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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

BURTON RICHTER, an individual; LINDA COLLINS CORK, an individual; GEORGIA L. MAY, an individual; THOMAS MERIGAN, an individual; ALFRED SPIVACK, an individual; and JANICE R. ANDERSON, an individual; on behalf of themselves and all other similarly situated, and derivatively on behalf of CC-PALO ALTO, INC.,

Plaintiffs,

vs.

CC-PALO ALTO, INC., a Delaware corporation; CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP, an Illinois limited partnership; and CC-DEVELOPMENT GROUP, INC., a Delaware corporation, PENNY PRITZKER, an individual, NICHOLAS J. PRITZKER, an individual, JOHN KEVIN POORMAN, an individual, GARY SMITH, an individual, STEPHANIE FIELDS, an individual, and BILL SCIORTINO, an individual,

Defendants.

vs.

CC-PALO ALTO, INC., a Delaware corporation,

Nominal Defendant,

Case No. C 14-00750 EJD

MOTION TO DISMISS FIRST AMENDED COMPLAINT OF DEFENDANTS PENNY PRITZKER, NICHOLAS PRITZKER, JOHN POORMAN, GARY SMITH, STEPHANIE FIELDS AND BILL SCIORTINO

Date: May 14, 2015
Time: 9:00 a.m.
Place: Courtroom 4, 5th Fl.
Judge: The Hon. Edward J. Davila

Trial Date: None Set

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on May 14, 2015, at 9:00 a.m. or as soon thereafter as it may be heard, at the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, California 95113, before the Honorable Edward J. Davila, Defendants Penny Pritzker, Nicholas Pritzker, John Poorman, Gary Smith, Stephanie Fields and Bill Sciortino (the "Director Defendants") will and hereby do move for an order dismissing with prejudice all of Plaintiffs' claims against them in the First Amended Complaint ("FAC") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP").

As we discuss below, dismissal of Plaintiffs' claims against the Director Defendants with prejudice is appropriate because:

(1) The Court lacks subject matter jurisdiction because Plaintiffs do not, and cannot, allege any injury in fact and because the allegations in the FAC demonstrate that the case is not ripe for judicial review.

(2) Plaintiffs do not have standing to assert derivative claims against the Director Defendants. As creditors of CC-Palo Alto, Inc. ("CC-PA"), they only have standing to assert derivative claims if they properly allege that CC-PA is insolvent. Plaintiffs have failed to do so.

(3) Even if Plaintiffs have standing to pursue derivative claims, their direct class action claims *against* the corporation fatally conflict with their purported derivative claims *on behalf of* the corporation. Therefore, Plaintiffs fail as proper derivative plaintiffs under FRCP 23.1; and

(4) Plaintiffs' non-derivative claims fail to state proper claims for relief against the Director Defendants.

The Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Diana DiGennaro and all exhibits attached thereto, the record in this case, including the Motion to Dismiss and supporting documents jointly filed by CC-PA, Classic Residence Management Limited Partnership and CC-Development Group, Inc. (the "Corporate Defendants"), and any evidence or argument presented to the Court prior to its ruling on the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The individual defendants are present or former directors of defendant CC-PA. They are all alleged to be residents of the State of Illinois. Defendant Penny Pritzker, currently serving as the United States Secretary of Commerce, is alleged to have last served as a CC-PA director in 2011. None of these Director Defendants were named in Plaintiffs' original complaint. But, after this Court dismissed that complaint with leave to amend, Plaintiffs added both derivative and direct claims against these six individuals. The Director Defendants are named in three derivative causes of action (eleventh, thirteenth and fifteenth) and eight direct causes of action (first through seventh and tenth).

Putting aside whatever strategic considerations may have motivated Plaintiffs to escalate this lawsuit to a personal level, the decision to sue the six individuals was misguided. The underlying dispute raises mostly hypothetical questions about the legal and financial relationship between Plaintiffs and CC-Palo Alto and its corporate parent. Naming these individual as defendants fails to improve the standing of Plaintiffs to assert the claims that this Court previously dismissed or to cure their other pleading deficiencies. The derivative claims on behalf of CC- PA also put Plaintiffs in the untenable position of acting both for and against the corporation.

A. Lack Of Subject Matter Jurisdiction.

This Court does not have subject matter jurisdiction over Plaintiffs' claims because Plaintiffs cannot meet Article III's standing and ripeness requirements. Plaintiffs have not, and cannot, allege any injury in fact, nor can they allege ripeness because the harm alleged is, at most, remote and speculative. The Motion should be granted for this reason alone. Section I, *infra*, joins in and incorporates by reference the Corporate Defendants' arguments regarding the lack of subject matter jurisdiction.

B. Defects In The Derivative Claims.

A derivative action is an equitable remedy available to *shareholders* of corporations who seek to recover damages from officers, directors, or others *on behalf of* the corporation. Here, Plaintiffs do not allege that they are or ever have been shareholders of CC-PA. Instead, they seek to

bring derivative claims as creditors of CC-PA. Under controlling Delaware law, "equitable considerations" give creditors of a corporation standing to pursue derivative claims, but only when the company is insolvent. As we show below, Plaintiffs have not alleged sufficient facts to establish that CC-PA is insolvent. In fact, their allegations and the extrinsic material on which they rely show that CC-PA is solvent under the analysis applied by Delaware courts. Therefore, all of the derivative claims should be dismissed. *See* Section II, *infra*.

C. Conflicts Of Interest Bar The Derivative Claims.

Because a derivative claim is brought for and on behalf of a corporation, Federal Rule of Civil Procedure 23.1 requires that a derivative plaintiff be able to "fairly and adequately" represent the interests of shareholders in acting on behalf of the corporation. Plaintiffs cannot meet that requirement when they are simultaneously seeking damages *against* the corporation. Here, Plaintiffs allege common law and statutory claims seeking millions of dollars in damages, fines, penalties and attorneys fees from CC-PA. Those claims are in conflict with Plaintiffs' derivative claims seeking funds *on behalf of* the corporation and disqualify Plaintiffs from pursuing the derivative claims. *See* Section III, *infra*.

D. Defects In The Direct Claims.

Section IV, *infra*, addresses the failure to plead viable direct claims against the Director Defendants and incorporates by reference the Corporate Defendants' arguments that the direct causes of action are deficiently pleaded and fail to state a claim.

FACTUAL AND PROCEDURAL BACKGROUND

On February 19, 2014, Plaintiffs filed the original complaint in this action against CC-PA, Classic Residence Management Limited Partnership, and CC-Development Group, Inc. ("CC-DG"), asserting claims for concealment, negligent misrepresentation, breach of fiduciary duty and constructive trust, financial abuse of elders, violation of California Civil Code Sections 1750, *et seq.*, violation of California Business and Professions Code Sections 17200, *et seq.*, and breach of contract. ECF No. 1.

The defendants moved to dismiss the complaint, and this Court granted their motions with leave to amend. ECF No. 55. The Court identified the major flaw in Plaintiffs' original complaint

as a failure to allege that "CC-PA has already failed to meet a repayment obligation." ECF No. 55 at 9. The Court found "no indication that any Plaintiff has terminated his/her Residency Contract and has been denied the repayable portion of the entrance fee." *Id.* Plaintiffs likewise "are not already going through the process of seeking refunds only to find that their repayment requests were denied. In fact, there is no indication that any Plaintiff has yet attempted to resell their apartment or is in such critical health that termination is imminent." *Id.* at 10. The Court concluded that "Plaintiffs have not adequately shown an existing harm or an imminent harm in regards to their entrance fees such that they can establish an injury in fact." *Id.*

Plaintiffs filed an amended complaint on December 10, 2014. ECF No. 56. The First Amended Complaint fails to cure the essential defect that its claims are hypothetical and speculative. It still fails to identify a single instance in which CC-PA has failed to make a timely re-payment of an entrance fee or a failure to make any other payment to a creditor or vendor. Its "insolvency" allegations assert theories rejected by Delaware cases.

ARGUMENT

I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS LACK STANDING AND THE CASE IS NOT RIPE FOR JUDICIAL REVIEW.

A party may move to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Federal jurisdiction is limited to "actual 'cases' and 'controversies.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). In order to show an actual case or controversy, a plaintiff must demonstrate both standing and ripeness. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848-49 (9th Cir. 2007).

To establish standing, a plaintiff must allege: (1) an injury in fact that is concrete and particularized, as well as actual and imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is *likely* (not merely speculative) that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Plaintiffs bear the burden to allege facts demonstrating each of these three elements, *Warth v. Seldin*, 422 U.S. 490, 518 (1975), and those facts "must affirmatively appear in the record." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990), *overruled on other*

grounds, 541 U.S. 774 (2004) (quotation marks and citation omitted). If a future injury is alleged, "the threatened injury must be *certainly impending*"; "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis in original) (quotation marks and citation omitted).

To determine ripeness, the Court must evaluate (1) the fitness of the issues for judicial decision and (2) whether there is an imminent and significant hardship inherent in withholding court consideration. *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds*, 430 U.S. 99 (1977). The first element inquires whether the case "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). The second element considers whether "withholding review of the issue would result in direct and immediate hardship and would entail more than possible financial losses." *Mun. of Anchorage v. United States*, 980 F.2d 1320, 1325-26 (9th Cir. 1992) (citation omitted).

Here, the Court lacks subject matter jurisdiction for the reasons stated in the Corporate Defendants' Motion to Dismiss. The Director Defendants hereby join in, and incorporate by reference, the Corporate Defendants' arguments regarding subject matter jurisdiction and any documents filed in support thereof. In summary, Plaintiffs do not have standing because they have not, and cannot, allege an injury in fact. To date, none of the Plaintiffs have terminated their residency contracts, none are currently awaiting repayment, and even if a Plaintiff were to terminate his or her contract tomorrow, any future repayment obligation would not be due until the unit resold (providing funds for repayment) or ten years had passed (providing time to generate funds for repayment). *See* FAC ¶18. CC-PA has never failed to make a repayment (FAC Ex. 6 at 1), and as discussed in Section II, *infra*, the allegations in the FAC and the documents attached thereto show that a hypothetical future default is highly unlikely and purely speculative. Plaintiffs also do not have standing with respect to the monthly fees because the unambiguous language of the residency contracts contradicts their alleged injury. Plaintiffs' attempt to circumvent the injury-in-fact requirement by pleading derivative claims fails for the reasons discussed in Section II, *infra*. Lastly, the case is not ripe for adjudication for similar reasons: the alleged harm is hypothetical and

speculative, and there would be no imminent harm in withholding consideration by the Court at this time. For these reasons, and those set forth in the Corporate Defendants' Motion to Dismiss, the Court lacks subject matter jurisdiction and the case should be dismissed.

II. PLAINTIFFS FAIL TO PROPERLY PLEAD INSOLVENCY AND, THEREFORE, DO NOT HAVE STANDING TO PURSUE DERIVATIVE CLAIMS AGAINST THE DIRECTOR DEFENDANTS.

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the court to dismiss a complaint that fails to state a claim upon which relief may be granted. On a motion to dismiss, the court "need not assume the truth of legal conclusions [that are] cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). A complaint must plead facts sufficient to support its claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citation omitted). Rather, the claim alleged must be "plausible" and cannot be speculative. *Twombly*, 550 U.S. at 556. The "[f]actual allegations must be enough to raise a right of relief above the speculative level." *Id.* at 555. This the FAC fails to do.

Directors of a corporation owe their fiduciary duties to the corporation and, indirectly, to its shareholders. *N. Am. Catholic Educ. Programming Fund, Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007). When a corporation is *solvent*, directors' fiduciary duties sometimes may be enforced on behalf of the corporation by the corporation's shareholders through a derivative action. *Id.* If, however, the corporation is *insolvent*, its creditors may have standing to bring derivative claims against the directors on behalf of the corporation for breaches of fiduciary duties. *Id.* at 101-102. Creditor derivative actions are unusual and are required to meet a rigorous pleading standard.

To plead insolvency, Plaintiffs must allege facts demonstrating that CC-PA has either: "(1) 'a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the face thereof,' or (2) 'an inability to meet maturing obligations as they

fall due in the ordinary course of business.'" *Id.* at 98 (quoting *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 782 (Del. Ch. 2004)); *see also Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Communications Corp.)*, 392 B.R. 561 (Bankr. D. Del. 2008) (same).

As demonstrated below, there are no legal or financial impediments to CC-PA successfully continuing its business, and there are no allegations that CC-PA has ever defaulted on a single obligation. Therefore, CC-PA is not insolvent under either prong of the insolvency test applied by the Delaware courts.[1]

A. The FAC Shows That CC-PA's Business Can Successfully Be Continued.

Plaintiffs allege that CC-PA is insolvent because it has been distributing funds to CC-DG and that, as a result, CC-PA's liabilities have always exceeded a reasonable market value of its assets. FAC ¶¶99-105. Because of accumulating entrance fee loans, Plaintiffs allege, CC-PA has no prospect of continuing. *See, e.g.*, FAC ¶¶21, 94, 99. In support of these allegations, Plaintiffs rely heavily on the August 2, 2012 letter from the California Department of Social Services ("CDSS") (FAC Ex. 5) and the actuarial study included in the Milliman Report (FAC Ex. 4).

Plaintiffs' allegations are insufficient to plead insolvency and fail to create derivative standing for three reasons. First, a balance sheet deficit alone is insufficient. Second, the allegations show that the entrance fee loans are not currently due and will decrease over time. Third, the allegations demonstrate that CC-PA has multiple sources of prospective funding to repay the loans. Taken together, the FAC and accompanying documents contradict Plaintiffs' conclusory allegations and demonstrate CC-PA's more than reasonable prospects for continued success.

1. A Balance Sheet Deficit Alone Does Not Constitute Financial Insolvency.

Alleging that CC-PA's liabilities exceed its assets is not sufficient to plead insolvency. *See Prod. Res. Grp.*, 863 A.2d at 783 (describing as "uncontroversial" the premise that "the mere fact that [a company's] liabilities exceed its assets does not end the inquiry.") (footnote omitted). "It is

[1] CC-PA is a Delaware corporation. FAC ¶35. Under the internal affairs doctrine, Delaware state law governs Plaintiffs' derivative claims. *Laborers' Local v. Intersil*, 868 F. Supp. 2d 838, 844 (N.D. Cal. 2012) (under internal affairs doctrine, California courts apply the "law of the state of incorporation" when deciding issues related to "liabilities of officers or directors to the corporation or its shareholders.") (quotation marks and citation omitted); *see also* FAC ¶153 ("The derivative claims herein are brought under Delaware state law . . . .").

interpreted to imply that it is." *Id.* (emphasis in original). To the contrary, Milliman reports that it has "seen nothing that would call [into] question the community's ability to remain a going concern, as discussed in the Actuarial Standards of Practice for CCRC, and to fully perform its continuing care contract obligations." *Id.* at 1; *see also id.* at 2 ("Despite the deficit on the actuarial balance sheet, all the evidence reviewed for my report supports Vi at Palo Alto's ability to remain a going concern").

2. The Entrance Fee Loans Are Insufficient To Show Insolvency Because They Are Not Currently Due And Will Decrease Over Time.

In addition to relying on the balance sheet, Plaintiffs allege that CC-PA is insolvent because it does not *currently* have adequate cash reserves to repay each of the entrance fee loans. This also does not establish insolvency. Unless and until those loans become due, CC-PA's inability to repay them remains purely hypothetical. Plaintiffs' theory is similar to alleging that a California homeowner, who has never missed a mortgage payment or defaulted on any other obligation, is insolvent solely because his 30-year mortgage balance exceeds the cash in his bank account. Under such a theory, almost all California homeowners would be "insolvent."

In *Francotyp-Postalia*, one of a Delaware corporation's two stockholders brought an action seeking the appointment of a custodian to resolve a purported deadlock over how to address the corporation's alleged insolvency. The insolvency allegation was based on the fact that the corporation's liabilities exceeded its assets. Those liabilities were mostly in the form of outstanding loans made to the corporation by one of the stockholders. But, the loans in question were not due until the corporation could repay them with profits from sales to third parties. 1998 WL 928382, at *8. Because the corporation had not yet made any sales to third parties, the loans were not yet due and, therefore, an allegation that the corporation was insolvent could not be based on its present inability to repay the stockholder's loans. *Id.*

Here, as in *Francotyp-Postalia*, the "central question" is "when are these loans due?" *See id.* at *5. Plaintiffs' allegations admit that the outstanding entrance fee loans are not due until either 14 days after re-occupancy of the resident's apartment or ten years after the termination of the residency contract. FAC ¶18. The structure of these loans is designed to ensure adequate funds for

repayment either through re-occupancy of the vacated unit by a new resident or, in the unlikely event the unit is not reoccupied, providing a period of ten years to raise sufficient funds to repay the loan. *See Banks v. Cristina Copper Mines, Inc.*, 99 A.2d 504, 507 (Del. Ch. 1953) ("If a defendant which is charged to be insolvent only in the sense that it cannot pay its current bills has sufficient credit upon which to raise funds to pay those bills," insolvency has not been established).

Future reductions in the refundable portion of the entrance fees makes the possibility of default even more remote. "The percentage of the Entrance Fee that must be refunded under the terms of Plaintiffs' Promissory Notes is based on the date the resident loans the Entrance Fee. Over time, the percentage of the Entrance Fee that is refundable has decreased." FAC ¶78; *see also id.* ¶97 (chart showing decrease in refundable portion of entrance fees). The Milliman Report confirms that "[w]hen Palo Alto reaches maturity and the population stabilizes, we expect the repayment liability to stabilize and then decline as the average repayment percentage declines." FAC Ex. 4 at 5.

3. CC-PA's Potential Sources Of Future Funding Also Defeat The Insolvency Claim.

Plaintiffs also rest their insolvency allegations on the speculation that "CC-PA will require new sources of funds for its continuing obligations, but will have no reserves set aside and cannot rely on CC-DG, which denies any obligation to invest or loan additional capital to CC-PA." FAC ¶98. But such speculation fails to satisfy the insolvency test.

In *In re Teleglobe*, the debtor corporation had relied on funding by its parent corporation. Although the parent was not contractually obligated to do so, it had provided funding in the past and had indicated that it would continue to provide funding in the future. 392 B.R. at 600-601. The plaintiffs' expert argued that the parent company's funding could not be considered in the insolvency analysis because it was not contractual. *Id.* at 601. The court disagreed. It held that "[w]hile Teleglobe may have had a deficiency of assets below its liabilities without consideration of [the parent's] funding," as long as it was actually receiving funding, there were reasonable prospects that the business of the corporation could be continued. *Id.* at 600-601. That remained true until the parent announced its intention to cease funding the company. *Id.* In applying the cash

flow test, the plaintiffs' expert again excluded the parent company's funding because it was "not certain to come to fruition in the future" and was "contingent" in nature. *Id.* at 602. The court rejected this approach, holding that "[u]ncertainty such as that which existed in the funding by [the parent] is normal in any cash flow analysis." *Id.* at 603.

Here, as in *In re Teleglobe*, Plaintiffs have alleged that CC-PA has obtained funds from its corporate parent in the past, including from 2005 through 2013. CC-PA also has other sources of funding, including entrance fee loans and bank loans. Each of these potential sources of funding is alleged in the FAC or in the documents attached thereto, and all are sufficient to defeat Plaintiffs' hypothetical insolvency allegations.

Future entrance fees. There is no dispute that the financial business model for this community includes new residents replacing those that leave, with the new entrance fees available to pay whatever is left on the prior resident's note. The FAC contains no allegation that any resident who has left his or her unit has ever failed to receive the payment that was then due after re-occupancy of the unit. As the Milliman Report explained, the "[e]ntrance fee repayments are intended to be paid from entrance fee proceeds received from new entrants at Palo Alto," and "[o]ver the long term, as new residents replace existing residents, the contingent repayment liability on the balance sheet will decline." FAC Ex. 4 at 5;[3] *see also* FAC Ex. 6 at 1 ("Even in this most difficult economic and housing market environment, resales at the community have been more than sufficient to support repayments"); DiGennaro Decl. Ex. A at 1 ("CC-PA has a deep wait list of new potential residents, currently numbering in excess of 500"); *id.* ("CC-PA has a solid track record of full occupancy since its opening in July 2005, even during the country's most difficult economic times over the past several years"). No allegation in the FAC contradicts Milliman's assessment or casts doubt on CC-PA's ability to resell units.

[3] These future entrance fees are projected to be more than sufficient to cover such repayment liabilities and the likelihood that they will be forthcoming during the next ten years is 98%. DiGennaro Decl. Ex. A, Att. B at 1; *id.* at 2 ("occupancy remains high and the waiting list is long. At this time, I have no reason to believe that [CC-PA] will not be able to continue to attract new residents with entrance fees sufficient to perform all contract obligations of Vi at Palo Alto, including entrance fee repayments").

Plaintiffs allege that "CC-PA's ability to raise the funds necessary to refund earlier residents' Entrance Fees by borrowing new entrance fees from incoming residents will be gradually eliminated." FAC ¶98. This allegation seems intended to suggest that CC-PA's ability to use incoming entrance fees for repayments will decrease. But the inference suggested by this allegation is contradicted by paragraph 97 of the FAC, which makes clear that it is the "refundable portion" of the entrance fee that is being decreased. Therefore, it is CC-PA's *liability* that will reduce over time, not its ability to charge entrance fees at market rates and use them to pay back residents. *See* FAC Ex. 6 at 2 ("the reduction of entrance fee repayment obligations over time as contemplated by the Ground Lease will serve to reduce future obligations and will not necessarily impact price . . . or the ability to make repayment obligations with proceeds from new sales or other funds which may be available").

Future funding from CC-DG. Plaintiffs seek to support their insolvency theory with allegations that CC-DG is not obligated to continue to provide funding to CC-PA if needed. *See, e.g.*, FAC ¶103. Under Delaware law, however, past voluntary funding from a parent is sufficient to infer future funding and is inconsistent with insolvency. *See In re Teleglobe*, 392 B.R. at 600-603. Plaintiffs allege that in each year from 2005 through 2013, CC-PA has had to ask for cash from CC-DG to enable CC-PA to repay the loans from residents in the Care Center as its obligations to such residents matured upon their death or departure. FAC ¶102. The FAC admits that CC-DG voluntarily has made such advances, even though CC-DG denies that it has any obligation to do so in the future. *Id.* CC-DG's voluntary contributions to CC-PA are relevant because the insolvency analysis is primarily focused on a company's reasonable prospects and ability to continue functioning, not on the maintenance of cash reserves. Based on the allegations in the FAC, the potential for CC-DG's assistance, in addition to the expected future re-occupancy fees, is more than sufficient to defeat Plaintiffs' insolvency allegations.

Ability to obtain financing. The FAC also fails to allege a credible argument that CC-PA would not be able to obtain outside financing should it need such financing to repay entrance fees or other obligations. The extrinsic material upon which Plaintiffs rely shows that CC-PA would be able to obtain such financing. CC-PA has no third-party debt and has been debt-free since the pay-

off of its construction loan approximately three months after the community opened in 2005. DiGennaro Decl. Ex. A at 3. As the Milliman Letter explains, "[i]n light of the significant fair market value of the equity of CC-PA and its ongoing positive cash flow, we believe that if CC-PA experienced a liquidity need, it would be able to obtain bank financing on favorable terms." *Id.* Nothing in the FAC refutes this assessment. *Cf. Banks*, 99 A.2d at 507 ("While it might be that the value of [the corporation's] assets are grossly overstated, and that it might be problematical as to whether or not funds could be raised upon the security thereof, nevertheless. . . I feel that . . . the defendant should be able to raise sufficient [funds] to pay in full [the outstanding debt]" and therefore is not insolvent).

For each of these reasons, the FAC fails to allege that CC-PA has "a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the face thereof." Therefore, the FAC fails to establish standing for creditors under the first insolvency test.

B. There Are No Allegations Of Missed Payments; In Fact, CC-PA Is And Has Always Been Able To Meet Its Obligations As They Come Due.

Plaintiffs do no better on the second test of insolvency under Delaware law. They do not (and cannot) allege that CC-PA has ever failed to pay any "obligations as they fall due in the ordinary course of business." *N. Am. Catholic Educ. Programming Fund, Inc. v. Gheewalla*, 930 A.2d 92, 98 (Del. 2007). Plaintiffs plead a handful of conclusory allegations purporting to show, in words or substance, that CC-PA is "incapable of honoring its debts to the Plaintiffs and the Class." FAC ¶21. That is insufficient. "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted).

As the Court noted in dismissing the original complaint, Plaintiffs do not allege "that CC-PA has already failed to meet a repayment obligation." Order Granting Motion to Dismiss, ECF No. 55 at 9; *see also id.* at 10 ("Plaintiffs have not adequately shown an existing harm or an imminent harm in regards to their entrance fees such that they can establish an injury in fact"); FAC Ex. 6 at 1 ("Neither the provider [CC-PA] nor any Vi affiliated entity has ever defaulted on an entrance fee

repayment obligation").[4] There also are no allegations that CC-PA has not paid, or is unable to pay, any of its operating expenses, which are covered by the residents' monthly fees. FAC ¶128 & Ex. 8 at 8.

CC-PA's audited financial statements and the Milliman Report, both of which are attached to the FAC, show that CC-PA is cash flow positive, FAC Ex. 2 at 6, and that it is projected to remain cash flow positive throughout the next ten years. FAC Ex. 4 at 24-26. The residency contracts further bolster the prospect of future success, because they provide for "monthly fee increases of sufficient magnitude so as to cover all projected expenses of operating the community." *Id.*

Plaintiffs manage to allege only hypothetical insolvency—the mere *possibility* that an entrance fee loan or some other obligation will not be repaid. But, as discussed above, hypothetical and speculative allegations are not enough. *See Francotyp-Postalia*, 1998 WL 928382, at *5; *Twombly*, 550 U.S. at 555 (the "[f]actual allegations must be enough to raise a right of relief above the speculative level"). The allegations in the FAC and attached documents show that Plaintiffs have not and cannot adequately plead insolvency under either test.

Because a creditor cannot bring a derivative claim unless the corporation is insolvent, Plaintiffs' derivative claims (the eleventh through thirteenth and fifteenth causes of actions) should be dismissed as a matter of law. Dismissal with prejudice is appropriate where, as here, the plaintiff "has now had ample opportunity to present a properly pled complaint," even if the dispositive issue—insolvency—was not previously raised in the motion to dismiss the original complaint. *Lightsway Litig. Servs., LLC v. Yung (In re Tropicana Entertainment, LLC)*, 520 B.R. 455, 472 (Bankr. D. Del. 2014) (plaintiff sought leave to file a second amended complaint on the grounds that defendants did not raise insolvency in their motion to dismiss the original complaint; court denied plaintiff's request).

[4] The CC-PA Response Letter also confirms that CC-PA "has never defaulted on a continuing care contract obligation or any other financial commitment." DiGennaro Decl. Ex. A at 3.

III. THE COURT SHOULD DISMISS THE DERIVATIVE CLAIMS BECAUSE PLAINTIFFS HAVE A CONFLICT OF INTEREST IN SIMULTANEOUSLY SUING CC-PA AND SUING ON BEHALF OF CC-PA.

All six Plaintiffs bring both derivative claims against the Director Defendants *on behalf* of CC-PA (the eleventh through thirteenth and fifteenth causes of action) and class claims directly *against* CC-PA (the first through tenth causes of action). The direct claims seek substantial amounts of damages, fines, penalties, and attorneys fees from the corporation. Simultaneous prosecution of claims *against* and *on behalf of* a corporation raise a conflict of interest, disabling Plaintiffs from satisfying the requirements of Federal Rule of Civil Procedure 23.1. For this reason, the Court should dismiss Plaintiffs' derivative claims.

Derivative actions in federal court are subject to the procedural requirements of Rule 23.1, which states that a derivative action "may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association." Fed. R. Civ. P. 23.1(a). The Ninth Circuit has held that "[a]n adequate representative [under Rule 23.1] must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class." *Larson v. Dumke,* 900 F.2d 1363, 1367 (9th Cir. 1990).

District courts in the Ninth Circuit have dismissed derivative actions because the simultaneous prosecution of non-derivative actions *against* a company by plaintiffs bringing derivative actions on *behalf* of a company creates a conflict of interest sufficient to deem the derivative plaintiffs inadequate representatives of the company under Rule 23.1. *See, e.g.*, *Bryant v. Mattel, Inc.*, No. CV 04-9049 DOC RNBX, 2010 WL 3705668, at *24-25 (C.D. Cal. Aug. 2, 2010); *Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341 (D. Or. 1987); *Love v. Wilson*, No. CV 06-06148ABCPJWX, 2007 WL 4928035 (C.D. Cal. Nov. 15, 2007), *aff'd sub nom. Love v. Sanctuary Records Grp., Ltd.*, 386 F. Appx. 686 (9th Cir. 2010).

In *Bass v. First Pact Networks, Inc.*, No. C 92-20763 JW, 1993 WL 484715, at *1 (N.D. Cal. Sept. 30, 1993), defendant First Pact Networks ("FPN") moved to dismiss the plaintiff's derivative action on the ground that the plaintiff was an inadequate representative of FPN and its shareholders under Rule 23.1. The defendant argued that the plaintiff's "pending personal litigation

against FPN substantially impedes his ability to represent FPN's shareholders in the derivative action." *Id.* The court agreed, holding that "plaintiff's personal suit against FPN amounts to an outside entanglement fatal to his adequate representation of FPN shareholders." *Id.* The court dismissed the derivative action because the shareholders would be denied adequate representation if the plaintiff was permitted to proceed as plaintiff. *Id.*[5]

While the Ninth Circuit has not expressly addressed the issue, it has suggested that dual representation violates Rule 23.1. *See In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) (noting that court was "*concerned* about the potential conflicts created by . . . [plaintiff's] dual representation of derivative and securities plaintiffs") (emphasis added); *Zarowitz v. BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989) (holding, in dicta, that "[u]nder [the Rule 23.1] standard, [plaintiff] could not serve as [an adequate] representative plaintiff" in shareholder derivative action because his "interest in increasing the value of his stock through a larger derivative suit recovery is dwarfed by his interest in pursuing his [direct] litigation with the Bank").[6]

Here, the Court should dismiss Plaintiffs' derivative claims because Plaintiffs fail to meet Rule 23.1's adequacy requirement due to a conflict of interest. The FAC shows that the very same Plaintiffs who are seeking to recover damages *on behalf* of CC-PA as CC-PA's creditors in the derivative claims are simultaneously seeking substantial relief *against* CC-PA. In their direct class claims, they seek millions of dollars in compensatory, punitive and treble damages, restitution, disgorgement of profits, and attorneys fees from CC-PA, payable directly to them or to their counsel. *See* FAC Section IX (Class "Prayer for Relief"). The relief sought by the direct class claims against CC-PA is fatal to Plaintiffs' attempt to simultaneously act for the corporation. The

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[5] Other federal courts have recognized that an individual cannot serve as the representative plaintiff in both a direct class action and a derivative action because of the inherent conflict of interest. *See, e.g., Ruggiero v. American Bioculture, Inc.*, 56 F.R.D. 93, 95 (S.D.N.Y. 1972) ("[I]t is difficult to see how the . . . plaintiffs can reconcile their existing duties to [the company] and its present shareholders as derivative plaintiffs with the duties which they seek to assume on behalf of a class which attacks [the company]").

[6] The Delaware Chancery Court has also recognized that "[a]ny stockholder seeking to bring a derivative suit on behalf of the corporation has to act in the best interest of the corporation and cannot therefore sue it for damages simultaneously." *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 961 (Del. Ch. 2013) (footnote omitted).

FAC shows that Plaintiffs' economic interest in attaining large sums of money from CC-PA is antagonistic to the interest of the derivative class in attaining money for CC-PA. Given these diverging economic interests, Plaintiffs will be unable to "enforc[e] the right[s]" of CC-PA fairly and adequately under Rule 23.1 because they will have a conflict of interest in simultaneously seeking money from CC-PA's coffers on behalf of the class[7] and seeking money for CC-PA.

Because the direct and derivative claims raise fundamentally inconsistent requests for relief, Plaintiffs will not have the "capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the [derivative] class." *Larson*, 900 F.2d at 1367. As in *Bass*, Plaintiffs' direct claims against CC-PA amount to an "outside entanglement fatal" to their representation of CC-PA in the derivative claims because the dual representation will render it likely that Plaintiffs will disregard CC-PA's interests. 1993 WL 484715 at *1. Accordingly, the Court should dismiss Plaintiffs' derivative claims because Plaintiffs fail to meet Rule 23.1's adequacy requirement.

IV. PLAINTIFFS' DIRECT CLAIMS AGAINST THE DIRECTOR DEFENDANTS SHOULD ALSO BE DISMISSED.

A. The Director Defendants Join In And Incorporate By Reference The Corporate Defendants' Motion To Dismiss The First Through Seventh And Tenth Causes Of Action.

Plaintiffs' direct claims against the Director Defendants fail for the reasons stated in the Corporate Defendants' Motion to Dismiss. The Director Defendants hereby join in, and incorporate by reference, the Corporate Defendants' arguments regarding the non-derivative claims and any documents filed in support thereof.

B. The Non-Derivative Claims Also Fail Because They Do Not Allege Personal Participation Or Involvement On The Part Of The Director Defendants.

Plaintiffs' direct claims against the Director Defendants all share one fatal characteristic: they are asserted generally against "all defendants," but fail to specify whether or to what extent each Director Defendant personally participated in or authorized the alleged wrongful acts. This is particularly problematic because the Director Defendants have been involved with CC-PA in

[7] The class consists of "all residents of the Vi at Palo Alto from January 1, 2005 to the present." FAC ¶51.

different capacities and at different times over the years. *See* FAC ¶¶38-43; *see also* Footnote 10, *infra*. In lumping them all together with the other defendants, the FAC fails to adequately plead personal liability on part of the individual defendants. *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1308 (N.D. Cal. 1997) ("[D]irectors or officers of a corporation do not incur personal liability for the torts of the corporation merely by reason of their official position, *unless they participate in the wrong or authorize or direct* that it be done.") (emphasis added) (quotation marks and citation omitted).[8] Accordingly, all of the direct claims against the Director Defendants should be dismissed. *Prod. Res. Grp., LLC v. NCT Grp., Inc.*, 863 A.2d 772, 787 (Del. Ch. 2004) ("[I]n general, creditors must look to the firm itself for payment, rather than its directors or stockholders, except in instances of fraud or when other grounds exist to disregard the corporate form").[9]

[8] In the personal jurisdiction context, courts have dismissed claims against individual defendants where the complaint failed to allege that the officer or director was personally involved in, directed, or was the "guiding spirit" of the alleged wrongful activity. *See, e.g.*, *Clarus Transphase Scientific, Inc. v. Q-Ray, Inc.*, No. C 06-3450 JF RS, 2006 WL 2374738, at *1 (N.D. Cal. Aug. 16, 2006); *Salesbrain, Inc. v. AngelVision Technologies*, No. C 12-05026 LB, 2013 WL 1191236, at *8 (N.D. Cal. Mar. 21, 2013) ("Plaintiffs' allegations simply are too vague and conclusory to suggest that [defendant] has such degrees of participation or control"); *Marsh v. Zaazoom Solutions, LLC*, No. C–11–05226 YGR, 2012 WL 952226, at *9 (N.D. Cal. Mar. 20, 2012) (holding that plaintiffs did not meet their burden to show specific personal jurisdiction over individual defendants where plaintiffs' second amended complaint was "devoid of any allegations of a specific act" and instead contained only allegations that the individual defendants were principals and members of the companies that operated the scam at issue and that the individual defendants actively participated in the misconduct); *Clerkin v. MyLife.com, Inc.*, No. C 11–00527 CW, 2011 WL 3607496, at *1–2, 4 (N.D. Cal. Aug. 16, 2011) (holding that plaintiffs did not meet their burden to show specific personal jurisdiction over an individual defendant who was the corporate defendant's "Vice President of Emerging Business" where plaintiffs' only allegations about him were that he "conspired with" others "to perpetuate" a fraudulent scheme and "personally performed acts" in support of a fraudulent scheme, because those allegations "[did] not afford any insight into how [he] controlled or directly participated in the alleged fraudulent scheme"); *Just Film, Inc. v. Merchant Servs., Inc.*, No. C 10–1993 CW, 2010 WL 4923146, at *6 (N.D. Cal. Nov. 29, 2010) (holding that plaintiffs did not meet their burden to show specific personal jurisdiction over individual defendants where plaintiffs alleged only that those individual defendants directed and controlled the entities alleged to have engaged in the wrongful conduct and did not allege how those individual defendants directed or controlled those entities); *Leroy-Garcia v. Brave Arts Licensing*, No. C 13-01181 LB, 2013 WL 4013869, at *8 (N.D. Cal. Aug. 5, 2013) ("Plaintiff alleges nothing to show that either of [the individual defendants] directly participated in the alleged infringing conduct"). Here, too, Plaintiffs' allegations are vague and conclusory, and do not show whether or how the Director Defendants controlled or directly participated in the alleged wrongdoing. *Cf.* FAC ¶¶37-45.

[9] The tenth cause of action includes a prayer for declaratory relief that "[t]he Directors of CC-PA have violated Delaware Code §§ 170, 173 and 174 by causing CC-PA to distribute funds to CC-DG in excess of CC-PA's surplus and net profits." FAC ¶200(f) (p. 62). These allegations mirror the

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C. The FAC Fails To Allege Facts Establishing That The Director Defendants Are Personally Liable For Any Alleged Elder Abuse And Therefore The First Cause Of Action Should Be Dismissed.

California's Elder Abuse and Dependent Adult Civil Protection Act "prohibits Defendants from obtaining or retaining property of an elder when they 'knew or should have known that [their] conduct is likely to be harmful to the elder . . . .'" FAC ¶9 (quoting Cal. Welfare & Inst. Code §15610.30) (emphasis removed). "Financial abuse" of an elder occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud," or assists another in doing the same. Welfare & Inst. Code §15610.30(a). Because Plaintiffs' elder abuse claim is premised on alleged concealment and misrepresentations, it is subject to heightened pleading standards under Federal Rule of Civil Procedure 9(b). *Edelman v. Bank of America Corp.*, No. SACV 09-00309CJCMLGX, 2009 WL 1285858, at *3 (C.D. Cal. Apr. 17, 2009).

The FAC alleges that "Defendants took, secreted, appropriated, obtained and/or retained money belong to Plaintiffs and the Class they seek to represent for a wrongful use and/or with the intent to defraud. . . ." FAC ¶194. Defendants allegedly did so "by improperly collecting hundreds of millions of dollars in 'Entrance Fees' through CC-PA and transferring those funds upstream to CC-PA's corporate parent, CC-DG." *Id.* Defendants also allegedly overcharged Plaintiffs and the class "by improperly allocating increased tax assessments, earthquake insurance charges, and marketing costs to the Vi at Palo Alto's operating expense budget, and passing on these charges as inflated monthly fees." *Id.* Plaintiffs allege that Defendants assisted one another in taking Plaintiffs' money because "CC-DG created CC-PA for the purpose of inducing Plaintiffs and the Class to loan substantial Entrance Fees to CC-PA, which it would then move upstream to CC-DG." *Id.* ¶195.

Plaintiffs fail to adequately plead elder abuse against the individual Director Defendants because nowhere do they allege that the Director Defendants knowingly took or retained any

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allegations in the thirteenth cause of action and similarly fail because of Plaintiffs' inability to plead derivative standing.

property belonging to Plaintiffs, or that they did so with fraudulent intent. The only defendant who could possibly be alleged to have taken Plaintiffs' money is CC-PA. *See id.* ¶¶114, 134, 135, 194. To the extent the Director Defendants allegedly "assisted" CC-PA in taking Plaintiffs' property, the FAC fails to allege with sufficient particularity any personal participation or specific intent on the part of the individual defendants. Mere conclusory allegations are insufficient to meet Rule 9's stringent standards. The first cause of action for elder abuse should be dismissed.

D. The FAC Fails To Plead The Second, Third And Fifth Causes Of Action With Sufficient Particularity As To The Director Defendants.

In support of the second, third and fifth causes of action for concealment, negligent misrepresentation and violation of Civil Code Section 1750, respectively, Plaintiffs allege that Defendants failed to disclose or misrepresented facts relating to CC-PA's alleged failure to maintain adequate reserves and alleged improper allocation of certain expenses to residents' monthly fees. *See id.* ¶¶86, 88, 90-95, 201-215, 229-237. These allegations are subject to a heightened pleading standard under Rule 9 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 9(b); *Lintz v. Bank of Am., N.A.*, No. 5:13-CV-01757-EJD, 2013 WL 5423873, at *5 (N.D. Cal. Sept. 27, 2013) ("In the Ninth Circuit, 'claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements'") (citation omitted).

Rule 9 provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The allegations must be specific enough to give the Director Defendants notice of the particular misconduct, *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985), including "an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citation omitted). Rule 9 permits "'[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally,'" but the Supreme Court has clarified that, in this context, "'generally' is a relative term." *Ashcroft v. Iqbal*, 556 U.S. 662, 686-87 (2009). "Rule 9 merely excuses a party from pleading [] intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8." *Id.* (rejecting plaintiff's argument that general allegation of discriminatory

intent was sufficient under Rule 9). "Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id.*

Here, Plaintiffs do not specify which of the Director Defendants, if any, participated in the alleged concealment and misrepresentations, or when they allegedly did so. *See* FAC ¶¶86, 88, 90-95. For example, Plaintiffs allege that "CC-PA never disclosed to Plaintiffs or the Class that it did not maintain cash reserves," and that "CC-PA expressly told incoming residents that the money they paid would remain at the Provider in Palo Alto." *Id.* ¶86. The FAC names only one person, CC-PA employee Barry Johnson, in connection with these allegations, and identifies only one specific conversation with a plaintiff or class member (although not the date of that conversation). *Id.*

Nowhere do Plaintiffs allege that the Director Defendants themselves made any misrepresentations or omissions, directed CC-PA employees to make misrepresentations or omissions, or had any contact whatsoever with any plaintiff or class member. In fact, it is not even clear whether the alleged misrepresentations and omissions occurred while each of the Director Defendants held the position of director or officer of CC-PA. *See* FAC ¶¶38-43. The FAC alleges the Director Defendants held various positions at CC-PA during certain time periods. *See id.* But because the FAC does not allege when the various alleged omissions and misrepresentations occurred, it does not plead the second, third and fifth causes of action with the requisite particularity and fails to demonstrate any personal involvement on the part of the Director Defendants.[10] The FAC also fails to allege, even generally, any specific intent on the part of the individual Director Defendants. Plaintiffs' unwillingness and inability to delve into the details of the Director

[10] The FAC is rife with examples of the disconnect between the Director Defendants' dates of service and the timing of the alleged wrongdoing. Just a few examples are as follows:

- Defendant Nicholas Pritzker served as an officer or director of CC-PA until 2010, while Plaintiffs Thomas Merigan and Alfred Spivack did not move to the Vi at Palo Alto until June 2011 and July 2012, respectively. FAC ¶¶39, 63, 67.
- A number of the Plaintiffs moved to the Vi at Palo Alto in 2005, but Defendant Bill Sciortino did not join the CC-PA board until 2008. FAC ¶¶43, 54, 57, 60, 70.
- The tax increase that CC-PA allegedly wrongfully allocated to residents' monthly fees did not occur until 2012, at a time when Defendants Penny and Nicholas Pritzker were no longer serving as officers or directors of CC-PA. *Id.* ¶¶38-39, 117 & Ex. 30.

Defendants' supposed involvement in the alleged misrepresentations and omissions is further evidence of how unnecessary they are to this lawsuit.

The allegations in the FAC are insufficient to state a claim for concealment, negligent misrepresentation or violation of Civil Code Section 1750 against the Director Defendants, and therefore the second, third and fifth causes of action should be dismissed.

E. The Director Defendants Do Not Owe Any Fiduciary Duty To Plaintiffs And Therefore The Fourth Cause Of Action Should Be Dismissed.

The fourth cause of action attempts to assert a direct, non-derivative claim against the Director Defendants for breach of fiduciary duty. The allegations in the FAC do not provide any basis for finding a fiduciary relationship between Plaintiffs and the Director Defendants other than by virtue of their service as directors. A corporation's creditors have no right to assert direct claims for breach of fiduciary duty against a corporation's directors. *N. Am. Catholic Educ. Programming Fund, Inc. v. Gheewalla*, 930 A.2d 92, 94, 103 (Del. 2007). Directors owe their fiduciary obligations to the corporation and to its shareholders, while creditors are afforded protection through other avenues, such as contract claims. *Id.* at 99. Therefore, the direct class claims for breach of fiduciary duty against the Director Defendants must be dismissed.

CONCLUSION

For the foregoing reasons, the Director Defendants respectfully request that the Court dismiss with prejudice all claims against them.

Dated: February 20, 2015

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