financially oppressive); *Labovitz v. Dolan*, 545 N.E.2d 304, 313-14 (Ill. App. 1989), *appeal denied*, 550 N.E.2d 557 (Ill. 1990)(actual refusal to distribute cash, thereby forcing partners to pay taxes on phantom income from non-partnership sources, may be oppressive).