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| **KARL R. WILBER, *et al.*** | **IN THE** |
| **Plaintiffs,** | **CIRCUIT COURT** |
| **v.** | **FOR** |
| **ALAN F. FELDMAN, *et al.*** | **BALTIMORE CITY** |
| **Defendants.** | **Case No. 24-C-22-000531** |

**MEMORANDUM OPINION**

This matter is before the Court on Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (DE # 22). The Court has considered the briefs of the parties and sets forth its decision below.

## I. Procedural Background

On February 7, 2022, Plaintiffs filed suit on behalf of themselves and all others similarly situated against Defendants. Plaintiffs later filed an Amended Complaint on February 15, 2022, and a Second Amended Complaint on May 16, 2022 (the "Complaint"). Pursuant to the stipulated briefing schedule, Defendants filed the instant Motion to Dismiss on July 15, 2022, Plaintiffs filed their Opposition thereto on September 15, 2022, and Defendants filed their Reply Brief on October 17, 2022.

## II. Factual Background

REITs I, II, and III (defined *infra*) were real estate investment trusts that invested in multifamily rental properties. Second Amended Complaint ("Compl.") at ¶ 32. Prior to what has been described as the Self-Management Transaction (defined *infra*), the REITs employed external advisors and property managers. *Id*. at ¶¶ 33, 35, 37. On September 8, 2020, Resource Real Estate Opportunity REIT, Inc. ("REIT I") entered into a transaction to acquire advisory and property management entities from its affiliates C-III Capital Partners, LLC ("C-III"), and RRE Legacy Co,

LLC (the "Sponsor"), which resulted in the internalization of management functions (the "Self-Management Transaction"). *Id.* at ¶¶ 81-83. On September 8, 2020, the board of REIT I approved a second transaction, in which REIT I would merge with and into Resource REIT, Inc., f/k/a Resource Real Estate Opportunity REIT II, Inc. ("REIT II" or the "Company"), with each REIT I share being converted into 1.22423 shares of the surviving Company (the "Merger Transaction"). *Id.* at ¶ 85. The Merger Transaction closed on January 28, 2021, following approval by the stockholders of REIT I. *Id.* Additionally, the Company acquired Resource Apartment REIT III, Inc. ("REIT III"). *Id.* at ¶ 86.

On June 17, 2021, Plaintiffs delivered a stockholder demand letter ("Demand") to Defendant Feldman, in which they alleged certain breaches of fiduciary duties by the Director Defendants.[1] Specifically, "The Demand identifies the Director Defendants and their duties to stockholders, and sets out the facts that provide the basis for Plaintiffs' claims, including those related to the REIT I Merger Transaction and the Self-Management Transaction. The Demand asks that the REIT II Board take action against the Director Defendants to recover damages for the benefit of REIT II and remedy deficiencies in REIT II's internal controls…." *Id.* at ¶ 113. The letter alleged that REIT I had overpaid in the Self-Management Transaction because the external management functions were worth only "minimal value." *Id*. at ¶¶ 2-5.

Following receipt of the Demand, the Company's Board of Directors formed a Special Litigation Committee ("SLC"). Directors Paula Brown and Alan Riffkin served on the committee in their capacities of real estate attorney and real estate investment banker. The SLC also engaged independent counsel. The SLC undertook an investigation that ultimately concluded Plaintiffs'

[1] The Director Defendants ("Directors") consist of Alan F. Feldman, Garry Lichtenstein, Thomas Ikeler, Lee Shlifer, David Spoont, George Carleton, Paula Brown, Alan F. Riffkin, and Andrew Ceitlin.

claims had no merit. The SLC informed the Board of this result on January 23, 2022. Blackstone Real Estate Income Trust, Inc. Proxy (the "BREIT Proxy") at 34. Counsel for the SLC informed Plaintiffs of this result two days later, on January 25, 2022.

In September of 2021, management met with nine financial advisors to discuss listing common stock or the sale of the Company. *Id.* at 29. The advisors opined that a sale could net a per-share price of $12.00 to $13.00 or more. *Id*. Upon review of this information, the Company elected to pursue a potential sale and hired Lazard as its financial advisor. In turn, Lazard contacted 69 potential bidders. *Id*. at 30. Of those potential bidders, 35 executed confidentiality agreements, and 11 submitted written indications of interest, ranging from $11.45 to $13.00 per share. *Id*. at 30-31. Blackstone Real Estate Income Trust, Inc. ("BREIT"), which ultimately became the successful bidder (the "BREIT Transaction"), made an initial offer of $12.05 per share, which was later raised to $14.75. *Id*. at 31-34. All bidders were made aware of Plaintiff's Demand. *Id*. at 34.

With respect to Plaintiffs' financial interest in this matter, they owned 10,000 shares of REIT I at the time of the Merger with REIT II. Compl. ¶ 12. As a result of the Merger, those shares were converted to 12,242.3 shares of REIT II. *Id*. at ¶ 85. In a separate transaction, Plaintiffs purchased an additional 20,000 shares of REIT II. *Id*. at ¶ 12. Thus, from an initial investment of $300,000, Plaintiffs owned 32,242.3 shares of the Company at the time of the BREIT Transaction, which was completed on May 19, 2022. *Id*. at ¶ 135. . Through this transaction, Plaintiffs received $14.75 in cash for each of their shares, for a total of $475,573.92. This constituted a profit of $175,573.92 (a 58% return on investment) to the Plaintiffs, plus dividends over the course of 10 years.

## III. Standard of Review

The Court takes as true all well-pled allegations and reviews them in the light most favorable to the Plaintiff. *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121 (2007). Although a court must assume the truth of all well-pleaded facts, dismissal is proper when the facts alleged, if proven, would fail to afford relief to the Plaintiff. Md. Rule 2-322(b)(2); *see also Hogan v. Md. State Dental Ass'n*, 155 Md. App. 556, 561 (2004). The facts as set forth in the complaint must be pleaded with "sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74 (2015) (quoting *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 643 (2010)). Upon an evaluation of Plaintiffs' allegations, the Court finds they have failed to state a claim for which relief can be granted, and sets forth its reasoning below.

In deciding a motion to dismiss, this Court may consider operative documents upon which Plaintiff pled their complaint. *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 175 (2015) (when "a document . . . merely supplements the allegations of the complaint, and the document is not controverted, consideration of the document does not convert the motion into one for summary judgment") (citations omitted); *Sutton*, 226 Md. App. at 74 n.13 (2015) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) ("statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit")). The Court therefore finds the exhibits submitted in support of the Motion to Dismiss, including but not limited to the BREIT Proxy, are properly before the Court for consideration without converting the motion to a motion for summary judgment.

## IV. Analysis

### *A. Counts I and III*

1. Plaintiff's claims are derivative

The Court concludes that Counts I and III are derivative, not direct claims. When looking to the language of the Complaint, it is clear Plaintiffs assert damage caused to the Company itself. For example, Plaintiffs assert that "[t]he Company was damaged because it issued preferred operating partnership units to C-III and the Sponsor, and made monetary payments to them, in connection with the internalization of valueless property managers," Compl. ¶ 58, "[t]he Company was also damaged because it paid excessive property management fees from its inception until its merger with REIT I was consummated," *id.*, the value of the Company's consideration to C-III and the Sponsor in the Self-Management Transaction "dwarfs the minimal value the Company actually received," *id*. at ¶ 3, "[t]he Company also was harmed" by issuing operating partnership units and other consideration to C-III and the Sponsor," *id*. at ¶ 4; and "[t]he Director Defendants knew that the merged Company would receive inadequate value in relation to the value of Company common shares that would be issued to C-III and the Sponsor." *Id*. at ¶ 161.

The derivative nature of the claims is further demonstrated by the June 2021 demand upon the Board of REIT II. As noted in the Complaint, "[i]n June 2021, Plaintiffs made a demand ("Demand") upon the Board of Directors of the Company to pursue claims of the Company arising in part out of the Self-Management Transaction. The claims identified in the Demand *are valuable Company assets*." *Id*. at ¶ 5 (emphasis added).

As noted by the Appellate Court of Maryland in *Paskowitz v. Wohlstadter*, "[w]hether a claim is derivative or direct is not a function of the label the plaintiff gives it. Rather, the nature of the action is determined from the body of the complaint." 151 Md. App. 1, 10 (2003) (citations omitted). Having considered the nature of the claims in the instant matter as they are set forth in

the body of the Complaint, and as highlighted in the quoted excerpts therefrom, *supra*, the Court concludes that the Complaint does not articulate how Plaintiffs have been harmed separately and distinctly from the alleged harms to the corporation. The Court also rejects Plaintiffs' contention that share dilution caused them individual harm that would render their claims individual and non-derivative. *Olivera v. Sugarman*, 451 Md. 208, 240-44 (2017); *Gentile v. SinglePoint Financial, Inc.*, No. Civ.A. 18677-NC, 2003 WL 1240504 at *5 n.36 (Del. Ch. Mar. 5, 2003); *In re Berkshire Realty Co. S'holder Litig.*, No. Civ.A. 17242, 2002 WL 31888345 at *4 (Del. Ch. Dec. 18, 2002); *Behrens v. Aerial Commc'ns Inc.*, No. Civ.A. 17436, 2001 WL 599870 at *3 (Del. Ch. May 18, 2001); *Oliver v. Boston Univ.*, No. 16570, 2000 WL 1091480 at *6 (Del. Ch. July 18, 2000).

2. Counts I and III fail because Plaintiffs are no longer stockholders

Generally, to maintain a derivative action a plaintiff must continuously own shares in the corporation. *Price v. Upper Chesapeake Health Ventures*, 192 Md. App. 695, 714-15 (2010). An exception to this general rule arises where a plaintiff's ownership is terminated by a merger, and the plaintiff alleges the board pursued the merger fraudulently and merely to preclude a derivative action. *Id.* (citing *Feldman v. Cutaia*, 951 A.2d 727, 731 n.20 (Del. 2008); *Lewis v. Ward*, 852 A.2d 896, 899 (Del. 2004); *Lewis v. Anderson*, 477 A.2d 1040, 1046 n.10 (Del. 1984); *Grosset v. Wenaas*, 175 P.3d 1184, 1197 (Cal. 2008).

In the instant matter, Plaintiffs are no longer shareholders of the Company and have not alleged that Defendants pursued the merger fraudulently and with the purpose of avoiding a derivative action. Instead, Plaintiffs have made claims for breach of fiduciary duty and unjust enrichment. Further, Plaintiffs allege the Merger Transaction was "part and parcel of the same plan", Compl. at ¶¶ 88-95. Having concluded that Plaintiffs' claims are derivative, rather than

direct, the Court finds the claims are extinguished because Plaintiffs are no longer stockholders in the Company. Dismissal of Counts I and IIII is therefore appropriate.

3. Counts I and III fail because the SLC properly considered and rejected Plaintiffs' Demand

In addition to the reasoning set forth *supra* in section IV(A)(2), the Court finds that Counts I and III also fail because the SLC properly considered and rejected Plaintiffs' Demand, and the rejection thereof is subject to the business judgment rule. The business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation. *Oliveira v. Sugarman*, 226 Md. App. 524, 542 (2016). This standard has been codified by statute in Maryland. Specifically, the statute provides that a director that acts "(1) [i]n good faith; (2) [i]n a manner [that he or she] reasonably believes to be in the best interests of the corporation; and (3) [w]ith the care than an ordinarily prudent person in a like position would use under similar circumstances" is immune from liability in "any action based on [the] act of the director." MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(c), (e); MD. CODE ANN., CTS. & JUD. PROC. § 5-417(b). A director's actions are "presumed to be in accordance" with this standard. MD. CODE ANN., CORP. & ASS'NS § 2-405.1(g). In the context of a special litigation committee, the Supreme Court of Maryland, in *Boland v. Boland*, 423 Md. 296, 311 (2011), held that if a court finds that "the SLC was independent, acted in good faith based on facts, and followed reasonable procedures," then the business judgment rule applies.

A plaintiff must plead facts sufficient to rebut the presumption when challenging the validity of actions taken by a board of directors. *Oliveira*, 451 Md. App. at 543; *see also Wittman v. Crooke*, 120 Md. App. 369, 376 (1998); *Penchuk v. Grant*, No. 449557V, 2018 WL 11354911, at *12 (Md. Cir. Ct. Montg. Cnty. Nov. 15, 2018). In general, "[i]f the corporate director's conduct

is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review." *Wittman*, 120 Md. App at 376 (citations omitted); *see also, In re Nationwide Health Props., Inc.*, No. 24-C-11-001476, 2011 WL 10603183, at *13, *15 (Md. Cir. Ct. Balt. City May 27, 2011) (indicating a plaintiff must plead specific facts alleging that directors acted fraudulently, with self-interest, or with gross negligence).

Applying *Boland* to the instant matter, this Court finds that the SLC was composed of independent, disinterested directors. SLC Report at 14-17. The Court is unpersuaded that Mr. Riffkin's acquaintance with Mr. Feldman or Mr. Cohen in any way detracted from his independence. The Court further finds that the SLC's methodology was reasonable. Following its appointment on August 2, 2021, the SLC engaged independent counsel, investigated Plaintiffs' allegations for five months, met with counsel numerous times, reviewed voluminous documents, and conducted 12 interviews of Resource REIT directors, employees, and advisors. SLC Report at 20-23. It is notable that the authority of the SLC was not restrained by the Board, with the SLC's determinations to be final, not "subject to review or reconsideration by the Board of Directors and shall in all respects be binding on the Corporation." SLC Report at 13. The Court finds that the SLC acted independently, in good faith, diligently, used reasonable procedures, and considered every aspect of Plaintiffs' allegations.

The Court further finds that Plaintiffs' allegations are insufficient to support an inference that the Directors engaged in any fraudulent, self-dealing, grossly negligent, or unconscionable conduct. To the contrary, the Self-Management Transaction and Merger were effectuated in a manner free of director conflict by employing special committees during the contemplation thereof. Moreover, the Board appointed new, independent directors to form a SLC regarding Plaintiffs' Demand. The SLC, in turn, provided a well-reasoned and disinterested analysis in

reaching the conclusion that the Demand was meritless. Ultimately, the Court finds the business judgment rule insulates the SLC's decision as well as the actions of the Board. As such, dismissal of Counts I and III is warranted.

***B. Count II***

Plaintiffs assert a claim of breach of duty against the Directors in Count II. Specifically, Plaintiffs allege that REIT II's Directors failed to obtain adequate value for the claims in Plaintiffs' Demand when negotiating the sale to BREIT. Compl. ¶ 166. Furthermore, Plaintiffs allege that the Directors engaged in self-dealing by negotiating with BREIT for immunity through broad indemnification rights. *Id.*

In *Wittman*, 120 Md. App. at 378, the Appellate Court of Maryland agreed with the trial court's finding that whether defendant directors "could have gotten a better deal" is "really not a cause of action. Maybe they could have. Maybe they couldn't have. But that doesn't constitute a cause of action." The Court finds that, as in *Wittman*, the Defendants in the instant matter were fully transparent in the proxy materials pertaining to the BREIT Transaction, which was ratified by the informed stockholders, and therefore Plaintiffs' claims are not actionable.

The Court further agrees with the Defendants that, because the SLC reached the conclusion that the Demand was meritless, there was no value to consider in the BREIT negotiations. SLC Report at 95, 104. Moreover, the Court finds it significant that the SLC considered the assertions of Plaintiffs and deemed the best-case value of the claims to be immaterial in light of the BREIT consideration. Notably, the SLC concluded, even in the best-case-scenario, that the value of Plaintiffs' potential claim was 13.9 cents per share, representing 0.6% of the $3.7 billion value of the sale to BREIT.

Finally, the Court also agrees with Defendants that the inclusion of immunity through broad indemnification rights in the BREIT Transaction fails to establish that the Director

Defendants engaged in self-dealing. *In re Massey Energy Co.*, C.A. No. 5430-VCS, 2011 WL 2176479 at *17 (Del. Ch. May 31, 2011) ("It is typical for counsel for a seller to bargain for indemnity . . . ."). Dismissal of Count II is therefore warranted.

### *C. Count IV*

As the Court has concluded that there is no basis for Plaintiff's claims in Counts I-III, there is likewise no viable path to maintain a claim for declaratory relief in Count IV pursuant to MD. CODE, CTS & JUD. PROC. § 3-401, *et seq.*

## V. Conclusion.

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss.

March 30, 2023
Date

Judge Jeffrey M. Geller
Circuit Court for Baltimore City

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| **Defendants.** | **Case No. 24-C-22-000531** |

**ORDER**

Upon consideration of Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (DE#22), Plaintiff's Opposition thereto, Defendants' Reply Brief, and for the reasons set forth in this Court's March 30, 2023, Memorandum Opinion, it is this 30th day of March, 2023:

**ORDERED** that Defendants' Motion to Dismiss be, and hereby is, **GRANTED**; it is further

**ORDERED** that the above-captioned action be, and hereby is, **DISMISSED**; and it is further

**ORDERED** that the Clerk shall close this matter with any open costs to be paid by Plaintiffs.

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Judge Jeffrey M. Geller
Circuit Court for Baltimore City