COSTA BRAVA PARTNERSHIP III, L.P.	*	**IN THE**
Plaintiff,	*	**CIRCUIT COURT**
v.	*	**FOR**
TELOS CORPORATION, et al.	*	**BALTIMORE CITY, Part 20**
Defendants.	*	**Case No. 24-C-05-009296**

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

MEMORANDUM OPINION

I. Introduction

Plaintiff Costa Brava Partnership III, L.P. ("Costa Brava"), a limited partnership organized under the laws of Delaware with its principal place of business in Massachusetts, filed suit against Telos Corporation ("Telos"), and its directors and officers alleging, *inter alia*, fraudulent and illegal conduct by the corporation, and its board of directors and officers. Costa Brava owns 15.9% of Telos' Cumulative Exchangeable Redeemable Preferred Stock ("ERPS").

Specifically, the Complaint filed by Costa Brava alleges seven counts against Defendants. In its disputed capacity as a creditor, Counts I through III of the Complaint allege an action for fraudulent conveyance of corporate funds stemming from Telos' payment of officer bonuses. As a result, Costa Brava requests the Court to enjoin future payment of the executive bonuses, and to appoint a receiver for Telos to take charge of the company's assets and operate the corporation. Counts IV and V of Costa Brava's Complaint request the Court to appoint a receiver for Telos, and ultimately dissolve the corporation for the alleged fraudulent and otherwise illegal conduct of Telos' directors and officers. By virtue of its status as a stock holder, Counts VI and VII are derivative claims that allege a breach of the Telos directors' and officers' good faith obligation

to perform their duties in the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.

The defendants are Telos, a Maryland corporation with its principal place of business in Ashburn, Virginia, nine directors of Telos ("Directors")[1], and five Telos officers ("Officers").[2] In response to Costa Brava's Complaint, Telos filed a motion to dismiss, or in the alternative, to stay the action. The Directors and Officers each filed respective motions to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

II. Background

A provider of information services that include consulting, systems integration, and hardware maintenance, Telos is a public company with security offerings that include Class A and Class B Common Stock. Issued in 1989, Telos' ERPS are the only preferred class of Telos stock that are publicly traded. By the terms of the ERPS Registration Statement, ERPS holders are entitled to semi-annual fixed dividend payments, mandatory redemption as fixed-term securities, and, under certain circumstances, the right to elect "Class D" directors. Of the 3,185,586 shares of ERPS outstanding as of June 1, 2005, Costa Brava holds 506,811 shares, all of which were purchased during the time period between January 2005 through June 2005.

In December 1991, Telos ceased making the periodic dividend payments to ERPS share holders due to "insufficient legally available funds." As such, the unpaid accrued dividends

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[1] The nine director defendants include: Geoffrey B. Baker, David Borland, Norman P. Byers, Fred Charles Ikle, Robert J. Marino, Langhorne A. Motley, Malcolm M.B. Sterrett, Bruce J. Stewart, and John B. Wood.

[2] The five officer defendants include: Michael P. Flaherty, John M. McDuffie, Michele Nakazawa, Richard Tracy, and Edward L. Williams.

on outstanding ERPS now totals roughly $39,700,000. Pursuant to the ERPS' Registration Statement, beginning in 2005, Telos was obligated to establish a fund for the redemption of 20% of the outstanding ERPS, as well as pay the ERPS unpaid accrued dividends. However, as indicated in S.E.C. filings, Telos is currently unable to pay the accrued dividends, and will not be able to meet the ERPS redemption schedule as well.

The events alleged in the Complaint that led to the inability to pay ERPS dividends and to comply with the mandatory redemption are as follows. Between 1998 and 2004, Telos paid cash bonuses to its Officers totaling $4,590,851, at a time when Telos was allegedly insolvent. From 2000 to 2004, Telos' granted Officers stock options in two of Telos' wholly-owned subsidiaries totaling 4,468,000 shares. Additionally, in 1995 Telos entered into a loan agreement with a 75% shareholder of Telos Class A stock (Defendant, Director John R. C. Porter). The loan agreement provided for a 17% interest rate, a rate almost double the 1995 prime rate of 8.8%. In November 2004, this loan was extended through 2008 at the same 17% interest rate. Beginning in 1997, Telos has also paid a continual consulting fee to Defendant Porter for undisclosed services ranging from $200,000 to $260,000 a year, and now totaling approximately $1,960,000.

According to the Complaint, in March 2005, Telos formed an Independent Committee to investigate ways to rectify Telos' capital structure insovlency and finance the redemption of the ERPS. In response to an Independent Committee letter dated March 30, 2005, Costa Brava secured several alternative financing plans to address the insolvency and redemption issues. However, Telos did not respond to Costa Brava's suggestions. Rather, in its 2005 S.E.C. filings, Telos sought to reclassify the ERPS as a long-term liability pursuant to Statement of Financial Accounting Standards No. 6, and to exchange ERPS for Exchange Debentures rather than submit to the mandatory

redemption schedule of the ERPS.

On or about September 9, 2005, Costa Brava made demand on Telos by serving its demand letter and draft Complaint on the Telos Directors, providing a thirty-day period for Telos to respond. In its letter, Costa Brava demanded that Telos conduct a full accounting of Telos's bonus payments, recover bonus payments distributed to Officers beginning in 1998, prohibit the implementation of Telos' stock option plan, and devise a payment plan for the ERPS dividends. Having heard no response from Telos, Costa Brava filed the instant Complaint on October 17, 2005. Sometime during December 2005, Costa Brava served a second demand letter on Telos, to which Telos responded. On or about December 22, 2005, Telos announced the establishment of a Special Litigation Committee, consisting of two independent directors, to review and evaluate the issues complained of by Costa Brava.

III. Director Stewart's Dismissal

Telos alleges that Director Stewart should be dismissed from this action. Director Stewart was not a director when the first demand letter was issued, and was named to the Telos board of directors twelve days before Costa Brava filed its Complaint. Telos contends that Director Stewart had no knowledge of, nor participated in the actions alleged against the other Directors. To the contrary, Costa Brava claims that because Director Stewart failed to address the initial demand upon becoming a Telos director, that he is in breach of his fiduciary duties to Telos.

The Court is persuaded that Costa Brava has not stated a cause of action against Director Stewart, given that he was not a member of the Telos board during the time period when the alleged fraudulent, illegal and *ultra vires* activities occurred, and has no firsthand knowledge of said events. Accordingly, the Court will grant the Directors' motion to dismiss with respect to

Director Stewart.

IV. Jurisdiction

(a) *Forum Non Conveniens*

In part, Telos' motion to dismiss relies on *forum non conveniens*. Pursuant to Md. Code Ann., Cts. & Jud. Proc. § 6-104(a) (2005), "If a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions it considers." In applying the "interest of justice" standard, a court must, "balance the convenience of witnesses and those public-interest factors of systemic integrity and fairness..." *Jones v. Prince Georges County*, 378 Md. 98, 120-21 (2003).

Given that Telos is incorporated under the laws of the State of Maryland, the Court is unpersuaded by Telos' argument that, "Maryland does not have a sufficient interest in the parties to the Complaint or the events that Plaintiff has alleged that overwhelms the interest of justice in trying the action in a more convenient forum..." *See* Telos Motion to Dismiss at 8. By choosing to incorporate under Maryland law, Telos elected to be a citizen of Maryland and, consequently, intended Maryland law to govern the affairs of the corporation. As such, the citizens of Maryland have an interest in resolving disputes involving Maryland residents, including corporations like Telos.

Furthermore, "modern methods of transportation and communication make it much less onerous now for a person to defend himself in a remote forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985). Given the geographic proximity of the Telos corporate headquarters in Ashburn, Virginia to Baltimore, Maryland, the Court does not see any material inconvenience that would prohibit conducting the instant proceedings in the Circuit Court for

Baltimore City.

(b) Personal Jurisdiction

The defendant Directors and Officers each filed motions to dismiss for lack of personal jurisdiction pursuant to Md. Rule 2-322(a)(1). In considering Defendants' motion to dismiss, the Court must assume the truth of all relevant and material facts that are well-pleaded and all inferences that can be reasonably drawn from the pleadings. *Bennett Heating & Air Conditioning, Inc. v. Nations Bank,* 103 Md. App. 749, *rev'd in part on other grounds,* 342 Md. 169 (1996). To determine whether the Court has personal jurisdiction over the Directors and Officers, it must first be determined "whether jurisdiction is established under Maryland's long-arm statute and, if so, then it must determine whether the exercise of jurisdiction comports with the Fourteenth Amendment Due Process Clause." *McGann v. Wilson*, 117 Md. App. 595, 602 (1997). However, because Maryland's long-arm statute extends to the fullest limits of the Fourteenth Amendment, *Id* at 601, the "statutory inquiry merges with [the] constitutional examination." *Beyond Sys., Inc. v. Realtime Gaming Holding Co.*, 388 Md. 1, 22 (2005).

In conducting such an analysis, "the constitutional touchstone [is] whether the defendant purposefully established 'minimum contacts' in the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). In *Hanson v. Denckla*, the Supreme Court defined minimum contacts as "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson,* 357 U.S. 235, 253 (1958). *See also, Shaffer, et al. v. Heitner*, 433 U.S. 186 (1977). If a court is able to find such minimum contacts, a court must then determine whether the assertion of personal jurisdiction offends, "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Under a traditional minimum contacts analysis, it would be difficult for the Court to assert either general or specific jurisdiction over the Directors and Officers. Telos' headquarters and

principal place of business is in Ashburn, VA, and as such, any and all corporate actions or decisions by the Directors and Officers occurred in Virginia, rather than Maryland. *See* Officers' Motion to Dismiss at 7; Directors' Motion to Dismiss at 6. Furthermore, none of the Officers or Directors are residents of Maryland; nor do they personally conduct any business in Maryland that would give rise to personal jurisdiction. Any contact that the individual Directors or Officers have with the forum state are *de minimus* and cannot be viewed as purposeful availment of the benefits of conducting business in Maryland.[3]

On the other hand, Costa Brava, relying on *Pittsburgh Terminal Corp. v. Allegheny Corp.*, 831 F.2d 522 (4th Cir. 1987), contends that mere acceptance of a directorship constitutes minimum contacts. *Pittsburgh Terminal Corp.*, 831 F.2d at 527. In *Pittsburgh*, the court asserted personal jurisdiction over the defendant directors because each act taken by the directors with respect to the corporation was "given effect in West Virginia by virtue of West Virginia law just as surely as if they had been in the principal office of the corporation in West Virginia, present and voting in person." *Id.* The court held that "under long-arm statute which gave jurisdiction over persons who 'transact any business in the state,...the directors' authorization of the issuance of stock for a consideration unfair to existing stock holders was transacting business within the meaning of the statute."[4] *Id.*

The facts in this case are analogous to those in *Pittsburgh*. Like the West Virginia long-arm statute in *Pittsburgh*, Maryland's long-arm statute is coextensive with the due process clause of the Fourteenth Amendment, and provides for jurisdiction over a defendant that "transacts

[3] The only contacts that the Defendant Directors and Officers have with the forum state include Officer McDuffie's biannual trips to the NSA which are unrelated to Telos, Officer Nakazawa's visits to her in-laws, Officer Tracy's biannual visits to see his cousin, Officer Williams' ownership of an Ocean City, MD vacation home which is unrelated to this action (*see* Md. Code Ann., Cts & Jud. Proc. § 6-103(a)), Director Motley's hunting license, and Director Borland's minimal consulting work.

[4] The West Virginia long-arm statute analyzed in *Pittsburgh* was coextensive with the due process clause of the Fourteenth Amendment.

any business or performs any character of work or service in the State." Md. Code Ann., Cts. & Jud. Proc. § 6-103(b)(1). Though the Telos corporate headquarters are in Virginia, Telos is a corporation organized under the laws of Maryland. Any action taken by the Directors and Officers with respect to the management of Telos can only be given effect in Maryland by virtue of Maryland law. Therefore, under § 6-103(b)(1) of Maryland's long-arm statute, the Directors' and Officer's activities relating to, *inter alia*, the ERPS, the alleged fraudulent transfers, and the stock option grants constitute "transacting business" in Maryland. Adopting the analysis presented by the court in *Pittsburgh*, it is proper for this Court to assert personal jurisdiction over the Directors and Officers. Accordingly, the Directors' and Officers' motions to dismiss will be denied.

V. ERPS - Costa Brava's Status as Creditor and/or Stockholder

(a) Fraudulent Conveyance: Counts I - III

Cost Brava's Complaint asserts a claim of fraudulent conveyance for payment of Officer bonuses while Telos was allegedly insolvent. Costa Brava's allegation turns on the creditor status of ERPS stockholders, given the classification of ERPS as debt. Costa Brava contends that the ERPS are debt because they lack voting rights in most circumstances, yield fixed dividend payments, maintain a fixed maturity date, have redemption and liquidation rights which do not exceed the security's issue price, retain priority over common stockholders, and are classified as "indebtedness" in the corporate charter. Additionally, Costa Brava requests the Court to find that the ERPS' unpaid accrued dividends are debt as well.

However, under a *Paulson v. Commissioner of Internal Revenue*, 469 U.S. 131, 138 (1985) analysis, it appears that the ERPS possess the attributes of equity. Upon a review of the ERPS Registration Statement filed on October 20, 1989, ERPS stockholders retain a part ownership interest in Telos, maintain the right to vote, are entitled to dividend payments, have no right to have a dividend declared, and have the right to a *pro rata* distribution of any remaining assets after a solvent dissolution of Telos. Thus, the ERPS appear to have the necessary hallmarks of equity.

Costa Brava's contention that the ERPS' unpaid accrued dividend payments are debt

is equally tenuous. "There is no relation of debtor and creditor between the corporation and preferred stockholders or cumulative stockholders until the declaration of the dividend, when, in consequence of declaration, the obligation of debtor and creditor does arise." *Heyn v. Fidelity Trust Co.*, 174 Md. 639, 649 (1938). Furthermore, in their Complaint, Costa Brava references the pertinent portion of the ERPS Registration Statement that states, "Dividends will be payable by the Company, when and if declared by the Board of Directors..." *See,* Complaint at ¶ 31. Until Telos declares a dividend on the ERPS, there appears to be no debtor-creditor relationship between Telos and Costa Brava..

Nonetheless, Costa Brava maintains that Telos admitted to the debt classification of the ERPS. In its 2005 S.E.C. filings, Telos published financial statements invoking Statement of Financial Accounting Standards No. 6 which seeks "to recharacterize its short-term mandatory obligation to redeem the ERPS and pay accrued dividends as long-term, rather than short-term liability." *See*, Complaint at ¶ 47. Furthermore, Costa Brava alleges that "Telos itself treats the unpaid dividend obligations as an "interest expense" and a "liability" in its publicly filed financial statements." *Id* at ¶ 105. Telos' own conduct seems to indicate that ERPS are debt.

Of equal significance to Costa Brava's fraudulent conveyance cause of action is the issue of Telos' insolvency. Telos would have the Court believe that Costa Brava has not adequately pleaded this element of its claim. However, Costa Brava contends that it need not prove insolvency; it must merely plead it. The Court is persuaded that Costa Brava's fraudulent conveyance claim contains sufficient allegations to place Telos' solvency at issue. Without the benefits of discovery, Costa Brava can only rely upon the information that is provided through public disclosures. Telos' insolvency was indicated by the formation in March 2005 of the Independent Committee to investigate the capital insolvency of the corporation. Based on that information, Costa Brava reasonably pled that "Telos was either insolvent..., or was driven into insolvency as a result of such conveyance, or was left with unreasonably small capital as a result of such conveyance." *See* Complaint at ¶ 116. Such language is sufficient to raise an insolvency issue concerning Counts I,

II, or III.

Finally, Telos argues that Maryland law does not provide for the appointment of a receiver as a remedy in a fraudulent conveyance claim. Telos directs the Court's attention to Md. Code Ann., Comm. Law § 15-210(b)(2), which provides for the appointment of a receiver of property. Telos contends that this section only permits a court to appoint a receiver for the property that is the subject of the fraudulent transaction. Therefore, under Maryland law, Costa Brava is not entitled to have a receiver appointed for Telos.

In response, Costa Brava argues that § 15-210(b)(2) should not be construed so narrowly. Even if § 15-210(b)(2) is not applicable, Costa Brava alleges that the court has the power to appoint a receiver pursuant to § 15-210(b)(4), which states that the court may "enter any order which the circumstances of the case require." Applying this section, Costa Brava states that a court has the authority to appoint a receiver when the circumstances of a case merit such a remedy. Mindful of the allegations regarding Telos' conduct towards ERPS holders, Costa Brava argues that the circumstances of this case justify said appointment.

"In considering a motion to dismiss for failure to state a claim under Md. Rule 2-322(b)(2), a court must assume the truth of all well pleaded facts and all inferences that can reasonably be drawn." *Rossaki v. NUS Corp.*, 116 Md App. 11, 18 (1995). Md. Rule 2-303(c) permits a party to plead alternative causes of action. Assuming the truth of all facts and reasonably drawn inferences, the Court does not believe that Costa Brava's claims for fraudulent conveyance should be dismissed without the opportunity for discovery on the issues of Telos' insolvency and the ERPS classification as debt. However, given the plain meaning of Md. Code Ann., Comm. Law § 15-210, and the absence of case law interpreting said section, the Court is convinced that Maryland law does not provide for the appointment of a receiver for Telos as a remedy for a fraudulent conveyance claim. Telos' motion to dismiss will be denied with respect to Counts I and II, but granted with respect to Count III.

(b) Statute of Limitations

Telos also argues that Counts I through III of Costa Brava's Complaint are time barred pursuant to Md. Code Ann., Cts. & Jud. Proc. § 5-101. Since Costa Brava's fraudulent conveyance claims do not invoke any statutory exception, § 5-101 applies a three year statute of limitations to its claims. *See, Hecht v. Resolution Trust Corp.*, 333 Md. 324 (1994). Furthermore, Telos contends that Costa Brava cannot toll the limitations period. As a shareholder, it was on notice, as a matter of law, regarding the executive bonus information contained in Telos' S.E.C. Form 10-K filings, since such information is public and accessible. *See, Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993).

Costa Brava argues that the applicable statute of limitations does not apply to causes of action that are equitable in nature. In *Shah v. HealthPlus, Inc.*, 116 Md. App. 327, 336 (1997), the court held that the statute of limitations did not apply to claims for equitable relief. Costa Brava contends, and the Court agrees, that only Count I of the Complaint is subject to the three year statute of limitations pursuant to § 5-101, since Counts II and III request the court to grant equitable relief.

Costa Brava further maintains that pursuant to the "discovery rule," a plaintiff must have notice of a claim to start the running of limitations. *Hecht*, 333 Md. at 336. Costa Brava alleges that it did not have notice of its claim for fraudulent conveyance until Telos made clear that it did not intend, in good faith, to make any efforts to fulfill its obligation to redeem the ERPS or pay accrued dividends.

A cause of action accrues when a plaintiff knows or reasonably should know of the wrong. *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). The Court's inquiry into when the statute of limitations began to run on Costa Brava's fraudulent conveyance claim hinges on when Costa Brava knew or reasonably should have known of Telos' insolvency. As Telos indicates in its papers, Costa Brava had no right to demand a dividend payment from Telos based on its ownership of ERPS. Therefore, Costa Brava had no reason to know of any questions concerning Telos' insolvency until the formation of the special committee to address that issue. The Court is persuaded that Costa Brava did not have notice that Telos was insolvent until Telos became unable to fulfill

its mandatory obligation to redeem the ERPS. Only then did Costa Brava have notice of Telos' insolvency and the alleged fraudulent executive bonus payments. The Court will deny Telos' motion to dismiss on limitations grounds.

(c) Direct Claims: Counts IV & V

In addition to its debtor-creditor claims against Telos, Costa Brava, alternatively pled direct claims against the Directors and Officers in its capacity as a stockholder. Alleging, *inter alia*, fraudulent, illegal and *ultra vires* acts, Costa Brava petitioned this Court to dissolve and appoint a receiver for Telos pursuant to Md. Code. Ann., Corps. & Assoc's §§ 3-413(b)(2) and 3-414.

Telos moves to dismiss Costa Brava's direct claims against the Directors and Officers asserting that such claims are not warranted by the allegations in the Complaint. Telos contends that the transactions complained of by Costa Brava constitute ordinary business transactions, rather than oppressive acts by the corporation, solely for the personal benefit of its Directors or Officers. Citing James Hanks' *Maryland Corporate Law*, Telos further argues that "Maryland courts have routinely refrained from granting requests for corporate dissolution based on a retrospective evaluation of the consequences of corporate business transactions." *See*, Telos Motion at 25. Telos argues that an evaluation by the Court of this type would be improper.

Costa Brava counters that its allegations are sufficient to provide for the relief requested. "Taken as true, [the] allegations show Telos' Officers and Directors act in furtherance of their own personal interests separate from the interest of the corporation." *See*, Costa Brava Memorandum In Opposition at 34. Costa Brava argues that the cases cited by Telos regarding actions that constitute oppressive acts were decided only after factual evidence had been submitted to the trier of fact. Without the opportunity for discovery, Costa Brava contends that it does not need to prove its case, but merely to allege sufficient facts to state a cause of action. Costa Brava also points the Court's attention to the fact that Telos does not dispute the allegations supporting Plaintiff's claims.

The Court at this juncture finds that the facts alleged by Costa Brava are sufficient

to state a cause of action for dissolution and appointment of a receiver. Given the case law cited, and the standard of review applied in a motion to dismiss, the Court will deny Telos', the Directors' and the Officers' motions to dismiss with regard to Counts IV and V.

(d) Derivative Claims: Counts VI & VII

The central issue in Telos' motion to dismiss regarding Costa Brava's derivative claims revolves around the demand made upon the Telos Board of Directors. Telos alleges that the thirty-day deadline imposed by Costa Brava is arbitrary and provides an insufficient amount of time to enable Telos to respond. In support of its contentions, and given the dearth of substantive Maryland law on point, Telos directs the Court's attention to § 7.42 of the Model Business Corporation Act which provides for a ninety-day period in which to respond to a pre-suit demand. Telos alleges that, given the extensive nature of Costa Brava's demand requests, the thirty-day period provided an inadequate amount of time within which to form a special litigation committee pursuant to *Werbowsky v. Collumb*, 362 Md. 581 (2001), and ultimately to address the issues raised in Costa Brava's demand.

Costa Brava asks the Court to consider the reasonableness of its thirty-day response time in light of § 7.03(d) of the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations*. (Thirty days is a reasonable period). Costa Brava contends that Telos was provided sufficient details of the issues that it complained of because a draft copy of its Complaint was served upon the Directors with its demand letter. Additionally, the issues presented were neither highly technical nor required in-depth research to examine. *See,* Complaint at ¶ 31. Nonetheless, Telos did not reply to the initial demand letter. Nor did it form the special litigation committee until December 22, 2005. Costa Brava contends that, even had Telos been afforded the ninety day response period that it requests, it actions would have been untimely, since no written or oral response to the initial demand was ever offered by Telos, and the formation of the special committed took place roughly one hundred days after demand was made.

It is uncontroverted that on or about September 9, 2005, Costa Brava made demand

on Telos. Under the facts alleged, the Court believes that Telos received fair notice of the issues presented to it by Costa Brava. While the Court does not agree that Costa Brava's initial thirty-day response period is reasonable in all circumstances, the fact remains that Telos' special litigation committee has had five months to address the issues presented in Costa Brava's first demand letter, and has yet to take any of the requested action. Therefore, the Court finds that Costa Brava's demand was effectively rejected, and it will deny Telos' motion to stay.

(e) Contemporaneous Ownership Requirement

For Costa Brava to maintain its derivative claims against Telos, it must have standing to do so. Therefore, Costa Brava must allege that its ownership of the ERPS was contemporaneous with the alleged illegal actions of Telos contained in Counts VI and VII of the Complaint. *See, Danielwica v. Arnold*, 137 Md. App. 601, 624 (2001). According to Cost Brava Forms SC 13D dated March 17, 2005 and June 6, 2005, all but 5,000 of Costa Brava's 506,811 shares of ERPS were acquired between January 25, 2005 and June 2, 2005.[5] Telos contends that Costa Brava is barred from asserting its derivative claims because it did not own the ERPS when the alleged harm took place. On its face, it would appear that Costa Brava has not established contemporaneous ownership of the ERPS as a basis for standing.

Costa Brava contends that because its derivative claims only seek equitable relief, the contemporaneous ownership requirement does not apply in this instance. However, the court in *Ettridge* held that contemporaneous ownership is required for equitable claims. "If any person having knowledge of illegal, oppressive, or fraudulent acts by the management of a corporation may bring an action for the dissolution of that corporation simply by obtaining a share of its stock, the threat of disruptive and extortionate litigation becomes all too real." *Ettridge v. TSI Group, Inc.*, 314 Md. 32, 43 (1988). Applying the holding of *Ettridge*, Costa Brava is precluded from asserting its derivative claims for alleged fraudulent and/or illegal conduct prior to its ownership of the stock.

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[5] There are no public records indicating when Costa Brava purchased the remaining 5,000 ERPS; nor does Costa Brava plead this information in its filings.

However, "A stockholder is not forever precluded from taking effective action because his predecessor in title had acquiesced in acts similar to those that may now be laying waste to the corporation." *Id* at 44. The court in *Ettridge* went on to state "that evidence of prior misconduct, while unavailable...as a basis for relief, may be relevant and admissible to give color and meaning to evidence of current misconduct." *Id.* Consequently, Costa Brava is permitted to assert derivative claims against Telos for any and all conduct which occurred subsequent to its ownership of ERPS stock in January 25, 2005. Defendants' motion to dismiss Counts VI and VII will be granted in part and denied in part.

VI. Conclusion

For the foregoing reasons, the Telos Directors' motion to dismiss shall be **GRANTED** with respect to Director Stewart and **DENIED** in all other respects; the Telos Officers' motion to dismiss shall be **DENIED**; and Telos Corporation's motion to dismiss shall be granted in part and denied in part, as follows:

a. **GRANTED** as to Counts VI and VII with respect to any derivative claims based on transactions or events that occurred prior to January 25, 2005 and **DENIED** as to Counts VI and VII with respect to any derivative claims based on transactions or events that occurred on or subsequent to January 25, 2005;

b. **GRANTED** as to Count III;

c. **DENIED** as to Counts IV and V;

d. **DENIED** as to Counts I and II; and

e. **DENIED** in all other respects.

/s/ Albert J. Matricciani, Jr.
ALBERT J. MATRICCIANI, JR.
JUDGE
March 30, 2006

cc: All Counsel of Record (via e-mail)

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

ORDER

UPON CONSIDERATION of the Motions to Dismiss submitted by Defendant Telos Corporation, Defendant Directors, and Defendant Officers, Plaintiff Costa Brava Partnership, III's Oppositions thereto, and Defendants' Responses thereto, the Court having heard argument from counsel on February 28, 2006, it is this 30th day of March, 2006, by the Circuit Court for Baltimore City, Part 20, for the reasons more fully set forth in the accompanying memorandum opinion filed this date,

ORDERED, that Defendant Directors' motion to dismiss is **GRANTED** with respect to Director Stewart and **DENIED** in all other respects,

ORDERED, that Defendant Officers' motion to dismiss is **DENIED**; and it is further

ORDERED, that Defendant Telos Corporation's motion to dismiss is granted in part and denied in part, as follows:

a. **GRANTED** as to Counts VI and VII with respect to any derivative claims based on transactions or events that occurred prior to January 25, 2005 and **DENIED** as to Counts VI and VII with respect to any derivative claims based on transactions or events that occurred on or

subsequent to January 25, 2005;

b. **GRANTED** as to Count III;

c. **DENIED** as to Counts IV and V;

d. **DENIED** as to Counts I and II; and

e. **DENIED** in all other respects.

/s/ Albert J. Matricciani, Jr.
ALBERT J. MATRICCIANI, JR.
JUDGE

cc: All Counsel of Record (via e-mail)