IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JAMES FREDERICK, et al.,	:	
Plaintiffs,	:	Case No. 370685-V
v.	:	
PATRICK CORCORAN, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION

The plaintiffs in this putative class action, two stockholders of CreXus Investment Corporation ("CreXus" or "the company"), have sued the members of the company's board of directors for damages arising out of alleged breaches of their fiduciary duties. According to the plaintiffs, these breaches occurred in connection with the board's approval of a cash-out merger between CreXus and Annaly Capital Management, Inc. ("Annaly"). The change of control transaction was effectuated by a merger agreement, approved on January 30, 2013, and then a tender offer, which closed on April 16, 2003. Under the merger agreement, the transaction could not close unless a majority of CreXus stockholders, not affiliated with Annaly, tendered their shares. This threshold was met as approximately 82% of these stockholders tendered their shares. The merger closed on May 23, 2013, and the purchase price for the tendered shares was $720.8 million, all of which was paid by Annaly in cash. The price paid represented a 17.1% premium for CreXus stockholders. As a consequence of the merger, CreXus was delisted from the New York Stock Exchange and is now wholly owned by Annaly.

Procedural Background

This case was initiated by the plaintiffs on November 16, 2012, shortly after CreXus issued a press release announcing the original Annaly offer (which was made on November 9, 2012) but before the parties had entered into a merger agreement (which was signed on January 30, 2013). CreXus filed its initial Schedule 14D-9 on March 18, 2013 (which described the transaction and recommended it to the stockholders), and the plaintiffs filed a Second Consolidated Amended Class Action Complaint ("amended complaint") on April 26, 2013. The defendants moved to dismiss the amended complaint, and the court held a hearing on the motions to dismiss on August 7, 2013. At the conclusion of the hearing, the court granted the motions and dismissed the plaintiffs' amended complaint with prejudice, and without leave to amend. At the hearing the court advised that a written decision would follow, elaborating upon the reasons stated by the court at the conclusion of the hearing. This is that written decision.

As noted above, this case was filed in November 2012. After the court denied the plaintiffs' motion for expedited discovery on March 22, 2013, the plaintiffs abandoned any attempt to enjoin the tender offer and second step merger between the acquisition subsidiary of Annaly and CreXus. The motion to expedite was denied because the deal protection devices the plaintiffs complained of at the initial hearing, a $25 million termination fee, a post-agreement go shop provision, a top-up provision so that Annaly could effectuate a short-form merger, and Annaly's right to make a topping bid, were not so obviously unreasonable in the context of this particular transaction so as to necessitate expedited, pre-injunction discovery or other special treatment. To the contrary, after reviewing an earlier and quite similar amended complaint (filed March 21, 2013), the

court concluded that comparable deal protection provisions either have been approved, or have not been disapproved, by the Delaware Court of Chancery in the context of a request for expedited discovery or a preliminary injunction. *See, e.g., In Re Bioclinica, Inc., Shareholder Litig*ation, No. 8272-VCG, 2013 WL 673736 (Del. Ch., Feb. 25, 2013); *In Re Orchid Cellmark, Inc,. Shareholder Litig*ation, No. 6373-VCN, 2011 WL 1938253 (Del Ch., May 12, 2011). *See also in Re Compellent Technologies, Inc. Shareholder Litig*ation, No. 6084-VCL, 2011 WL 2382523 (Del. Ch., Dec. 9, 2011)(discussing deal protection devices in the context of a class action settlement that resulted in the modification of some of the those).[1]

The parties then proceeded to brief the two central questions in this case.[2] First, whether the amended complaint sufficiently pled the lack of independence of the Special Committee such that its decision should not be accorded deference under the business judgment rule. Second, whether the amended complaint stated a cognizable claim that the Special Committee failed to discharge their "*Revlon* duties"[3] in connection with negotiating and approving the transaction with Annaly, which amounted to the sale of the

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[1] The court is aware that, ordinarily, unreported opinions have no precedential value. Md. Rule 1-104(a). However, the court has referred to certain unpublished opinions of the Delaware Court of Chancery for their persuasive analysis. *See Clancy v. King*, 405 Md. 541, 558 n.17 (2009). Published decisions of the Delaware courts on matters of corporate law frequently are highly persuasive, unless plainly inconsistent with settled Maryland law. *See Kramer v. Liberty Property Trust*, 408 Md. 1, 24-25 (2009).

[2] The court is aware that other legal issues may lurk in this case. However, the court has addressed only the issues actually raised by the parties, leaving other possibly important issues for another day. *See Gatz Properties, LLC v. Auriga Capital Corp.*, No. 4390, 59 A>3d 1206 (Del., 2012)(reminding the Court of Chancery to address only the issues raised by the parties).

[3] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A2d. 173 (Del. 1986). *See also Malpiede v. Townson*, 780 A.2d 1075, 1083-84 (Del. 2001)(discussing *Revlon* duties under Delaware law).

company for cash.[4] The third issue is whether the amended complaint stated a breach of fiduciary duty claim against Annaly, and an aiding and abetting claim against Annaly, FIDAC and CreXus.

Legal Standard

In ruling on a motion to dismiss under Md. Rule 2-322(b), the court accepts as true all well-pled facts in the amended complaint and any reasonable inferences derived from those facts, in a light most favorable to the non-moving party. Review at this juncture is cabined to the pertinent pleading, and any documents attached to or incorporated into that pleading by reference. In this case, the amended complaint repeatedly and specifically references, and quotes from, the Schedule 14D-9 filed by CreXus with the Securities and Exchange Commission on March 18, 2013, as well as the company's Form 10-K, filed on April 12, 2012.[5] As a consequence, the court may consider these documents and their contents in ruling on the pending motions to dismiss. Md. Rule 2-303(d). The court's objective at this point simply is to see whether relief can or cannot be granted on the basis of the facts alleged in the amended complaint as a

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[4] The court is aware that the controlling authority in Maryland is *Shenker v. Laureate Education, Inc.*, 411 Md. 317, 338-39, 351 (2009), which generally follows *Revlon* and its progeny, at least in the context of a cash-out merger. In this context, *Revlon* is simply a short-hand for the board's duties of candor and maximization of stockholder value once the decision to sell had been made.

[5] The Schedule 14D-9 is cited or referred to by the plaintiffs in ¶¶ 4 through 7 and ¶ 59 of the amended complaint filed on April 26, 2013. The plaintiffs quote extensively from the Form 10-K, in ¶¶ 34 and 35. As a practical matter, and given the heavy reliance on these documents by the plaintiffs in their pleading, they are incorporated by reference into their complaint within the meaning of Md. Rule 2-303(d). *Cf. In re Synthes, Inc., Shareholder Litigation*, 50 A.3d 1022, 1026 (Del. Ch. 2012)("Having premised their recitation of the facts squarely on [the defendants' SEC filing] and incorporated it, the plaintiffs cannot fairly, even at the pleading stage, try to have the court draw inferences in their favor that contradict that document, unless they *plead* non-conclusory facts contradicting it.").

matter of law. *Converge Services Group, LLC v. Curran*, 383 Md. 462, 475 (2004); *Kendall v. Howard County*, 204 Md. App. 440, 446-47 (2012).

Boilerplate or conclusory allegations do not receive the benefit of this forgiving standard. *RRC Northeast, Inc., v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010). "[A]ny ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Ronald M. Sharrow, Chtd. v. State Farm Mut. Auto Ins. Co.*, 306 Md. 754, 768 (1986); *Cf. Berman v. Karvounis*, 308 Md. 259, 265 (1987)("what we consider are allegations of fact and inferences deducible from them, not merely conclusory charges."). A claimant still must allege sufficient facts to constitute a cause of action. *Ver Brycke v. Ver Brycke*, 379 Md. 669, 696-97 (2004); *Scott v. Jenkins*, 345 Md. 21, 27-28 (1997). Consequently, "a pleading that fails to allege [legally sufficient] facts, or that fails to demand a particular form of relief, fails to fulfill the purposes of pleading." P. NIEMEYER & L. SCHUETT, MARYLAND RULES COMMENTARY at 180 (3d ed. 2003).

In short, in ruling upon a stockholder's challenge to a merger, a "trial court is not required to accept every strained interpretation of the allegations proposed by the plaintiff[s] . . . . [and] a claim may be dismissed if allegations in the complaint or the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)(footnote omitted).

The Transaction

Annaly is a Maryland corporation, but is based in New York City. Annaly is a real estate investment trust ("REIT"), that invests principally in mortgage-backed securities and other debt instruments. In 2008, Annaly formed CerXus and, in connection

with CreXus's initial public offering ("IPO") in September 2009, acquired 25% of the outstanding stock. The initial offering price was $15.00 per share. Annaly's stock ownership was reduced to 12.4% as a result of a subsequent public offering.

CreXus, also a REIT chartered in Maryland, acquires, manages and finances commercial mortgage loans and other mortgaged-backed debt instruments. In connection with the original IPO, CreXus entered into a management agreement with Fixed Income Discount Advisory Company ("FIDAC"), an external REIT manager. FIDAC is a wholly owned subsidiary of Annaly and managed the day-to-day operations of CreXus under a management agreement, dated August 31, 2009. CreXus had no employees, other than its officers. These officers also are employed by FIDAC and are officers of Annaly. These potential conflicts were clearly disclosed by the company in its SEC filings.[6]

At the time of the challenged transaction, CreXus had a five-member board of directors, two of which, Kevin Riordan and Ronald Kazel, are affiliated with Annaly and FIDAC. As noted above, Riordan and Kazel are managing directors of FIDAC and Annaly. The company had three outside directors, not affiliated with Annaly or FIDAC: Robert B. Eastep, Patrick Corcoran and Nancy Jo Kuenstner.

Eastep is a certified public accountant and has been on the board since 2009. Eastep is a Senior Vice President and the Chief Financial Officer of Central Virginia Bankshares, Inc., which is listed on the NASDAQ. Previously, Eastep had served as Executive Vice President and the Chief Financial Officer of Saxon Capital, Inc., a NYSE listed REIT that serviced residential loans prior to its sale to Morgan Stanley. Earlier in his career, Eastep directed SEC audit engagements at KPMG. Eastep has a B.S. in business administration from West Virginia University, and holds a Certificate in

[6] Amended Complaint at ¶ 34.

financial management from the Kellogg Graduate School of Management of Northwestern University.

Corcoran, a board member since 2009, is the Director of Central Michigan University's real estate development and finance program. Previously, Corcoran had served as the head of commercial mortgage-backed securities at J.P. Morgan. In addition, Corcoran has held senior positions at Nomura Securities, the Prudential Insurance Company and the Federal Reserve Bank of New York. He has two masters degrees and a Ph.D. in economics from the University of Michigan.

Kuenstner, a board member since 2009, was an investment banker at both J.P. Morgan and Citibank, for a combined two decades. She currently serves as a director of another public company, as well as Lafayette College. Kuenstner is the former president and Chief Executive Officer of the Law Debenture Trust Company of New York, which provides corporate trust and related services in the Unites States and major foreign banking centers, including the United Kingdom and Hong Kong. Kuenstner has an MBA from the University of North Carolina.

On November 5, 2012, the company's stock price was $11.31 per share. On November 8, 2012, it closed at $10.98 per share.

At a CreXus board meeting held on November 9, 2012, Wellington Denahan, the Chairman and CEO of Annaly, advised the CreXus board that Annaly was interested in purchasing the company. The CreXus board determined that, in view of Annaly's 100% ownership of FIDAC and significant ownership of the company, it needed to form a Special Committee of independent directors to review any proposal from Annaly. At this meeting, Annaly advised the CreXus board that it had hired Bank of America Merrill

Lynch ("BofA Merrill Lynch") as its financial advisor, and K&L Gates LLP as legal counsel in connection with any proposed transaction with CreXus. Following the board meeting, Kuenstner, Eastep and Corcoran met separately to discuss the process for considering the anticipated written offer from Annaly. They agreed to meet again if Annaly presented a written proposal. Later that same day the Annaly board approved a proposed acquisition of 100% of CreXus for $12.50 per share, in cash. A written proposal was delivered to the CreXus board.

Kuenstner, Eastep and Corcoran met the next day, November 10, 2012, to discuss the Annaly offer and the formation of a Special Committee of CreXus' board to formally consider Annaly's proposal or any other strategic alternatives. Later that same day the CreXus board approved the establishment of a Special Committee, comprised of Kuenstner, Eastep and Corcoran, "with the power and authority . . . to consider the November 9 offer [from Annaly] and other potential strategic alternatives, to reject or approve any such potential transaction to the fullest extent permitted by Maryland law and to engage separate financial, legal or other advisors."

Both Annaly and CreXus issued press releases on November 12, 2012, announcing the Annaly offer, and CreXus separately announced the formation of the Special Committee. On November 13, 2012, CreXus's stock closed at $12.35, which was below the $12.50 offered by Annaly on November 9, 2012.

The Special Committee held two meetings on November 12, 2012, to discuss potential candidates for its financial and legal advisor. Candidates for the legal advisor were interviewed between November 13 and November 16, 2012. At a meeting on

November 16, 2012, the Special Committee selected Goodwin Proctor LLP as its legal advisor, and discussed potential financial advisors.

The Special Committee next met on November 20, 2012, to further discuss Annaly's offer and the selection of a financial advisor. The Special Committee decided to hire a firm that was familiar with its line of business but with no significant existing relationship with Annaly. That same day, the Special Committee decided to engage Lazard Frères & Co. ("Lazard") as its financial advisor and, along with attorneys from Goodwin Proctor, began negotiating financial terms with Lazard.

The Special Committee met on November 29, 2012, to discuss the terms of Lazard's engagement, as well as Annaly's November 9th proposal. The Special Committee also discussed the potential revocation of a prior right granted to Annaly to acquire up to 35% of the company's stock, viewing such an increased (from 12.4%) ownership level as a possible deterrent to third party bids. Goodwin Proctor reported that it had been contacted by a financial advisor of a potential bidder, but the Special Committee decided to defer further contact with this potential bidder "until after it had formally retained a financial advisor and determined whether or not to pursue a strategic transaction." Lazard's engagement letter was signed on November 27, 2012.

The Special Committee next met on December 3, 2012 to discuss stockholder lawsuits that had been filed in the wake of the announcement. On December 12, 2012, a protocol was put in place to enable the Special Committee to obtain information from FIDAC, but at the same time to preclude the committee's deliberations from being revealed to Annaly.

On December 14, 2012, the Special Committee asked FIDAC to prepare three-year financial projections for CreXus, along with a business plan, to provide baseline against which strategic offers could be measured. At that time, Lazard had been contacted by four potential bidders, and the Special Committee told Lazard to contact the parties who had expressed interest to keep their interest alive in the event that the Special Committee decided to sell the company.

Annaly, through its legal counsel, gave the Special Committee, though its legal counsel, a proposed draft merger agreement on December 17, 2012. Among other terms circulated by Annaly were an all cash, two-step merger, a 30-day post agreement go shop provision, and a five day matching period. The Special Committee told Goodwin Proctor not to respond to the Annaly proposal until the committee had decided whether to remain independent or to sell the company. On December 28, 2012, the Special Committee and Lazard discussed the status of FIDAC's three-year projections and the assumptions on which they were to be based.

On January 2, 2013, CreXus and Annaly signed an agreement precluding Annaly from increasing its stock ownership as long as the Special Committee was considering its offer, and no sooner than May 30, 2013. Two days later the Special Committee met to review the financial projections FIDAC had prepared at its request, and discussed the assumptions used in those projections.

On January 9, 2013, the Special Committee met and discussed the financial projections received from FIDAC with Lazard, along with Lazard's preliminary valuation analysis and assessment of the M&A climate. The committee also discussed a possible decision not to sell the company or simply allowing it to go into "runoff" mode.

At the meeting on January 11, 2013, the Special Committee met with Goodwin Proctor and Lazard to discuss potential options for the company, including the offer from Annaly. The issue of the FIDAC termination fee also was discussed, along with how this might affect third party bidders. At this meeting, the committee decided to pursue a strategic transaction, and discussed ways to get Annaly to increase the merger consideration and modify the proposed deal terms prior to the committee starting a broader solicitation from third parties. The committee reasoned that having a definitive agreement with Annaly before a market check was the preferred route, as long as it included a 45 day go shop provision. In its view, third party bidders would be more likely to submit their highest bids if they knew in advance the definitive terms of the Annaly transaction. A 45 day go shop provision was sufficient, in the committee's view, due to the relative ease of valuing CreXus' mortgage assets. As well, the committee concluded that third party bidders would be in no worse position if an agreement were signed because Annaly would have to credit the FIDAC termination fees against its own termination fee. Lazard and Goodwin Proctor were authorized to negotiate with Annaly for improved terms and a higher price. Lazard discussed the Special Committee's views with BofA Merrill Lynch later that same day.

On January 16, 2013, Goodwin Proctor gave K&L Gates a revised merger agreement, which provided that any tender offer could not proceed until the expiration of the 45 day go shop period, eliminated Annaly's matching rights, and required a superior proposal to purchase only 51% of the company, as compared with Annaly's proposed purchase of 100%. Also included was the requirement that any termination fee be credited against the FIDAC termination fee.

On January 18, 2013, Annaly raised its share price to $12.70 per share, and declined to extend the go shop period to 45 days from 30 days, or to give up its matching rights. The Special Committee met on January 23, 2013, to discuss Annaly's revised offer. Further meetings were held on January 23 and January 25, 2013, to discuss possible counter-offers to Annaly both on price and deal terms. Lazard and BofA Merrill Lynch met several times to review various proposals, and finalized the confidentiality agreement between Annaly and CreXus.

After Annaly raised is offer to $13.00 per share, the Special Committee met with Lazard and Goodwin Proctor five times between January 27, 2013 and January 30, 2013, and discussed the negotiations with Annaly and each side proposed changes to deal terms, including crediting any termination fee to the FIDAC termination fee because any third party purchaser likely would terminate the FIDAC agreement.

On January 30, 2013, the Special Committee approved a definitive merger agreement with Annaly at $13.00 per share, the material terms of which are discussed in more detail later in this opinion. The Annaly board approved the agreement that same day, and the transaction was publicly announced on January 31, 2013. Among the reasons why the Special Committee recommended the transaction with Annaly were the following:

- The offer price of $13.00 represented a 17 % premium over the closing share price of November 9, 2012, the last trading day prior to the first public announcement.
- The company's stock price had not exceeded the offer price in the last twelve months.

- Annaly's offer of $13.00 was the highest price reasonably obtainable.
- An all cash transaction, with no financing contingencies, provided certainty of a timely closing.
- Lazard provided a favorable fairness opinion.
- The 45 day go shop period was an adequate market check and no third party bidders were dissuaded.
- The maximum termination fee was only 2.5% of the deal value, and it was fully creditable to the FIDAC termination fee.
- The transaction could be finalized only after a vote of the majority of CreXus stockholders, not including Annaly.

On January 31, 2013, Lazard began the 45 day go shop period and contacted 47 potential bidders, including all of the parties which previously had expressed an interest in the company. Ultimately no superior bids emerged and CreXus filed a Schedule 14D-9 on March 18, 2013.[7] After the solicitation period, over 82% of the public stockholders, not including Annaly, voted in favor of the transaction. The transaction with Annaly closed on May 23, 2013.

Discussion

A. The Parties Contentions

In moving to dismiss, the defendants argue that the amended complaint does not allege sufficient facts to show that the Special Committee labored under any disabling conflicts, such that their actions are not entitled to the presumptions attendant to the business judgment rule. Second, the defendants contend that the amended complaint fails

[7] Amendments to the Schedule 14D-9 were filed by CreXus on April 2, 2013 and April 10, 2013. These amendments do not affect the result in this case.

to sufficiently allege that the sales process used by the Special Committee, or any deal terms to which they agreed, evidences a violation of any fiduciary duties either by CreXus, the Special Committee or the company's board as a whole, or by Annaly. They also contend that the plaintiffs failed to allege any material misstatements in or omissions from the Schedule 14D-9 filed by CreXus, explaining the Special Committee's reasons for recommending the transaction.

The plaintiffs counter that they have sufficiently pled facts to show that the Special Committee was not independent and that this lack of independence warrants further judicial review. In their view, the members of the Special Committee were so dominated and controlled by Annaly, such that their actions should be viewed as those of Annaly itself. They point to a number of items: CreXus was an externally managed REIT; the external managers, FIDAC directly and Annaly indirectly, had superior access to information; Annaly possessed effective voting control and maintained practical control over CreXus.[8] The plaintiffs also point to the fact that the members of the Special Committee were originally appointed to their seats on the CreXus board by Annaly when the company went public in September 2009, making them beholden to Annaly.[9] The plaintiffs also point to the fact that the members of the Special Committee received compensation for serving on the CreXus board, in both cash and stock.[10] Finally, the plaintiffs contend that the board (including the members of the Special Committee) had favored Annaly in the past and that this transaction, and the Special Committee's

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[8] Amended Complaint at ¶¶ 10, 31, 33-35.

[9] Amended Complaint at ¶¶ 14-15, 17.

[10] Amended Complaint at ¶¶ 38, 39.

conduct, is simply of a piece with prior decisions favorable to Annaly, and further evidence of lack of independence.[11]

The plaintiffs second main contention is that the process employed by the Special Committee in deciding to sell the company was inadequate and did not sufficiently maximize stockholder value. This contention has a number of subparts. With respect to the sales process itself, the plaintiffs criticize, among other things, the lack of any pre-signing market check, the Special Committee's decision to sign a definitive merger agreement with Annaly before shopping the company to other potential buyers, the Special Committee's use of and reliance upon financial projections prepared by an Annaly affiliate (FIDAC, the external manager of the CreXus), the termination fee and what they view as an illusory post-agreement go shop provision.[12]

The plaintiffs also contend that the price of $13.00 per share was too low,[13] and that the Special Committee agreed to unreasonable deal protections devices.[14] Finally, the plaintiffs point to what they view as inadequate disclosures in the Schedule 14D-9.[15]

B. <u>The Independence Of The Special Committee</u>

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[11] Amended Complaint at ¶¶ 9, 46-51. This contention, that CreXus had elected an equity sale over a possible alliance with Starwood, in order to favor Annaly, was rejected by this court in a prior lawsuit. *Clark v. Corcoran*, No. 361865 (September 12, 2012). Judge Mason dismissed the derivative complaint finding no merit in these contentions. This court agrees with Judge Mason's rulings and declines to revisit this issue.

[12] Amended Complaint at ¶¶ 11, 53-58, 63-64.

[13] Amended Complaint at ¶¶ 66-67, 70, 71-75.

[14] Amended Complaint at ¶¶ 53, 63.

[15] Amended Complaint at ¶¶ 29, 60, 62, 73.

Special Committees are expressly allowed under Maryland law.[16] Structurally, it is undisputed that a Special Committee was properly appointed in this case. The Schedule 14D-9 states (and no contrary facts have been pled by the plaintiffs) that the Special Committee was authorized by board resolution and that it was empowered "to reject or approve any potential transaction to the fullest extent permitted by Maryland law and to engage separate financial, legal or other advisors."[17] The record before the court shows that the Special Committee could and did hire qualified legal and financial advisors, neither of which had any prior material dealings with Annaly. Nor did these advisors have any particular expectation of future business from Annaly. The plaintiffs have not alleged otherwise.

It also is manifest that the Special Committee, at least structurally, had the authority to just say no. As well, the Special Committee was authorized to explore any other potential transaction, in addition to that presented by Annaly. Ultimately, a board vote approving the transaction was taken in this case, by a vote of the majority of the directors.[18] Riordan and Kazel abstained.

In the context of a merger, factual allegations showing, or permitting the inference, that the majority of the board, or the Special Committee, was not both disinterested and independent will provide sufficient support for a claim for breach of

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[16] Md. Code, Corps. & Ass'ns § 2-411(a)(1); § 8-206.

[17] Schedule 14D-9 at p. 6. *See* J. HANKS, MARYLAND CORPORATION LAW § 6.16 (2012 Supplement)(discussion of the powers of the board and special committees under Maryland law).

[18] A vote of the full board of directors, not just the Special Committee, appears to have been required in this case as the power to approve the merger and make a recommendation to the stockholders in this circumstance could not be delegated. Md. Code, Corps. & Ass'ns, § 2-411(a)(2); § 8-206.

fiduciary duty and survive a motion to dismiss. However, to sufficiently allege that a director is not independent, a plaintiff must set forth specific facts demonstrating that the director is "beholden" to a controlling party "or so under the [controlling party's] influence that [the director's] discretion would be sterilized." *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993). Ordinarily, "[a] director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders." *Rales*, 634 A.2d at 936.

Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences, such as where one director effectively controls another. *Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002). The law is clear that, without more, allegations that directors are friendly with one another, travel in similar social circles, or have had prior business dealings with the proponent of the transaction are insufficient to show lack of independence. *Beam ex rel. Martha Stewart Living Omnimedia v. Stewart*, 845 A.2d 1040, 1051-52 (Del. 2004).

Further, as to any particular director, the alleged disqualifying self-interest or lack of independence must be material; that is, reasonably likely to affect the director's decision-making process. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993); *see also Shapiro v. Greenfield*, 136 Md. App. 1, 18-24 (2000)(discussion of interested directors in the context of Md. Code, Corps. &Ass'ns § 2-419). In other words, a plaintiff must allege facts sufficient for the court to infer that the director in question has material ties to the proponent of the transaction sufficiently substantial that she simply cannot fulfill her fiduciary duties.

Particularly with respect to a director's receipt of fees or other compensation for serving on the board (such as stock options), "allegations of pecuniary self-interest must allow the court to infer that the interest was of a 'sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties without being influenced by her overriding personal interest.'" *In re General Motors (Hughes) Shareholders Litigation*, 2005 WL 1089021 (Del. Ch. May 4, 2005) (citing *In re General Motors Class H Shareholders Litigation*, 734 A.2d 611, 617-18 (Del. Ch. 1999), *aff'd*, 897 A.2d 162 (Del. 2006). Interest or dependence will not be found or inferred merely because directors are paid for their services, were chosen initially at the behest of controlling stockholders or participated or approved the challenged transaction. *See Werbowsky v. Collomb*, 362 Md. 581, 610, 622 (2001)(discussing independence in the context of demand-futility).

With respect to compensation, the test is not simply that of whether the amount received in board fees seems like a lot of money to a "reasonable or ordinary person" or the "man on the street." Instead, the plaintiff must allege specific facts from which it at least could be inferred that the payments at issue are material to the particular director in question. *Cede & Co.*, 634 A.2d at 364.

All of the specific facts the plaintiffs have pled in this case regarding the "interestedness" of the members of the Special Committee have no legal merit. Receiving board fees does not make a director interested in a transaction, particularly when, as here, there are no factual allegations of materiality. The allegations regarding domination and control by Annaly either are quite conclusory or simply too general. Viewing the amended complaint in the light most favorable to the plaintiffs, they have

insufficiently alleged that the Special Committee was either conflicted or controlled by Annaly, or interested in the transaction, or that their independence reasonably may be called into question.

Fundamentally, the plaintiffs' theory of the case rests on the notion that because CreXus was externally managed by an affiliate of Annaly there is virtually no transaction structure that would be appropriate whereby Annaly could acquire CreXus, absent a pre-market check or an auction. This argument is made notwithstanding that Maryland law does not prohibit, and indeed permits, externally managed REITS[19]and to date, no Maryland appellate case has required a pre-market check or an auction. Some trial courts in Maryland have expressly rejected these contentions. *E.g., Foster v. The Town and Country Trust*, 2006 MDBT 2, 2006 WL 991000 (Feb. 24, 2006); *Jasinover v. Rouse Co.*, 2004 MDBT 12, 2004 WL 3135516 (Nov. 4, 2004); *see* J. HANKS, MARYLAND CORPORATION LAW § 6.6A at 195 (2012 Supplement).

This court likewise eschews plaintiffs' contentions that a pre-market check or an auction is required of a Special Committee in a related-party merger or other change of control transaction as a prerequisite to independence. This court rejects the plaintiffs' implicit structural bias argument, largely for the same reasons this court previously rejected it in the context of special litigation committees. *Boland Trane Associates, Inc. v. Boland*, 2012 MDBT 1 (June 6, 2012). The plaintiffs have offered nothing of substance to support their bald conclusion that other bidders were frightened off because of the signing of the merger agreement in the absence of a pre-market check.[20]

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[19] *See* Md. Code, Corps. & Ass'ns § 8-301(3), (4) & (9).

[20] At oral argument, the court asked plaintiffs' counsel whether they knew of *any* other bidders who were chilled or scared off by the form or terms of this transaction. The response was that

In summary, insufficient facts have been alleged for this court to infer that the Special Committee was not disinterested or independent.

C. The Price and Process Claims

In *Shenker v. Laureate Education, Inc.*, 411 Md. 317, 337 (2009), the Court of Appeals essentially imposed *Revlon*[21] duties on directors of a Maryland corporation "at least in the context of negotiating the amount shareholders will receive in a cash-out merger transaction." Although the Court of Appeals phrased it somewhat differently, *i.e.*, "corporate directors owe their shareholders fiduciary duties of candor and maximization of shareholder value," *Shenker*, 411 Md. at 341, there does not seem to be any real difference from *Revlon* in practical effect.[22] Under *Shenker*, "in a cash-out merger transaction *where the decision to sell the corporation already has been made,* shareholders may pursue direct claims against directors for breach of their fiduciary duties of candor and maximization of shareholder value." *Shenker*, 411 Md. at 342 (emphasis added). To date, the Court of Appeals has not extended this holding beyond "a cash-out merger when the decision to sell the corporation has already been made." J.

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counsel had learned of a single potential bidder but could not publicly disclose its identity. This speaks volumes. (Tr. at 61-62, Hearing of Aug., 7, 2013).

[21] In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173, 182 (Del. 1986), the Supreme Court of Delaware held that once the decision to sell the company is made, or a sale otherwise becomes inevitable, the directors have a duty to obtain the best price for the benefit of the shareholders. The Delaware Supreme Court has identified at least three scenarios in which a board might face *Revlon* duties: (1) when the company initiates an active bidding process to sell itself; (2) where, in response to a bidder's unsolicited offer, the company abandons its business strategy and seeks an alternative transaction; or (3) when the company's approval of a transaction results in a sale or a change in control. *In re Santa Fe Pac. Corp. Shareholder Litigation*, 669 A.2d 59, 71 (Del. 1995).

[22] The Court of Appeals noted in *Shenker* that its holding was consistent with *Revlon*. 411 Md. at 350. The Court also noted, however, that Maryland does not follow Delaware in the context of unsolicited takeover bids, as long as there has not been a decision to sell the company. *Id.*, 411 Md. at 349-50. *Cf. Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)(applying enhanced judicial scrutiny to a hostile takeover).

HANKS, MARYLAND CORPORATION LAW § 6.6A at 192 (2012 Supplement). It remains to be seen whether the Court of Appeals will do so. In any event, because this case presents a cash-out merger, *Shenker* applies.

Shenker was decided in 2009, and the Court of Appeals in that case did not undertake to specify or delineate what directors are supposed to do other than to be loyal, tell the truth and maximize stockholder value. As a consequence, the court must seek guidance from other decisions.

Until the Court of Appeals rules otherwise, this court will continue to look to Delaware law to the extent that it is not inconsistent with Maryland law. *See Boland Trane Associates, Inc. v. Boland*, 2012 MDBT 1 (June 6, 2012)(applying to a large measure Delaware law to evaluate the work of a special litigation committee to the extent it did not conflict with the Court of Appeals' holdings in *Boland v. Boland*, 423 Md. 296 (2011)).

To recap, when a board of directors decides to sell a company for cash, it must obtain the best value reasonably attainable for the company's stockholders. Importantly, any favoritism displayed towards particular bidders must be justified solely by reference to the objective of maximizing stockholder value. If the directors bias or tilt the process for or against a bidder that is not for the purpose of maximizing the price the stockholders will receive for their shares of the company, there is a breach of fiduciary duty. *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1282-83 (Del. 1989). However, judicial review in this context is not a license for courts to "second guess reasonable, but debatable, tactical choices that directors have made in good faith." *In re Toys "R" Us Shareholder Litigation*, 877 A.2d 975, 1000 (Del. Ch. 2005). A court's task is simply "to

examine whether the directors have undertaken reasonable efforts to fulfill their obligations to secure the best available price [and the best available terms], and not to determine whether the directors have performed flawlessly." *Id.*, at 1001 (quoting *In re Pennaco Energy Inc.*, 787 A.2d 691, 705 (Del. Ch. 2001)).

Moreover, there exists no fixed litany or playbook that must be followed and directors are allowed to consider a host of business factors. *See Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43-45 (Del. 1994). Further, it is doubtful that the Court of Appeals will invariably require an auction, a heated bidding contest or a "market check" *before* the target in a cash-out merger may safely enter into a definitive merger agreement. J. HANKS, MARYLAND CORPORATION LAW § 6.6A at 195-96 (2012 Supplement). Of course, deal protection devices afforded the putative buyer by the target "must be balanced against the costs of possibly precluding or chilling the opportunity for other bidders to make offers." *Id.* at 196-97.

The court rejects the plaintiffs' argument that the mere signing of a merger agreement with Annaly, without first engaging in a market check, either scared off potential bidders or resulted in a failure to maximize stockholder value. As a matter of pleading, there are no facts alleged to suggest that this was the case. As a matter of logic this contention is inconsistent with business realities. To the contrary, the agreement with Annaly established *a floor* for a cash-out the transaction, not *a ceiling*. And that floor was adequately tested in this case by a post-agreement market check. Sixteen potential bidders requested a non-disclosure agreement during the go shop period, and eight of these potential bidders submitted signed agreements. *See In re the MONY Group Inc. Shareholder Litigation*, 852 A.2d 9, 19 (Del. Ch. 2004)("[A] board can fulfill its duty

to obtain the best transaction reasonably available by entering into a merger agreement with a single bidder, establishing a 'floor' for the transaction, and then testing the transaction with a post-agreement market check."). There are no factual allegations in the amended complaint that any potential bidder which, like Annaly, signed a non-disclosure agreement with CreXus, did not have access to the exact same information that was available to Annaly.

The fact that no other bidder came forward and was willing to pay more than the $13.00 per share, *i.e.*, $720.8 million in cash, that was offered by Annaly is hardly startling news.[23] *See Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279, 1287 (Del. 1989)("[W]hen it is widely known that some change of control is in the offing and no rival bids are forthcoming over an extended period of time, that fact is supportive of the board's decision to proceed."). Here, the Special Committee negotiated for and obtained a 45 day go shop period, and had the right to negotiate with *any* bidder which put forth a superior proposal. These were reasonable and effective protectors of stockholder value under the circumstances of this case. The simple fact that no one in the REIT community was willing to pay more than $13.00 a share in cash for CreXus does not give rise to the inference that the process was flawed or that the price was inadequate. It means simply that no one wanted to put up the cash needed to top Annaly's bid. Although a target company (or other potential bidder) might desire, or even achieve in some cases a longer go shop period or a lower termination fee, the merger agreement in this case afforded a

[23] The thinness of the amended complaint in this regard is illustrated by ¶¶ 74 and 75, which apparently were included to show that the price was inadequate by quoting "outside sources." Paragraph 74 references a criticism of the transaction in an article (author unknown, methodology unknown) found on the website, The Motley Fool. Paragraph 75 alleges that a single stock analyst predicted a price target of $16.00 for CreXus stock. The factual basis for this prediction is not stated. This is hardly the stuff on which to base any conclusion about price.

reasonable and effective post-signing market check. *See In re Tops Company Shareholders Litigation*, 926 A.2d 58, 86-87 (Del. Ch. 2007).

The matching right afforded Annaly in this case was not unreasonable. Annaly was limited to only three business days in which to match a competing offer. Matching rights "are hardly novel and have been upheld by [the Delaware Court of Chancery] when coupled with termination fees despite any additional obstacle" such devices present. *In re Lear Corp. Shareholder Litigation*, 926 A.2d 94, 120 (Del. Ch. 2007). This device can be overcome by other bidders in real world situations, if that bidder actually has a superior offer and wants the assets of the target company. *See In re Tops Company Shareholders Litigation*, 926 A.2d at 86; *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 107 (Del. Ch. 1999). This is especially true in this case because a superior bidder only had to cover more than 75% of the value of CreXus, as compared with the 100% the Special Committee required of Annaly under the merger agreement. As a consequence, it was not unreasonable for the Special Committee to afford Annaly the assurance of matching rights in this case as a safeguard in the case of a bidding war. *See In re Cogent, Inc., Shareholder Litigation*, 7 A.3d 487, 502 (Del. Ch. 2010).

Critically, as well, the plaintiffs misapprehend the import of the termination fee in this case. First, at $ 25 million, the termination fee is a small percentage of the total value of the transaction, which exceeded $ 720 million. *In re Netsmart Techs., Inc. Shareholder Litigation*, 924 A.2d 171, 177 (Del. Ch. 2007); *In re Pennaco Energy, Inc. Shareholder Litigation*, 787 A.2d 691, 707 (Del. Ch. 2001). Of at least equal importance in this case is the fact that CreXus would have to pay FIDAC a termination fee *regardless* of the identity of the acquirer. Under the agreement the Special Committee negotiated

with Annaly, any termination fee due to Annaly would be credited against any termination fee owed to FIDAC. As a consequence, third party bidders would be in no worse position in respect of the FIDAC termination fee had CreXus not already signed the proposed merger agreement with Annaly. This is hardly an act of favoritism towards Annaly.

Termination fees are regularly used, and well understood, deal protection devices. A termination fee that does not exceed 3% of the value of the transaction ordinarily is held to be reasonable. *In re Cogent, Inc., Shareholder Litigation*, 7 A.3d 487, 502-04 (Del. Ch. 2010). Among other things, termination fees protect the usually substantial investment of the first bidder against "free riding" by another bidder. At that point, a majority of the work already has been done (documents have been collected and reviewed, and key merger terms fleshed out) and the initial bidder stands to lose much in terms of time and money. *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000). In short, the deal protection devices complained of by the plaintiffs in this case, singly or in combination, have not been shown to be unreasonable and do not rise to the level of a breach of fiduciary duty. *See in re Cogent, Inc. Shareholder Litigation*, 7 A.3d at 508-09 (viewing deal protection devices in the aggregate).

D. The Disclosure Violations

The plaintiffs also contend generally that the Schedule 14D-9's disclosures were inadequate or misleading. For example, they complain that the Special Committee and Lazard relied on financial information provided by FIDAC but failed to disclose the limitations of this information.[24]

[24] Amended Complaint at ¶¶ 29, 57-62.

When directors of a Maryland corporation seek stockholder approval for a merger, they have a duty to provide all material facts relevant to making an informed decision. *Shenker*, 411 Md. at 341-42; *see Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994). Directors also must avoid making materially misleading or partial disclosures, which distort the history of actual events or skew material facts. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999). In other words, fulfillment of the duty of candor is paramount when seeking stockholder action. *Malone v. Brincat*, 722 A.2d 5, 11 (Del. 1998).

The court in this case must consider whether the information relied on by the Special Committee in its decision-making process was adequate. In this regard, the plaintiffs challenge the Special Committee's use of the financial projections prepared by FIDAC. These projections were requested by the Special Committee and Lazard so that they could evaluate Annaly's offer. The projections at issue were not pre-existing FIDAC projections or projections supplied by Annaly to support its offer.

Further, the amended complaint does not contend that FIDAC's projections were understated or flawed in any way, or that Lazard considered them to be inadequate. And it is disclosed in the Schedule 14D-9 that the projections were prepared by FIDAC at the request of the Special Committee and used by Lazard. The court simply does not apprehend this to be problematic. As FIDAC was the manager of CreXus, and ran its day-to-day operations, who else would the Special Committee took to for financial information? Where could the Special Committee find a more reliable source of information, separate from the entity which was contractually bound to supply correct information?

The plaintiffs' generalized complaints about price and Lazard's "inadequate" financial analyses are even more baffling. Lazard's comparable company analysis implied a range of $12.26 to $14.62 per share. The discounted cash flow analysis implied a range of $12.10 to $14.15 per share. The transaction analysis implied a value of $12.68 to $15.04 per share. All of this is set forth in detail in the fairness opinion. Yet, nowhere in the amended complaint is there a single criticism of Lazard's methodologies or the value conclusions in its fairness opinion.[25] At bottom, the alleged deficiencies do not go to the validity or the clarity of the information presented.

In order to trigger a duty of further disclosure, the information at issue must be material to the transaction and to the stockholders' understanding of the transaction. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Tellingly, the plaintiffs give no reasons in the amended complaint as to why a stockholder would want or need any of the information the plaintiffs claim was omitted from the schedule 14D-9. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141-42 (Del. 1977). In other words, the plaintiffs have not pled how any of the allegedly omitted information was material. Nor is anything pled about how, absent further disclosures, a stockholder could not make a reasoned, informed decision as to how to vote on the transaction. *See Arnold v. Society for Savings Bancorp., Inc.*, 650 A2d at 1287. The law does not require "a play-by-play description of every consideration or action taken by a Board, especially when such information would tend to confuse stockholders or inundate them with an overload of information." *In re Cogent, Inc. Shareholder Litigation*, 7 A.3d at 511-12 (footnote omitted).

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[25] Schedule 14D-9 at 17-24.

Having carefully reviewed the amended complaint, the court is certain that no disclosure violation has been properly pled in this case. Nothing complained of rises to the level of a material misstatement or omission.

E. "Entire Fairness"

At oral argument, the plaintiff raised for the first time in the case the concept of entire fairness, which has been adopted in Delaware as a standard of judicial review in connection with certain controlling shareholder and interested party transactions. *See Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997); *Kahn v. Lynch Communications Systems, Inc.*, 638 A.2d 1110, 1115- 1118 (Del 1994).[26] Although both *Kahn* cases are cited in the table of cases in the plaintiffs' brief, there is no discussion whatsoever of entire fairness in the text of that brief. The only standard of review referred to by the plaintiffs is business judgment, along with arguments as to why it should not apply in this case.

Ordinarily, a court is not required to address an argument that is not sufficiently set forth in a party's brief. *See Abbott v. State*, 190 Md. App. 595, 631-32 n. 14 (2010); *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) *cert. denied*, 376 Md. 544 (2003).

Among other reasons, to do so would be unfair to the opposing party who had no opportunity to consider the argument, respond in writing or prepare for oral argument. *See DiPino v. Davis*, 354 Md. 18, 56 (1999).

Although the court is quite familiar with the *Kahn* line of cases, and the entire fairness standard of review that Delaware has adopted, it would be patently unfair and

[26] Additional discussions by the Delaware Supreme Court of entire fairness are found in *Americas Mining Corp v. Theriault*, 51 A.3d 1213 (Del. 2012) and *Emerald Partners v. Berlin*, 726 A.2d 1215 (Del. 1999).

unwise for several reasons to address it in this case. First, the doctrine has not been squarely adopted by the Court of Appeals or the Court of Special Appeals in any context. It was specifically rejected by the Court of Special Appeals in evaluating the work of a special litigation committee in a demand-refused stockholder derivative suit. *Bender v. Schwartz*, 172 Md. App. 648, 670-73 (2007).[27] As well, it appears to have been rejected, albeit implicitly, by the Court of Special Appeals in *Whittman v. Crooke*, 120 Md. App. 369, a case which involved a direct action by stockholders challenging a merger.[28]

Second, the defendants did not have the opportunity to brief the question because the plaintiffs did not raise and argue this issue in their motion papers. Third, the court has not had the benefit of any cogent analysis of the doctrine or its application to this case, orally or in writing, by any party.

Fourth, this area of the law continues to evolve, even in the Delaware Court of Chancery. As recently as May, 29, 2013, Chancellor Strine issued a published opinion

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[27] Of course, *Bender* preceded the Court of Appeals' decision in *Boland*, and the utlimate implications of *Boland* remain uncertain. Some practitioners have advised their clients not to appoint special litigation committees in light of the procedural hurdles newly created by the Court of Appeals in *Boland*, believing that the utility of the device has been much diminished due to the novel procedural hoops created by the Court's so-called "enhanced *Auerbach*" level of judicial scrutiny. *See Auerbach v. Bennett*, 393 N.E.2d 994 (1979). Dissenting in *Boland*, Judge Battaglia presciently observed: "What the majority does in its opinion is introduce a new standard of judicial review for a refusal to pursue litigation in a shareholder derivative action when a disinterested special litigation committee has recommended against pursuit of litigation." *Boland*, 423 Md. at 374 (Battaglia, J. dissenting). Commentators have been equally critical of the majority's approach, noting that *Boland* upset "settled law and imposed unnecessarily difficult standards for the composition of special litigation committees and for the conduct of their investigations and conclusions." J. HANKS, MARYLAND CORPORATION LAW § 7.21[c] at 276.14 (2012 Supplement)(footnote omitted).

[28] It may well be that entire fairness was neither briefed nor argued in *Wittman*. That may explain the absence of any reference to that doctrine in Chief Judge Murphy's opinion for the court. Nevertheless, the reasoning of *Wittman* lends support to the notion that, under Maryland law, even interested party transactions may be ratified by the stockholders, as long as there is full disclosure of all material information, thereby extinguishing claims for breaches of fiduciary duty (perhaps excepting the duty of loyalty). 120 Md. App. at 377-78.

holding that, as a matter of first impression, business judgment and not entire fairness would apply when an interested party transaction is both approved by an independent special committee and a vote of the majority of the stockholders unaffiliated with the controlling stockholder. *In re MFW Shareholder Litigation*, 67 A.3d 496 (Del. Ch. 2013).[29]

For these reasons, the court declines to address the issue in this case.[30]

F. Breach of Fiduciary Duty

The court has already described why the complaint is deficient as to any breach of fiduciary claim against CreXus or its directors. The claim against Annaly too is deficient.

As an initial matter, no facts are alleged that Riordon or Kazel (concededly affiliates of Annaly), did anything at all. They were not on the Special Committee and they did not vote on the transaction. There are simply no facts alleged as to how these individuals may have breached any duty owed to the CreXus or its Stockholders and, as a consequence, there is nothing in this regard to impute to Annaly.

In addition, although Annaly owned 12.4% of CreXus at the time the merger agreement was signed, this level of stock ownership is far from the amount needed to control CreXus under the facts of this case. Offering to buy CreXus is not a breach of

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[29] Chancellor Strine alluded to this modification to the *Kahn v. Lynch* rule of entire fairness in *In re Cox Communications, Inc., Shareholders Litigation*, 879 A.2d 604, 642 (Del. Ch. 2005). The Court of Chancery previously had applied this rule to transactions involving a third party where the alleged controlling stockholder was affiliated with the target, not the acquirer. *In re John Q. Hammons Hotels, Inc. Shareholder Litigation*, 2009 WL 3165613 (Del. Ch., Oct. 2, 2009). It was recently reaffirmed in *Southeastern Pennsylvania Transportation Authority v. Volgenau*, No. 6354, 2013 WL 4009193 (Del. Ch., Aug. 5, 2013).

[30] Chancellor Strine's approach has much to recommend it as it would fairly replicate an arm's-length merger with a third party. Such an approach also would provide much needed certainty in corporate transactions. If the parties (and their counsel) know what to do in order to avoid costly litigation, they likely will do it. *See In re MFW Shareholder Litigation*, 67 A.3d at 526-36.

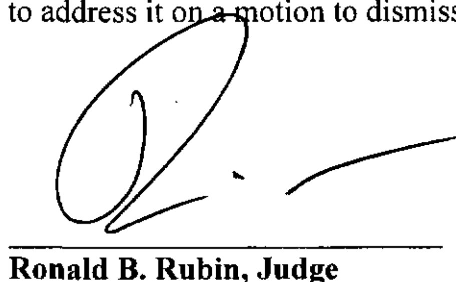
any duty owed to CreXus stockholders. There is nothing alleged about Annaly's conduct which is different from acts normally attendant to a cash-out merger, or out of the ordinary in any way.

G. Aiding and Abetting

For aiding and abetting liability to attach, there must be a primary violation and a knowing participation in that violation. *Alleco Inc. v. Weinberg Foundation, Inc.*, 340 Md. 176, 200-01 (1995); *see Malpide v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). There being neither adequately pled in this case, this count fails as a matter of law.

H. Charter Exculpation

In accordance with Md. Code, Corps. & Ass'ns § 2-405.2, CreXus' stockholders had adopted a charter provision exculpating its directors from money damages, apart from the circumstances mentioned in Md. Code, Cts. & Jud. Proc. § 5-418(a). ("[A] Maryland corporation may include any provision expanding or limiting the liability of its directors and officers to the corporation or its stockholders," save for exceptions regarding the receipt of an improper benefit or "active and deliberate dishonesty."). This issue is raised in the defendants' briefs but is not included in the plaintiffs' amended complaint. For that reason alone, the court declines to address it on a motion to dismiss.



Dated: August 14, 2013

Ronald B. Rubin, Judge