IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STEPHEN B. BENNETT	:	
	:	
Plaintiff,	:	
	:	**Case No.: 267722-V**
v.	:	
	:	
DAMASCUS COMMUNITY BANK, et al.	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

I. Procedural Overview

On December 29, 2005, plaintiff Stephen B. Bennett filed a three count Complaint. Named as defendants were his former employer, Damascus Community Bank ("the Bank") and five members of the Board of Directors (J. Daniel Rawlings, Bernard L. Moxley, Douglas D. Browning, George C. Cramer and Stephen J. Deadrick, collectively the "individual defendants") who allegedly caused his wrongful dismissal as president of the Bank in November 2004. In Counts I and III, Bennett sued in his individual capacity for a declaration that his termination as president was wrongful and for damages arising from the alleged wrongful termination. In Count II, Bennett purported to sue derivatively, on behalf of the Bank, alleging, apparently, that the Bank wrongfully terminated his employment and hired another individual as its president. Notwithstanding his removal as an officer, Plaintiff remains a director and shareholder of the Bank. Bennett did not sue Cynthia B. Cervenka, who replaced him as president, and who was not a member of the Board at the time of his removal but is now a member of the Board.

On February 13, 2006, the individual defendants moved to dismiss the original Complaint or, in the alternative, for summary judgment. On February 14, 2006, the Bank moved to dismiss Count II. On March 2, 2006, before a ruling on any of the pending motions, Bennett filed an

Amended Complaint under Maryland Rule 2-341(a). The Amended Complaint does not refer to the original Complaint and, therefore, it is the operative pleading before the court. P. NIEMEYER & L. SCHUETT, MARYLAND RULES COMMENTARY 251 (3d ed. 2003).

On March 8, 2006, the Bank again moved to dismiss Count II of the Amended Complaint, the derivative count. As well, the individual defendants on March 9, 2006, moved to dismiss the Amended Complaint or, in the alternative, for summary judgment. The court held a hearing on all pending motions on April 6, 2006.

II. Legal Standards Applicable to the Pending Motions

With respect to Counts I and III, the individual defendants have filed a "speaking demurrer" under Maryland Rule 2-322(b). *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 782-83 (1992). Because the court has referred to and will in fact consider matters outside of the pleadings (*e.g.*, Bennett's affidavit, the defendant directors' affidavits, the Bank's Bylaws, minutes of Board meetings, various letters), pursuant to Maryland Rule 2-322(c), the individual defendants' motion will be considered as a motion for summary judgment under Maryland Rule 2-501. *Bleich v. Florence Crittenton Services*, 98 Md. App. 123, 132-33 (1993); P. NIEMEYER at 206-07. In considering these counts, therefore, the court will apply the customary summary judgment standards. *Okwa v. Harper*, 360 Md. 161, 177-78 (2000); *Green v. H & R Block*, 355 Md. 488, 502 (1999); *Warner v. German*, 100 Md. App. 512, 516-17 (1994).

In seeking the dismissal of Count II, the derivative claim, the parties again have referred to matters outside of the Amended Complaint. Consequently, for reasons that will become apparent, the court will consider the motion to dismiss Count II under Maryland Rule 2-502. *See Werbowsky v. Collomb*, 362 Md. 581, 621 & n.13 (2001).

III. The Parties' Principal Contentions

Plaintiff Bennett is a stockholder and director of the Bank. Until November 2004, he also served as the Bank's president. Bennett became president of the Bank in 1998 under an "at will" employment agreement. On November 17, 2004, the directors of the Bank notified Bennett that his employment as president had been terminated. Bennett remains a major stockholder of the Bank, as well as a member of its Board of Directors.

In Counts I and III of the Amended Complaint, Bennett sued in his individual capacity and seeks money damages. Specifically, in Count I, Bennett seeks a declaration that the Board's decision to terminate him was wrongful, that he should be reinstated as president, and receive all back wages and other employee benefits. In Count III, Bennett alleges that the defendants breached his "at will" contract because, he contends, the Bank did not follow the proper procedures in terminating him.

Count II is a purported derivative claim brought on behalf of the Bank, seeking damages payable to the Bank. The conduct at issue in Count II mirrors that at issue in Counts I and III, and all operative facts arise out of Bennett's alleged wrongful termination and the Bank's decision to hire a new president.

IV. The Derivative Claim - Count II

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

> A derivative claim is a claim asserted by a shareholder plaintiff on behalf of the corporation to redress a wrong against the corporation. The defendant in a derivative action may be a corporate fiduciary, such as a director, who committed a wrong against the corporation. The action is "derivative" because it is brought for the benefit of the corporation, not for the shareholder plaintiff. *Kramer v. Western Pacific Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988). For that reason, ordinarily, damages recovered in a derivative suit are paid

> to the corporation. *Id*.
>
> By contrast, a "direct" action is a claim asserted by a shareholder, individually, against a corporate fiduciary, such as a director, to redress an injury personal to the shareholder. *Kramer,* 546 A.2d at 351 (quoting R. Clark, *Corporate Law* 639-40 (1986)). Because damages recovered in a direct action are to remedy the shareholder plaintiff individually, they are payable to him, not to the corporation.

Paskowitz v. Wohlstadter, 151 Md. App. 1, 9 (2003).

Count II of the Amended Complaint manifestly seeks relief on behalf of the Bank, and not relief to Bennett personally. Paragraph 22 plainly states: " *The Bank has been damaged* by the payment of a replacement President's wages and benefits, while, at the same time incurring liability for wages and benefits owed to Mr. Bennett and losing the valuable services of Mr. Bennett as its President." (emphasis added).

In a shareholder derivative suit, the making of a pre-suit demand, or pleading facts sufficient to show that one would be futile, is both a procedural requirement and a matter of Maryland substantive corporate law; the demand requirement is not simply a procedural nicety. *Werboswky*, 362 Md. at 601; *Danielewicz v. Arnold*, 137 Md. App. 601, 627-29 (2001). The same holds true in Delaware, where it is considered both a procedural and substantive requirement. *See, e.g., Levine v. Smith*, 591 A.2d 194, 201 (Del. 1991); *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984).

In both the original Complaint (¶ 21) and in the Amended Complaint (¶ 21), Bennett has attempted to plead that pre-suit demand on the Board would have been futile, thereby, he asserts, excusing a pre-suit demand. Reduced to its essence, Bennett claims (in both Complaints in nearly identical language) that the Board which terminated him cannot be expected to sue themselves. Although such an allegation likely is (and, in any event, should be) legally insufficient after *Werboswky*, *compare Danielewicz,* 137 Md. App. at 629-31 *with Hecht v.*

Resolution Trust Corp., 333 Md. 324, 350 (1994), the futility exception to the demand rule simply does not apply to this case. The reason is simple: Bennett did in fact make a pre-suit demand.

On October 12, 2005, over two months before filing the original Complaint, Bennett, through counsel, made a pre-suit demand on the Board of Directors of the Bank. (Ex. 2 to Plaintiff's Opposition to Defendants' Motion to Dismiss the Amended Complaint, in which Bennett's counsel contended: "We believe that Mr. Bennett was wrongfully terminated *and that both he and the bank have been damaged as a result thereof*.") (emphasis added). The demand was rejected on November 1, 2005 (Pl.'s Ex. 3). Hence, the futility exception to the demand rule is legally irrelevant. The consequences that flow from Bennett's making a pre-suit demand are clear.

In *Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990), the Supreme Court of Delaware held that the making of a pre-suit demand on the Board constitutes a concession by the plaintiff that a majority of the Board is independent, disinterested and is capable of properly considering a demand. This rule has consistently been followed in Delaware. *Grimes v. Donald*, 673 A.2d 1207, 1215 (Del. 1996); *Levin*, 591 A.2d at 212-13; *Rales v. Blasband*, 634 A.2d 927, 935 & n.12 (1993). The rule in *Spiegal* was derived from the decision in *Stotland v. GAF Corp.*, 469 A.2d 421, 422-23 (Del. 1983)(holding that by making a demand the shareholder plaintiff had "mooted" his claim that demand was futile).

Although the Maryland appellate courts have not had occasion to address this specific question, this court believes, particularly given the recent analysis of the demand rule and its purposes in *Werbowsky*, that Maryland would follow Delaware's rule that the making of a demand "moots" the futility exception and precludes reliance thereon in bringing a derivative

action. Consequently, by making a pre-suit demand, Bennett has conceded the independence and disinterestedness of the Board and is not entitled to rely on the futility exception to the demand rule.

Plaintiff Bennett has twice filed Complaints alleging that he can pursue a derivative action against the Bank because, he claimed, pre-suit demand would be futile. The language of futility in each Complaint is nearly identical. On both occasions, he wholly failed to recognize the legal effect of his October 2004 demand letter his counsel sent to the Bank well before filing either the original Complaint or the Amended Complaint. The demand rule is a rule of substantive law and it is not new. Nevertheless, Bennett twice has failed to grasp its importance and pursue the correct path. This is an issue which should, if practical, be resolved as early as possible and a putative derivative plaintiff bears a heavy burden in order to take control of corporate litigation. *See, e.g.*, *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000); *Grimes*, 673 A.2d at 1215-17.

Ordinarily, at such an early state of a lawsuit, a plaintiff is entitled to amend his pleading as of right. Maryland Rule 2-341(a). It then would be incumbent on the defendants to move to strike and show that it would be prejudiced if the amendment were allowed. *Prudential Securities, Inc. v. E-Net, Inc*., 140 Md. 194, 231-34 (2001). If Count II were amended to plead demand wrongfully refused, this court would then need to go down the complex and expensive path of determining whether, under the Business Judgment Rule, *Wittman v. Crooke*, 120 Md. App. 369, 376 (1998), a demand, having been made, was wrongfully refused by the Board. *See, e.g., Aronson*, 473 A.2d at 813; *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 -84 (1981). *See also Abromowitz v. Posner*, 672 F.2d 1025, 1030 (2d Cir. 1980); *Joy v. North*, 692 F.2d 880, 892

(2d Cir. 1982); *Spiegel*, 571 A.2d at 773-74, 777. At the hearing, after being advised of the *Spiegel* problem, Plaintiff did not ask for leave to replead.

Although Maryland Rule 2-341 contemplates liberal amendments, particularly when no trial date is on the horizon, this case does not warrant another amendment Count II because such an amendment in this case would be futile. *Cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend properly denied if there has been "repeated failure to cure deficiencies by amendments previously allowed… [or further amendment would be] futile.")

Bennett is asserting direct, personal claims in Count I and III as a result of his termination as president. Necessarily, his interests conflict with those of the other shareholders and, therefore, he is not an adequate legal representative of the Bank. If Bennett's direct claims were to be proven, Bennett and the other Bank shareholders "would be in direct competition with each other for the damages that the directors and officers would be required to pay in compensation for their illegal actions." *Horowitz v. Pownall*, 582 F. Supp. 665, 666 (D. Md. 1984).

"A plaintiff in a derivative action must be qualified to serve in a fiduciary capacity as a representative of [the other shareholders], whose interest is dependent upon the representative's adequate and fair prosecution." *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983). This rule in the derivative context is grounded in notions of due process and is akin to the adequacy of representation test by a class plaintiff in a class action. Maryland Rule 2-231(a)(4). This rule is necessary because "a shareholder may bring a derivative action to gain leverage by which to settle an unrelated dispute, *to advance the shareholder's primary interests as an employee*, creditor, or hostile bidder in a tender offer, *or for other reasons not shared by the holders as a class*." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949)(emphasis added).

Here, it is plain that Bennett has interests materially different from those held by the other Bank shareholders, notably his alleged wrongful termination as a corporate officer. *Barron v. Strawbridge & Clothier*, 646 F. Supp. 690, 695-96 (E.D. Pa. 1986); *Recchion v. Kirby*, 637 F. Supp. 1309, 1315 (W.D. Pa. 1986). He is in direct competition with his fellow shareholders for monetary damages that arise out of the same core set of operative facts. *Horowitz*, 582 F. Supp. at 666. Consequently, Bennett is not a proper derivative plaintiff given the facts alleged and personal claims asserted in the Amended Complaint. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §1833 at 393 (2005).

For the reasons set forth above, Count II of the Amended Complaint will be dismissed Under Maryland Rule 2-502, with prejudice, and without leave to amend. *See Werbowsky*, 362 Md. at 621.

V. The Contracts Claims – Counts I and III

A. Preliminary Matter

In an undated affidavit filed on March 3, 2006, attached as an Exhibit to Docket Entry No. 21, counsel for Bennett contends that "all of the facts needed to justify" plaintiff's opposition to the individual defendants' motion for summary judgment "cannot be set forth because discovery has not been completed." According to Bennett's counsel, there "are numerous disputed issues of material facts which must be 'fleshed out' and resolved before summary judgment could possibly be appropriate in favor of any party." Reference is made generally to interrogatories, document requests and depositions to be served "in the near future." Nothing specific is stated as to which issues, if any, of disputed material fact the discovery is to be directed or what potential import the discovery responses may have on the legal and factual issues in the case.

Maryland Rule 2-501(d) gives the court the discretion to deny or continue a summary judgment motion if the court is satisfied that "the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit." The Rule 2-501(d) affidavit must, at a bare minimum, explain why the unavailable information is necessary to the court's consideration of the motion, why the information would raise a genuine factual issue and specify the reasons for the non-moving party's failure, to date, to obtain such information. *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, §2741 (1998).

Counsel's affidavit is insufficient to defer a ruling on summary judgment for three independent reasons. First, the affidavit filed by Bennett's counsel is pure boilerplate, merely, citing the language of the Rule. No detail is provided. *See Adickes v. S.H. Kress & Co*., 398 U.S. 144, 160 (1970) (affiant must explain why the information is not available). Bennett has not "identified the information sought by discovery, the reasons the information has not yet been obtained, and the materiality of the information." *Channel Master Satellite v. JFD Electronics Corp*., 748 F. Supp. 373, 395 (E.D.N.C. 1990). Nothing is specified at all about what exactly is needed in discovery nor the material issues of fact to which the needed discovery would pertain. In contrast with *Androutsos v. Fairfax Hosp.*, 323 Md. 634, 639 (1991), where that court was presented with discovery requests specifically aimed at identified factual issues on which discovery was needed, no such showing has been made in this case.

Second, in opposing summary judgment, Bennett has provided the court with a wealth of pertinent evidentiary materials that bear directly on the propriety of summary judgment, including copies of Board minutes, the Bylaws of the Bank, numerous letters, internal Bank documents, documents from the FDIC and, most important, a detailed affidavit from the plaintiff (undated but filed with the court on March 3, 2006) made on personal knowledge and setting

forth his side of the story in exquisite detail. Moreover, Bennett demanded and was accorded his statutory inspection rights under §§2-512 and 2-513 of the Corporations Article (Bennett's Exs. 6 & 7). Plaintiff's evidentiary materials, along with his affidavit, made on personal knowledge, shows he currently is able to vigorously oppose summary judgment. *See Post v. Bregman*, 349 Md. 142, 154 & n.5 (1998).

Third, this case has been pending since December 2005, and, at least insofar as the record discloses, the plaintiff has made no real discovery efforts.

B. Counts I and III

In Count I of the Amended Complaint, Bennett seeks a declaratory judgment that the Board violated its own procedures and Bylaws in its decision to terminate him as president because (1) Bennett was not given notice of the Board meeting at which his fate was decided; (2) the Board has "secret, special meetings" in violation of the Bylaws at which his fate was discussed; and (3) Bennett never ratified the Board's decision. (Am. Compl. at p. 4.) In Count III, Bennett alleges that the Board's actions resulted in a breach of his "at-will" contract, resulting in his entitlement to some $500,000 in damages.

Section 2-413(c)(1) of the Corporations Article provides: "if the board of directors in its judgment finds that the best interests of the corporation will be served, it may remove any officer or agent of the corporation." This basic principle of corporate law is reiterated in the Bank's Bylaws, wherein §5(B) specifically grants the Board the authority *"[t]o remove any of the officers, or any agents and employees of the Bank, at any time it may be deemed for the best interest of the Bank*." (emphasis added).

Of course, in Maryland, such removal "does not prejudice any of (such officer's) contract rights." MD. CODE. ANN. CORPS. & ASS'NS § 2-413(c)(2). *Cf. Pioneer Specialties, Inc. v.*

Nelson, 161 Tex. 244, 339 S.W.2d.199 (1960). But, as Bennett concedes, he has no employment contract with the Bank as his employment was "at-will." (Am. Compl. at ¶ 9.) Consequently, §2-413(c)(2) provides him no legally enforceable rights. *See, e.g., Suburban Hosp., Inc. v. Dwiggins*, 324 Md. 294, 303 (1991); *Adler v. American Standard Corp*., 291 Md. 31, 35 (1981)(an employee at-will is terminable for any reason). Given the clear policy expressed by the General Assembly in enacting §2-413(c)(1) of the Corporations Article, there is no "public policy" exception applicable to Bennett's at-will status in this case. *See Wholey v. Sears Robuck*, 370 Md. 38, 53-54 (2002); *Adler*, 291 Md. at 45. Finally, and, important to this case, §5(B) of the Bylaws specifically provides that if an officer is removed, "*the compensation of that officer or employee shall thereupon cease and be discontinued*." (emphasis added). In Maryland, "the business judgment rule creates the presumption that directors act in good faith." *Zimmerman v. Bell*, 800 F.2d 386, 392 (4th Cir. 1986). *See NAACP v. Golding*, 342 Md. 663, 673 (1996). Bennett has not shown the existence of a genuine issue of material fact precluding the grant of summary judgment on the issue of the Board's right to fire him. *Wittman*, 120 Md. App. at 376-77; *Black v. Fox Hills North Community Association, Inc.*, 90 Md. App. 75, 81-82 (1992). Consequently, the Bank is entitled to judgment as a matter of law on the question of whether it had the legal right to terminate Bennett. *Castiglione v. Johns Hopkins Hospital*, 69 Md. App. 325, 388 (1986).

Thus, Bennett's case is reduced to contesting *only* the procedures used to remove him.

The Bank's directors have submitted affidavits based on personal knowledge stating that at a regular meeting of the Board on November 10, 2004, of which Bennett was aware and at which a quorum was present, the Board unanimously decided to offer Bennett the opportunity to retire or resign or, if his employment was involuntarily terminated, to offer Mr. Bennett a

severance package. (Def.'s Ex. 1). The directors' affidavits also state that defendant Rawlings was authorized by the Board to communicate the Board's decisions to Bennett. Bennett conceded in his Amended Complaint (¶13), that defendant Rawlings notified him of the Board's actions on November 17, 2004. Bennett also concedes in that same paragraph of his Amended Complaint (as well as ¶ 10 of his affidavit) that defendant Rawlings told him on November 17, 2004 that the Board had terminated his employment as president of the Bank, absent Bennett agreeing to resign. Bennett, in his affidavit does not dispute the fact that the Board held a regularly scheduled meeting on November 10, 2004, only that the directors knew that Bennett would not attend the meeting because Bennett's vacation schedule prevented him from doing so. (Bennett Aff. at ¶ 9). In short, there is no genuine dispute of fact that the Board held a regularly scheduled, properly noticed meeting on November 10, 2004, and that a quorum was present.

The individual defendants contend that the Board's actions were perfectly lawful and, in any event, were ratified at a subsequent Board meeting on March 31, 2005, at which meeting Bennett was present. During the March 31, 2005 meeting, the Board, on motion, amended the minutes to reflect the fact that Bennett had been terminated in November 2004. All Board members present at the March 31, 2005 meeting voted in favor of the motion, except for Bennett, who abstained. All of the Board members, including Bennett, signed the March 2005 minutes, which reflected the amendment regarding his termination as president in November 2004. (*See* Bennett Ex. 8, the March 31, 2005 Board Minutes).

Notwithstanding that the Board had the right to remove him as president under the Bank's Bylaws, the Corporations Article and Maryland common law, Bennett contends there remain triable issues of fact because: (1) the Board knew Bennett would not attend the November 10, 2004 Board meeting at which the decision to fire him was made; (2) there are no

contemporaneous minutes of that Board meeting reflecting the Board's decision to fire him; and (3) the Board had "secret" special meetings at which his firing was discussed and of which Bennett had no notice. We shall address these remaining contentions in turn.

Facts are material for summary judgment purposes if they "somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111 (1985). "Facts that do not pertain to the core questions involved are not 'material' and, consequently, are insufficient to avert a proper motion for summary judgment." *Warner*, 100 Md. App. at 517. In this case, the defendants' reasons for terminating Bennett, *see Brown v. Dermer*, 357 Md. 344, 355 (2000) are largely, if not wholly, legally irrelevant because, under Maryland common law, the Bank's Bylaws and §2-413(c)(1) of the Corporations Article, the Board had the right to terminate Bennett as president and select someone else. Consequently, in reviewing Counts I and III of the Amended Complaint, whether the Board had the right to fire Bennett is a question of law for the court and the proper subject of summary judgment. *See Wittman*, 120 Md. App. at 376. In any event, Bennett has not produced a shred of admissible evidence to create a genuine issue of material fact that, in making the substantive decision to fire him, the Board did not act in conformity with §2-405.1(a) of the Corporations Article, as the directors' affidavits plainly show they did. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737-39 (1993). *Cf. Yost v. Early*, 87 Md. App. 364, 380 (1991)(director defendants failed to show at trial that they acted in conformity with §2-405.1(b) in relying on information from outside accountants).

Relatedly, as long as the Board acted in conformity with the Bank's Bylaws and the Corporations Article, summary judgment is proper with respect to the so-called procedural defects asserted by Bennett. *See Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 526-27, 539 (2003).

The fact that Bennett did not attend the November 10, 2004 Board meeting, because he was on vacation (and the defendant directors knew he would not attend), is irrelevant to the Board's power to hold a Board meeting and to take action at that meeting. It is undisputed that there was a regularly scheduled Board meeting on that date and that all Board members (including Bennett) had notice of the meeting. A quorum of eight directors was present and, therefore, the Board was entitled to take action. That the decision to fire Bennett was made by the Board at a meeting it knew he would not attend, although not an act of bravery, was not unlawful. This case, however painful for Bennett, simply confirms Professor Vagts' apt description of the perils of holding a top corporate office: "Corporate executives are protected neither by tenure, as are academicians, nor by union rules, as are unionized employees. Hence discipline at the upper levels can be entirely without due process, [and] can in fact be harsh and arbitrary." D. VAGTS, BASIC CORPORATION LAW 308 (1979).

Bennett next contends, via his affidavit, that the decision to fire him was not really made at the regular Board meeting but at two special, secret meetings, one in "early" October and one in "early" November. Assuming, for the moment, that such secret meetings occurred and Bennett's possible firing was discussed, again, it is neither legally relevant nor sufficient to defeat summary judgment. The uncontested affidavits filed by the directors state unequivocally that the decision to fire Bennett was made at the regular Board meeting on November 10, 2004. And it is undisputed that such meeting was duly noticed and held in accordance with the Bylaws and §2-409 of the Corporations Article. *See* Article IV, §1 of the Bank's Bylaws, which state that the Board "shall hold regular meetings at such time and place as designated by the Board."

The allegations by Bennett, that there were discussions among Board members about Bennett's status as president before the regular meeting, even if true, does not invalidate the formal action taken by the Board at its regular meeting.

Finally, Bennett contends that the decision to fire him is void because it was not contemporaneously reflected in the minutes of the November 14, 2004 regular Board meeting. §2-111 of the Corporations Article does require a corporation to keep written minutes of Board meetings. The Bank's Bylaws, as to Board meetings, are silent on this issue. (The Bank's Bylaws, Article V, §6, do expressly require that minutes be kept of shareholder meetings.) The Board's failure to keep full minutes of its November 14, 2004 meeting, or keep them relatively contemporaneously, likely violates §2-111 of Corporations Article. However, at least as among the corporation, the directors and its officers, such failure does not invalidate actions in fact taken by the Board at the November 2004 meeting. *Davey v. Masser*, 204 Md. 612, 619, 621 (1954); J. HANKS, MARYLAND CORPORATION LAW §6.15 at 197 (2003 Supp.)("[F]ailure to keep or retain minutes does not invalidate actions properly taken by directors at a meeting.")

At the March 31, 2005 Board meeting, the Board, recognizing that the November 2004 minutes did not reflect its decision to terminate Bennett, inserted the following statement into the minutes of the March 2005 meeting:

> On motion made by Mr. Moxley, seconded by Mr. Dedrick, Mr. Moxley requested the following statement be made part of the minutes. "For historical purposes, the following is added to the minutes of March 31, 2005. Through an inadvertent error/omission in November 2004, the minutes do not reflect the Board's action to dismiss President Bennett from employment with Damascus Community Bank effective November 17, 2004." Mr. Bennett Abstained.

All directors present at the meeting, including Bennett, signed the Minutes of March 31, 2005, which contained the above-quoted statement regarding Bennett's termination in November 2004.

Under §2-410 of the Corporations Article, Bennett's failure to dissent from this corporate action at the March 31, 2005 meeting "is taken as a presumption" that he agreed to it.

Further, the Board's decision at the March 31, 2005 meeting can be viewed as a ratification of the November 14, 2004 decision to terminate Bennett. Maryland case law on the subject of directorial ratification is scant. That which does exist, however, supports the proposition that directors can ratify prior decisions when the prior decision was defective for some reason but within their *de jure* authority. *See, e.g., Webb v. Duvall*, 177 Md. 592, 597-99 (1940); *Miller v. Matthews*, 87 Md. 464, 474-75 (1898). Decisional law from Delaware, however, is explicit that "where board authorization of corporate action that falls within the boards' *de jure* authority is defective, the defect in authority can be cured retroactively by board ratification." *Kalageog v. Victor Kamkin, Inc*., 750 A.2d 531, 539 (Del. Ch. 1999). Applying Delaware law, the United States Court of Appeals for the District of Columbia has reached the same conclusion. *Carramerica Realty Corp. v. Kaidanow*, 321 F. 3d 165, 173 (D.C. Cir. 2003). Here, directors of the Bank had the legal authority to terminate Bennett under both the Bank's Bylaws and §2-413(c) of the Corporations Article. To the extent that the Board action at its regular meeting on November 10, 2004, is somehow considered defective, it was nevertheless ratified at the Board meeting held on March 31, 2005.

For the reasons set forth above, it is this **6th** day of **April**, 2006:

1. As to Count I of the Amended Complaint, **DECLARED**, **ADJUDGED** and **DECREED** that the Board of Directors of the Damascus Community Bank properly and lawfully terminated Stephen D. Bennett as president of the Bank and that no compensation or damages are due and owing from the Bank, or the individual defendants, to Bennett, and,

as to Count I of the Amended Complaint, the defendants' motion for summary judgment is **GRANTED**.

2. As to Count II of the Amended Complaint, said count is **DISMISSED, WITH PREJUDICE, AND WITHOUT LEAVE TO AMEND**.
3. As to Count III of the Amended Complaint, the defendants' motion for summary judgment is **GRANTED**.
4. This Order is and is intended to be a **FINAL ORDER**.

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RONALD B. RUBIN, Judge