

MARK G. EGAN, et al.	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FIRST OPPORTUNITY FUND INC., et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 24-C-14-008132

* * * * *

MEMORANDUM OPINION

This proceeding involves the application of Md. Code Corps. & Ass’ns. Art., §3-202, which confers on corporate shareholders the right to demand payment of fair value for their shares under certain circumstances, a right commonly known as “appraisal.”¹ It arises from a reorganization transaction involving the consolidation of First Opportunity Fund, Inc., a closed-end investment fund, and two other funds, Boulder Total Return Fund, Inc. and the Denali Fund, Inc., into a fourth fund, Boulder Growth & Income Fund Inc. Plaintiffs, Mark G. Egan and Private Investment Fund, LP, holders of common stock in FOFI, filed this action on December 24, 2014, seeking appraisal of their shares. Named as defendants are FOFI and Boulder Growth & Income Fund Inc. Defendants filed a motion to dismiss for failure to state a claim. The motion asserts that plaintiffs have no right to seek the appraisal remedy because a provision in FOFI’s charter precludes their exercise of that right. The motion was fully briefed and a hearing was held. For the reasons that follow, the court concludes that the motion should be granted.

Background

Dismissal for failure to state a claim is proper only if the plaintiff’s allegations and the permissible inferences therefrom, if true, would not afford relief to the plaintiff. *Pittway Corp. v.*

¹ See J. Hanks, Maryland Corporation Law § 10.1.

Collins, 409 Md. 218, 239 (2009). Hence, the court “must ‘assume the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them.’” *Arfaa v. Martino*, 404 Md. 364, 380 (2008) (quoting *Lloyd v. General Motors Corp.*, 397 Md. 108, 121-122 (2007)) (internal citations omitted). The universe of facts pertinent to the analysis of the motion is limited generally to the four corners of the complaint and its incorporated supporting exhibits. *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643 (2010). Therefore, the factual summary that follows is derived from those sources.²

FOFI and the other three Boulder Funds, all Maryland corporations, are closed-end investment funds. A group of investors including Stewart Horejsi, members of his family and various affiliated entities styled as the “Horejsi Affiliates,” owns a significant percentage of the common stock of each fund. The four funds have overlapping boards of directors. Each of the directors on FOFI’s board also serves on one or more of the boards of the other Boulder Funds. The investment advisers for the four funds are owned by the Horejsi Affiliates. The funds are jointly managed by the same portfolio managers, chief among whom is Stewart Horejsi. The four funds are also all administered by the same co-administrators.

Plaintiffs are owners of common stock in defendant FOFI. At time of the events described herein, there were 28,739,389 shares of common stock issued and outstanding. Plaintiff Egan owns 5,900 shares and plaintiff PIF owns 740,000 shares. The Horejsi Affiliates own 39.7% of FOFI’s common shares.

On October 15, 2014, a Joint Proxy Statement/Prospectus was issued at the direction of the boards of directors of the four funds. It announced a joint special meeting of shareholders of

² This recitation is limited to the facts necessary to frame the legal questions presented by the motion to dismiss. The allegations exchanged by the parties about each other’s motives and bona fides have no relevance to these legal questions and are not considered by the court.

the funds scheduled for November 14, 2014. A series of nine proposals were to be voted on for the purpose of consolidating the four funds into a single fund. The shareholders of FOFI, Boulder Total Return Fund, and The Denali Fund, Inc. were each asked, respectively, to approve a plan of reorganization under which the assets of that fund would be transferred to Boulder Growth and Income Fund, Inc. in exchange for shares of the latter fund and the assumption by it of the liabilities of the transferor. Shareholders of Boulder Growth and Income Fund, Inc. were asked to vote on a series of proposals attendant on the reorganization.

Shareholders of FOFI were also asked to vote upon Proposal 1, which was a proposed amendment to the corporation's charter "eliminating the right of stockholders to demand the fair value of their shares but only upon reorganization of [FOFI] with and into another affiliated registered investment company." Ex. B, Proxy Statement at 1. FOFI is the only one of the four corporations whose shareholders enjoy appraisal rights, as the other three funds are publicly traded. The shareholders were informed that upon approval of this proposal the following language would be added to FOFI's Articles of Amendment and Restatement (its charter):

Holders of shares of the Corporation's stock shall not be entitled to exercise any rights of an objecting shareholder provided for under Title 3, Subtitle 2 of the Maryland General Corporation Law or any successor statute in connection with a reorganization of the Corporation with another investment company or a family of investment companies having the same investment advisor or administrator as the Corporation.

Compl., Ex. B, Joint Proxy Statement/Prospectus, Proposal 1 at p.1. Proposal 2 asked FOFI's shareholders to approve the consolidation.³

The Joint Proxy Statement/Prospectus informed shareholders that if Proposal 1 was

³ Proposal 3 was for consideration by the shareholders of Boulder Total Return Fund, Inc., Proposal 4 for shareholders of the Denali Fund, Inc., and Proposals 5 through 8 for the shareholders of Boulder Growth and Income Fund, Inc. Proposal 9, relating to adjournment of the meeting, was for all funds.

approved, Articles of Amendment would immediately be filed with the Maryland State Department of Assessments and Taxation while the special meeting was temporarily recessed. Proposals 2 through 9 would not be considered unless and until the Articles of Amendment were approved by FOFI's shareholders, and were filed and effective.

By letter dated November 6, 2014, plaintiffs objected to the transactions proposed in the Joint Proxy Statement/Prospectus. Defendant FOFI responded to the letter on November 12, 2014. On November 14, 2014, the proposals were voted on by the shareholders of the corporation. Plaintiffs objected to the proposals during the meeting. Proposal 1 was approved by 60.1% of the voting shareholders. Following the vote on Proposal 1, the Articles of Amendment to the corporation's charter were filed with and approved by SDAT. Proposal 2 was then approved by 62.5% of the voting shareholders. By letter dated November 25, 2014, plaintiffs made a demand for the fair value of their shares in FOFI. On December 8, 2014, FOFI and Boulder rejected the demand. Plaintiffs filed a Complaint and Petition for Appraisal of Common Stock on December 24, 2014.

The Applicable Standard

Under Title 3, Subtitle 2 of the Maryland Corporations and Associations Article a shareholder may demand and receive payment of the fair value of its stock on the occurrence of certain fundamental corporate changes.⁴ One of these is a merger or consolidation with another corporation. Md. Ann. Code, Corps. & Ass'ns. Art., §3-202(a)(1). A shareholder also has the right to demand and receive fair value of its stock if the corporation amends its charter in a way that alters and substantially adversely affects the shareholder's contract rights as expressly set

⁴ The remedy afforded by the Maryland appraisal statute is comparable to rights extended to shareholders by the corporation statutes of all states. *See generally* 12B Fletcher, Cyclopedic of the Law of Corporations § 5906.20; 15 Fletcher § 7163.10. *See also* Model Business Corporation Act Ch. 13.

forth in the corporation's charter, unless the right to do so is reserved in the charter. Corps. & Ass'ns. Art., §3-202(a)(4).

The statute also sets forth several circumstances under which the right to demand and receive fair value does not apply. Corps. & Ass'ns. Art., §3-202(c). One of these is if: "[t]he charter provides that the holders of the stock are not entitled to exercise the rights of an objecting stockholder under this subtitle . . ." Corps. & Ass'ns. Art. § 3-202(c)(4). This provision was added to the statute by Ch. 642, 2000 Laws of Maryland, which adopted a number of miscellaneous amendments to the Maryland corporation statute. The court's research did not reveal the source of or reason for these amendments.

A shareholder who wishes to demand fair value must follow certain specific procedures. These include a written objection to the proposed transaction within a specified time frame and a demand to the corporation's successor for fair value of the stock within 20 days after the SDAT accepts for record the articles for the transaction. Corps. & Ass'ns. Art., §§3-203(a)(1)(I); 3-203(a)(3). A shareholder who has not received payment within 50 days after the SDAT accepts the articles for record may petition a court of equity for an appraisal to determine the fair value of the stock. Corps. & Ass'ns. Art., §3-208(a). The statute goes on to prescribe the procedure by which the appraisal occurs if the court finds that the shareholder is entitled to an appraisal.

The Parties' Positions

The complaint contains two counts. Count I seeks appraisal of the fair value of plaintiffs' stock under the provisions of section 3-202(a)(1) based on the consolidation of FOFI into the Boulder Growth & Income Fund. It alleges that the amendment to the charter divesting shareholders of their appraisal rights should be disregarded because it was not an independent transaction. Count II, asserted in the alternative, alleges that the amendment to the corporation's

charter, adding a provision that shareholders were not entitled to seek the appraisal remedy, eliminated express contract rights of the shareholders, thus triggering the shareholders' right to an appraisal under section 3-202(a)(4).

In their motion to dismiss, defendants first take aim at Count II. Defendants argue that the right to an appraisal is a statutory right, not a contract right, and was not expressly set forth in the charter. Thus, defendants say, the amendment to the charter does not engage section 3-202(a)(4). As to Count I, defendants argue that the elimination of appraisal rights and the merger are two separate valid transactions, each having its own independent legal significance.⁵ The amendment to the charter was specifically permitted under Corps. & Ass'ns. Art., §3-202 (a)(4). Because the charter provision was effective at the time of the vote upon the consolidation, it bars plaintiffs from seeking the appraisal remedy. Defendants also contend that the claim asserted in Count I is not ripe because at the time of the filing of the complaint, the consolidation of the funds had not occurred, as articles of merger had not been filed with SDAT.

Consistent with the parties' treatment of these issues, the court will first consider the challenge to Count II, and then will discuss Count I.

Count II

The basis of Count II is Md. Ann. Code, Corps. & Ass'ns. Art., § 3-202(a)(4), which grants shareholders to the right to demand and receive payment of the fair value of their stock if:

⁵ To avoid confusion, the court notes that this case does not involve the doctrine of "independent legal significance" applied by the Delaware courts. That doctrine has no application here. Under that doctrine, a transaction that is attacked for noncompliance with one provision of law is nonetheless valid if it is legally justified on the basis of another provision. *See Warner Comm. v. Chris-Craft Indus.*, 583 A.2d 962, 970 (Del. Ch. 1989); *Orezeck v. Englehart*, 195 A.2d 375, 378 (Del. Super. 1963)). The argument that each action is independently significant, while relevant to the parties' contentions about the form and substance of the transaction, does not involve that doctrine. *See Bigler, Form or Substance? The Past, Present and Future of the Doctrine of Independent Legal Significance*, 63 Bus. Law. 1, 23 (2007).

The corporation amends its charter in a way which alters the contract rights, as expressly set forth in the charter, of any outstanding stock and substantially adversely affects the stockholder's rights, unless the right to do so is reserved in the charter of the corporation.

Plaintiffs assert that the adoption of the amendment depriving FOFI's shareholders of the right to seek fair value was an amendment within the scope of this subsection, thereby triggering a right to fair value. Defendants contend that the right to the appraisal remedy is a statutory right, not a contract right, which is conferred by section 3-202, not by any provision of FOFI's charter. Defendants further suggest that in any event no such contract right is expressly set forth in the charter, which says nothing about the appraisal remedy.

Plaintiffs' assertion that the right to an appraisal is a contract right "expressly set forth" in FOFI's charter begins with the principle that a corporation's charter is a contract between the corporation and its shareholders. See J. Hanks, Maryland Corporation Law § 3.7. The next link in the argument is the statement that statutory law is incorporated into a contract as if it were expressly stated in the contract. See, e.g., *Brown v. Smart*, 69 Md. 320, 330 (1888). From these premises plaintiffs derive the conclusion that all of the Maryland corporation statutes, and particularly the provisions of section 3-202, are part of FOFI's charter.

Plaintiffs' argument fails on several levels. First, it is true that there are many appellate opinions voicing the rubric that subsisting law forms a term of parties' contracts. See, e.g., *Griffith v. Scheungrab*, 219 Md. 27 (1958); *Holmes v. Sharretts*, 228 Md. 358, 367 (1962); *Baker v. Standard Lime & Stone Co.*, 203 Md. 270, 282 (1953). While some of these opinions contain sweeping expressions of this proposition, its application in each of these cases involves the construction of the terms of a contract in light of governing provisions of law. It has not been applied so as to permit parties to enforce underlying provisions of law under the guise that they

are express contractual terms. Furthermore, the issue here is not whether a contract's terms should be interpreted in accordance with governing law, based on a common law principle of contract interpretation; the issue is the meaning of the terms of the phrase "contract rights" in a statute enacted by the legislature. The intent of the enactors in using that phrase is not proven by the general principle of contract interpretation cited by plaintiffs, and the court sees no reason to infer that by the use of the term "contract rights" the legislature intended to incorporate all of the statutory law of the State of Maryland.

Second, a review of the history of the statute convinces the court that the "contract rights" referred to in the statute are not as inclusive as plaintiffs claim. When the appraisal statute was first enacted, it conferred a right to appraisal in the event of a consolidation or a sale of substantially all of the assets of the corporation. At that time, the statute also provided that

No amendment of the charter of a corporation shall be valid which changes the terms of any of the outstanding stock by classification, reclassification or otherwise, in the absence of a reservation in the charter of the right to make such amendment, unless such change in the terms thereof shall have been authorized by the holders of all of such stock at the time outstanding. . . The word "terms" as used in this section in reference to stock is intended to mean only the contract rights of the holders thereof as expressed in the charter and shall be so construed.

Ch. 309, § 24, 1922 Laws of Maryland. In 1949, the statute was amended to allow a corporation to make such an amendment, while conferring a right to demand receive fair value on holders of stock of any class adversely affected by a change in the terms of the stock. Ch. 451, 1949 Laws of Maryland. In the 1951 general revision of the corporation law, the language was rephrased to confer this right where an amendment "alters the contract rights" of the stock. Ch. 135, 1951 Laws of Maryland. *See* Md. Ann. Code, art. 23, §10 (1951).

From this history, it appears that the statutory reference to "contract rights" was derived from the previous reference to the terms of outstanding stock. *See* also J. Hanks, Maryland

Corporation Law §8.2 (“Alteration of the contract rights of shares of outstanding stock, ‘as expressly set forth in the charter,’ means a change in the terms of that stock as stated in the charter.”) The terms of outstanding stock means the contractual attributes of the stock itself, and does not mean every contract right included in the corporate charter. Therefore, even if Maryland statutory law forms part of the corporate charter, it is not embodied in the contract rights referred to in section 3-202(a)(4).

Plaintiffs also seek to bolster their argument by reference to language in *Baker v. Standard Lime & Stone Co.*, 203 Md. 270 (1953). In that case, shareholders sought an appraisal based on a charter amendment. The 1949 statutory amendment, which conferred an appraisal right in the event of an amendment to the charter that changed the terms of stock, extended this right only to stock issued after its effective date, and the plaintiffs’ stock had been issued before the effective date. However, some of the stock was transferred on the corporation’s books after the statute’s effective date, and the plaintiffs contended that the statute applied to those shares. The Court of Appeals rejected this argument. In doing so, it stated: “Not only is the language plain, but the contract rights of the holders became fixed upon the date of issue not upon the date of transfer. A certificate of stock is not the stock itself, but a mere evidence of ownership and the holder’s rights as a stockholder.” 203 Md. at 279.

Plaintiffs cite the court’s reference to “contract rights” as implying that the appraisal statute is a contract right. However, it is clear that the court’s reference to contract rights was used to distinguish the issuance of shares from the transfer of those shares, in support of its conclusion that the statute did not apply to a transfer. To buttress their reading, plaintiffs also refer to other language elsewhere in the opinion to the effect that statutes governing a corporation are part of the contract between a corporation and its shareholders, giving the reader the

impression that this language was part of the quoted passage. In fact, the latter language had nothing to do with that discussion, but involved an argument that the amendment involved in that case was not within the scope of the statute permitting amendment of the charter. The amendment involved the issuance of preferred stock, and the court noted that the statutes in effect at the time the corporation was organized authorized the issuance of preferred stock, stating that this provision formed a part of the contract between the corporation and its shareholders. Contrary to plaintiffs' implication, this statement had nothing to do with the former discussion about contract rights. In short, *Baker* furnishes no support for plaintiffs' argument.

Finally, even if the right to an appraisal remedy could be considered to be a contract right, it is not "expressly set forth" in the charter. A right is express only if it is expressed. There is no expression concerning appraisal rights set forth in the charter. Plaintiffs attempt to finesse this gap by arguing that the remedy is "expressly incorporated" in the charter. This argument is based on statements from the case law that subsisting law forms part of a contract as though expressly set forth therein. *Brown v. Smart, supra*, 69 Md. at 330. In the court's view, this amounts to nothing more than linguistic legerdemain, but, in any event, treating an object "as though" it is expressly set forth is not equivalent to that object actually being expressly set forth.

For these reasons, the court concludes that the claim that the amendment to the charter triggers a right to appraisal is without merit.

II. Count I

Section 3-202(a)(4) gives a stockholder the right to demand and receive payment of the fair value of his or her stock from the successor if the corporation consolidates or merges with another corporation. There is no dispute that the transaction that gives rise to plaintiffs' demand

is a consolidation or merger with another corporation. However, the statutory entitlement is subject to the provisos set forth in subsection (c). Section 3-202(c)(4) states that a stockholder may not demand fair value if the charter provides that the holders of the stock are not entitled to exercise the rights of an objecting shareholder under the subtitle. Defendants assert that because FOFI amended its charter to deprive its shareholders of appraisal rights before the vote on the proposed merger, plaintiffs have no appraisal right.

The theory set forth in Count I of the complaint is that the court should “look through the form of the actions taken on November 14, 2014 and view those actions for what they are: a single merger transaction.” Complaint ¶84. Plaintiffs add that the conditional nature of the vote for consolidation “further demonstrates that the amendment of the Charter was necessary to effectuate the transaction - and not an independent transaction.” Complaint ¶85.

Plaintiffs argue that the corporate actions at issue comprised a single transaction masked as two separate transactions. They contend that a determination that the two votes were a single transaction leads to the conclusion that the merger triggered the objecting shareholders’ right to receive fair value for their shares under Corps. & Ass’ns. Art., § 3-202 (a)(1). They state that courts should look to the substance of a corporate action rather than its form, and cite *Froelich v. Erickson*, 96 F. Supp. 2d 507, 510 (D. Md. 2000).⁶ That case involved the application of the Maryland appraisal statute to a demand for appraisal by a member of a limited liability company whose preferred and common interests in the company were reclassified in a manner that reduced their value. Some months later, as a “housekeeping measure,” a squeeze-out merger was

⁶ Plaintiffs also characterize the structure of the two votes as a “sham” aimed at benefitting the Horejsi Affiliates at the expense of FOFI’s shareholders. In their papers, the parties trade dictionary definitions of sham transactions. In the court’s view, the application of the sham label does not further analysis here. A sham transaction connotes a legal fiction; in this case the amendment was adopted for the purpose that it purported to have, which was to prevent shareholders from exercising an appraisal right in connection with the transaction.

approved. Following the merger, the plaintiff demanded an appraisal based on the reclassification and the merger. The defendants resisted, arguing that a reclassification is not a transaction for which appraisal is available and that the demand was untimely as to the reclassification. The court determined that for the purpose of applying the appraisal statute, the reclassification and merger should be viewed as two parts of a single transaction. 96 F. Supp. 2d at 527. Noting that the disclosure statements for the reclassification anticipated the squeeze-out as a consequence, the court concluded that the reclassification was a necessary prelude to the merger and not an independent event. Plaintiffs cite *Froelich* for the proposition that the court should conclude that the two actions at issue here were in substance one transaction, whatever their form.

Plaintiffs also cite *Louisiana Municipal Public Employees' Retirement System v. Crawford*, 918 A. 2d 1172 (Del. Ch. 2007)(hereinafter *LAMPERS*). That case involved a Delaware statute granting appraisal rights to stockholders required by the terms of a merger to accept any consideration other than shares of stock in the surviving company, shares of stock listed on a national securities exchange, or cash for fractional shares. CVS sought to acquire Caremark. Caremark's board of directors voted a special one-time cash dividend to be payable on or after the date of the merger. Shareholders objecting to the merger argued that the dividend triggered the terms of the appraisal statute, thereby requiring that the shareholders be advised of their appraisal rights in the merger vote proxy. The court concluded that the dividend, although paid by Caremark, was "fundamentally" cash consideration for the merger paid on behalf of CVS. It stated:

[D]efendants specifically condition payment of the \$6 cash "special dividend" on shareholder approval of the merger agreement. Additionally, the payment becomes due upon or even after the effective time of the merger. These facts belie

the claim that the special dividend has legal significance independent of the merger. CVS, by terms of the CVS/Caremark merger agreement, controls the value of the dividend. Defendants even warn in their public disclosures that the special cash dividend might be treated as merger consideration for tax purposes. In this case, the label "special dividend" is simply cash consideration dressed up in a none-too-convincing disguise. When merger consideration includes partial cash and stock payments, shareholders are entitled to appraisal rights. So long as payment of the special dividend remains conditioned upon shareholder approval of the merger, Caremark shareholders should not be denied their appraisal rights simply because their directors are willing to collude with a favored bidder to "launder" a cash payment.

918 A.2d at 1191-92.

The complementary nature of the corporate actions at issue here lends a certain appeal to plaintiffs' argument. The merger proposals were contingent on the adoption of the charter amendment proposal. The charter amendment was presented at the same meeting, and obviously was presented for the purpose of facilitating the merger transaction. Moreover, the charter amendment provided that there would be no appraisal rights "in connection with a reorganization of the Corporation with another investment company or a family of investment companies having the same investment advisor or administrator as the Corporation." As such, its purpose and intent was not to apply to all merger transactions, but to the specific transaction involved here.⁷ Furthermore, the manner in which the corporate actions were undertaken connotes an implicit recognition that the statute would not countenance the adoption of a charter provision preventing

⁷ In the court's view, an argument could be made that the charter provision adopted by the shareholders is not within the terms of section 3-202(c)(4). Contrary to defendants' characterization, the charter was not amended to provide that the corporation's shareholders had no appraisal right; it was amended to provide that the shareholders had no appraisal rights for a single specific transaction. An interpretation of the statute that permits a corporation to authorize the appraisal remedy for some transactions and not for others, permitting it to pick and choose instances in which the remedy is available, seems to undermine the purpose of appraisal rights to protect minority shareholders from majority opportunism. *See generally* Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 Geo. L. J. 1 (1995). However, plaintiffs have not advanced such a contention, and the court is leery of pursuing a theory that has not been the subject of argument by the parties.

resort to the appraisal right as part of the same transaction by which the merger that was the potential trigger for the appraisal right was approved.

On the other hand, the amendment to the charter was adopted in accordance with the literal requirements of the Maryland corporation statute. Plaintiffs' argument requires that the court consider the potential source of its authority to reconfigure the shape of the corporate actions at issue, given the existence of express statutory prescriptions governing the terms of the parties' rights. Courts are not generally at liberty to disregard actions that comply with such prescriptions in search of a higher equity under the guise of "substance over form." One doctrinal basis that the court has examined is the step transaction doctrine, which treats the steps in a series of formally separate but related transactions as a single transaction, if all the steps are substantially linked.

Plaintiffs make passing reference to the step transaction doctrine. Although they do not develop this argument at any length, they cite a Maryland case in which the Court of Appeals applied the step transaction doctrine in a tax context. *Read v. Supervisor of Assessments*, 354 Md. 383 (1999).⁸ That case involved the imposition of a rollback tax to property subject to a Forest Conservation and Management Agreement. The tax applies if property is conveyed to another owner who does not assume the agreement. The owner withdrew property from the agreement and conveyed it some months later. The court held that by virtue of the step

⁸ According to the *Read* court, there are three tests used to determine whether transactions should be "stepped" together and considered not as isolated incidents, but as components in an overall plan. The binding commitment test provides that a transaction "will be stepped together if, at the first step of the transaction, a binding commitment was entered into to undertake later steps." The interdependence test focuses on whether the steps in the transaction are so interdependent that "the legal relations created by one transaction would have been fruitless without a completion of the series." The end result test "amalgamates purportedly separate transactions when it appears they actually were prearranged parts of 'a single transaction intended from the outset to be taken for the purpose of reaching the ultimate result.'" 354 Md. at 400-01 (citations omitted).

transaction doctrine the withdrawal and conveyances were to be viewed as parts of an integrated transaction. En route to this holding, the court undertook an extensive review of the authority relating to the doctrine. It traced its genesis to federal tax cases, where it developed from the notion that the incidence of taxation depends on the substance of a transaction. The court also noted the application of the doctrine by state courts in several contexts other than tax cases. 354 Md. at 401.

Several cases from other jurisdictions have examined challenges to corporate actions based on the application of the step transaction doctrine. See *Noddings Inv. Group, Inc. v. Capstar Communications*, 1999 WL 182568 (Del. Ch. 3/24/1999), *aff'd* 1999 WL 801438 (Del., 9/22/1999)(employing the doctrine to determine if two transactions should be treated as one for purposes of the application of a clause in a warrant); *Int'l Specialty Prods., Inc. v. Dexter Corp.*, 2000 WL 35453111 (D. Conn. 7/27/2000)(considering the doctrine in the context of the application of a Connecticut statute requiring a shareholder vote on a transfer of all of a corporation's assets to a series of transactions by which all of the assets were transferred); *Liberty Media Corp. v. Bank of New York Mellon Trust Co.*, 2011 WL 1632333 (Del. Ch. 4/29/2011)(involving the application of an indenture provision by which Liberty agreed not to transfer substantially all of its assets to a series of transfers).

In *Fisher v. Tails, Inc.*, 289 Va. 69, 767 S.E.2d 710 (2015), the Supreme Court of Virginia considered the step transaction doctrine in a context that is similar to this case. Virginia law provides for appraisal rights in the event of a sale of corporate assets, whereas Delaware law does not. Tails, Inc. changed its corporate domicile to Delaware prior to effecting a sale of assets. Each of these steps was approved at a single special shareholder meeting. Shareholders seeking appraisal argued that under the step transaction doctrine the court should consider the

change in domicile as part of the same transaction. They also argued that the court should look at the substance of the transaction, citing *LAMPERS*. The court rejected these arguments. It stated that the purpose of these doctrines “is to prevent transactional formalities from blinding the court to what truly occurred [allowing] a court to look beyond form to the substance of a transaction to equitably define what occurred in a transaction.” 767 S.E.2d at 714. The court declined to treat the change of domicile in a manner defined by the legislature as a step in a transaction. It concluded:

There is no authority cited by the Minority Shareholders that supports their assertion that a statutorily-sanctioned domestication of a corporation may be considered a step in a step transaction analysis or ignored in determining substance over form. Domestication of the corporation is not properly considered a step in the step transaction or substance over form analysis because domestication concerns the law that is applicable to the transaction rather than an equitable characterization of the transaction that took place. Domestication is regulated by statute.

Thus, recognition of the substance over form doctrine or the step transaction doctrine would in no way change the legal significance of the domestication of Tails as a Delaware corporation. Considering the various other transactions as one, and characterizing that transaction as a sale of all Tails' assets, does not change the statutes which dictate that Delaware law properly applied in determining whether the Minority Shareholders were entitled to appraisal rights. Under Delaware law, they were not. The circuit court did not err in granting the demurrer.

767 S.E. 2d at 714-15.

In this court's view, the step transaction doctrine does not empower the court to treat the adoption of a charter amendment effected in compliance with the Maryland corporation statute as a part of the merger transaction. The purpose of the step transaction doctrine is to preclude parties from evading statutory or contractual provisions by disaggregating transactions so as to mask their true nature. But, as defendants argue, the two actions here were separate and independent actions. Apart from the argument that the adoption of the amendment triggered

appraisal rights, which the court has rejected, plaintiffs do not contend that there is any legal bar to the adoption of such an amendment to FOFI's charter or to its application to outstanding stock. The fact that the charter amendment was a necessary precondition to the merger vote does not make the two actions a single transaction. As defendants note, the salient fact is that the provision became part of the charter before the vote on the reorganization, and there is no reason that supports drawing a distinction based on whether that occurred one minute, one day or one month before the latter transaction. Therefore, the fact that this action was taken in close temporal proximity to the subsequent vote on the consolidation is without significance.

For similar reasons, the court does not conclude that the authority cited by plaintiffs supports disregarding the form of the transaction. A reading of the *LAMPERS* opinion shows it to be highly fact-specific; the transaction was replete with hallmarks showing that the dividend was actually merger consideration. In this case, the substance of the transaction is the same as its form; the amendment to the charter was effective before the shareholders decided to authorize the merger. There is no necessity for the court to disregard that form in order to reach the true substance of the transaction. To the contrary, if the court recast the form of the transaction, it would be changing its substance.

Conclusion

For these reasons the motion to dismiss will be granted. A separate order will be entered.

Dated: _____

Judge W. Michel Pierson

MARK G. EGAN, et al.

*

IN THE

Plaintiffs,

*

CIRCUIT COURT

v.

*

FOR

FIRST OPPORTUNITY FUND INC.,
et al.,

*

BALTIMORE CITY

*

Case No. 24-C-14-008132

Defendants

* * * * *

ORDER

Defendants' Motion to Dismiss (Pleading No. 6) having come before the court for hearing, it is this _____ day of April, 2016, for the reasons in a Memorandum Opinion of even date,

ORDERED that the Motion be and hereby is GRANTED, and further

ORDERED that this action is DISMISSED with prejudice.

Judge W. Michel Pierson