DENNIS WHITLOW, Individually and on behalf of all others similarly situated,	**IN THE**
Plaintiff,	**CIRCUIT COURT**
v.	**FOR**
CARMEN BOWSER, *et al.*	**BALTIMORE CITY**
Defendants.	**Case No. 24-C-21-004813**

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss (DE # 11). The Court has considered the briefs of the parties and the oral argument of counsel presented at a hearing held on November 14, 2022. The Court sets forth its analysis below.

I. Procedural Background

On November 2, 2021, Plaintiff Dennis Wilson ("Plaintiff") brought suit individually and on behalf of the former common stockholders of Columbia Property Trust, Inc. ("Columbia" or the "Company") in response to the sale of the Company to Pacific Investment Management Company LLC ("PIMCO") (the "Merger"). Plaintiff filed a class action suit on behalf of himself and all similarly situated former stockholders. Plaintiff then moved for expedited discovery and for injunctive relief to enjoin the merger transaction. The Court scheduled a preliminary injunction hearing for November 30, 2021. Prior to the hearing, Plaintiff withdrew the request for injunctive relief and the Court issued a scheduling order that included a briefing schedule for the instant motion.

Plaintiff filed an Amended Class Action Complaint on March 9, 2022. Defendants filed a Motion to Dismiss on May 20, 2022. Plaintiff filed an Opposition on July 15, 2022, and Defendants filed a Reply Brief on August 19, 2022. Oral arguments on the Motion were heard on November

14, 2022. The arguments raised by Defendants in their motion and reply memorandum, and those argued by Plaintiff in opposition thereto, are discussed below.

II. Factual Background

Prior to its merger with PIMCO, Columbia was a publicly traded real estate investment trust that focused on the ownership and operation of commercial real estate. Columbia's business included the acquisition, renovation, and operation of properties across the United States, with a focus on properties located in New York, Boston, Washington, D.C., and San Francisco. Columbia also held operating partner interests in properties owned via joint venture agreements with Allianz SE ("Allianz").

Plaintiff has filed the instant action against the individuals who served on the Columbia Board of Directors (the "Board"), including Nelson Mills who served as a member of the Board and as Columbia's President and Chief Executive Officer. Plaintiff alleges that Defendants breached their fiduciary duties in connection with the merger between Columbia and PIMCO to the detriment of Columbia's stockholders. Specifically, Plaintiff claims that Defendants breached their duties of good faith and loyalty by initiating the sales process to appease an activist investor and then steering Columba toward their preferred bidder and thereby causing Plaintiff to suffer damages. Further, Plaintiff alleges that Defendants breached their duty of disclosure by withholding certain information about the proposed merger from the stockholders, preventing stockholders from evaluating information they needed to make an informed decision regarding the Merger.

Defendants argue that the business judgment rule applies to the actions of the Board of Directors, and that Plaintiff has failed to allege facts that overcome the statutory presumption in favor of the directors. Defendants further argue that Plaintiff's duty of disclosure claim fails, as Plaintiff has not established how any information allegedly omitted from the Proxy Statement

shared with stockholders prior to their vote on the Merger would have significantly altered the total mix of information available to the stockholders. Moreover, Defendants contend that, upon ratification of the transaction by shareholders, Defendants cannot be held liable under Maryland law. Lastly, Defendants argue that Plaintiff's claims are barred by the exculpatory provision in Columbia's charter.

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.l 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 Plaintiff's allegations, the Court finds that 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 agrees with Defendants that the exhibits submitted by them in support of their Motion to Dismiss are properly before the Court for consideration and without converting the motion to a motion for summary judgment.

III. Analysis

a. Applicability of the Business Judgment Rule

The Court concludes that the business judgment rule applies to Plaintiff's claims, and finds that Plaintiff has not pled sufficient facts to overcome that rule's presumption in favor of Defendants. 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).

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 Penchuk v. Grant*, No. 449557V, 2018 WL 11354911, at *12 (Md. Cir. Ct. Montg. Cnty. Nov. 15, 2018), *Wittman v. Crooke*, 120 Md. App. 369, 376 (1998). 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).[1]

Here, the facts alleged by Plaintiff are insufficient to support an inference that the actions of the Board in merging with PIMCO were not independent, not undertaken in good faith, or made in the Directors' own self-interest. Plaintiff contends that Defendants were inherently conflicted because an activist stockholder threatened a proxy fight, thereby bullying Defendants into a hasty merger in order to protect their reputations and avoid a proxy contest. Amended Complaint ("AC") ¶¶ 4-5. Plaintiff's alleged facts are insufficient to rebut the presumption that the actions of the Board of Directors were in the best interest of the company. This is especially true given the fact that the Complaint itself describes: (i) the impact that the COVID-19 pandemic had on the commercial real estate market, AC ¶ 56; Ex. 3 at CXP00000050, (ii) the detailed review of the Arkhouse offer, AC ¶¶ 56-63, (iii) the extensive efforts Columbia undertook in its strategic review process, which included 88 potential counterparties, of which 35 signed confidentiality agreements in order to access and review Columbia's due diligence materials, AC ¶¶ 63, 67, 76, and (iv) Columbia's consultation with independent legal counsel and financial advisors. *See, e.g.*, AC ¶¶ 6, 10, 52, 77, 79, 81, 86, 90, 93, 97, 106, 110. The Board ultimately determined that the best course

[1] In opposition to the Motion to Dismiss, Plaintiff relies on *Shenker v. Laureate*, 411 Md. 317 (2009), certain Delaware cases, and *In re: Am. Capital S'holder Litig.*, No. 422598-V, 2016 Md. Cir. Ct. LEXIS 13 (Oct. 12, 2016). Plaintiff's reliance on these opinions is misplaced, as the Maryland legislature abrogated the "additional common law" duty to maximize value for shareholders in 2016 when it amended MD. CODE ANN., CORP. & ASS'NS, § 2-405.1(i) to state that the statute "[i]s the sole source of duties of a director to the corporation or the stockholders of the corporation." Section 2-405.1(h) states that "[a]n act of a director of a corporation relating to or affecting an acquisition or a potential acquisition of control of the corporation . . . may not be subject to a higher duty or greater scrutiny than is applied to any other act of a director."

of action was to pursue a transaction with PIMCO in light of the other available options and the advice of the Board's independent financial advisors.

There is no indication that this process was "not in shareholders' best interest", "favoring PIMCO (with whom [Defendants] had material connections)", or that Defendants entered the transaction to "secur[e] material personal benefits." Opposition to Defendants' Motion to Dismiss, at 1. Plaintiff argues that because Arkhouse purchased 3.3% of common stock over the period of more than a year and threatened a proxy contest, there is a permissible inference that the individuals serving on the Board of Directors were inherently conflicted, persuaded to act in their own self-interest, and breached their fiduciary duty. Without more, there is simply "no logical force to the suggestion that otherwise independent, disinterested directors of a corporation would act disloyally or in bad faith and agree to the sale of their company 'on the cheap' merely because they perceived some dissatisfaction with their performance among the stockholders" or faced a threat that they "might face opposition for reelection at the next stockholders meeting." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 729 (Del. Ch. 1999). Plaintiff's claims as stated in the Amended Complaint simply do not lead to a permissible inference that Defendants breached their fiduciary duties, and do not provide any indication that the Directors were in fact disloyal or persuaded to act in bad faith.

b. Ratification of Merger Extinguishes Claims

Plaintiff's claims also fail as a result of the December 2, 2021, stockholder vote in favor of the Merger. Even if Plaintiff had presented a sufficient claim for breach of fiduciary duty arising from the Merger, such claims are foreclosed when a majority of informed and disinterested stockholders vote to ratify a proposed merger. *Wittman v. Crooke*, 120 Md. App. at 377 ("Maryland has long recognized the proposition that a board of directors is not 'liable to the stockholders for acts ratified by them.'") (quoting *Coffman v. Md. Publ'g Co.*, 167 Md. 275, 289 (1934)); *see also*

Penchuk, 2018 WL 11354911, at *12-13 (explaining the rationale behind such a policy is "to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves.") (quoting *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 312-314 (2015)).

Plaintiff's Opposition to the Motion to Dismiss raises only the following alleged disclosure violations that might render the Proxy insufficient for a shareholder vote, thereby negating claim extinguishment by ratification: 1) failure to include March 2021 projections in addition to the "Columbia Projections"; 2) additional details regarding "Project Pangea," the Arkhouse standstill agreement, and Board member discussions; and 3) alleged favoritism for Allianz and the PIMCO Funds. With respect to the March 2021 projections, the Court concludes that the Board was under no obligation to disclose additional projections that failed to include a full five years of projections and considering the Proxy's explanation that the projections "should not be relied upon as indicative of future results." *See, e.g. Penchuk v. Grant*, 2018 WL 113654911 at *8-*9; *LongPath Cap. v. Ramtron Int'l Corp.*, 2015 WL 4540443 at *18. With respect to Project Pangea and the Arkhouse standstill agreement, the Court is likewise unpersuaded and finds those matters to be mere *potential* opportunities that the Board need not disclose. *City of Miami Gen. Emps. V. Comstock*, 2016 WL 4464165 at *15 (Del. Ch. Aug. 24, 2016). The Court further finds that there was no disclosure violation based upon various Board discussions and comments cited by Plaintiff. *Newman v. Warren*, 684 A.2d 1239, 1246 (Del. Ch. 1996). Finally, with respect to the alleged favoritism of Allianz and the PIMCO Funds, the Court finds the allegation to be mere speculation. Moreover, the Court agrees that the Board fully disclosed its reasoning for recommending the PIMCO offer and it is clear that the allegation that Arkhouse presented a "superior" offer is simply

untrue; notably Arkhouse had no identified source of financing and no assurance that it could secure financing.

c. Duty of Disclosure

Plaintiff alleges that Defendants omitted material information from the Proxy Statement provided to stockholders, constituting a breach of their duty of disclosure. Directors are not required to disclose all available information merely because investors might find it helpful. *Skeen v. Jo-Ann Stores, Inc*., 750 A.2d 1170, 1174 (Del. 2000); *see also In re Nationwide*, 2011 WL 10603183, at *18. In determining the scope of information that must be disclosed to stockholders in advance of a merger, a materiality standard is applied. An omitted fact is considered material only if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001) (citation omitted); *Hudson v. Prime Retail, Inc.*, No. 24-C-03-5806, 2004 WL 1982383, at *13 (Md. Cir. Ct. Balt. City Apr. 1, 2004); *TSC Indus., Inc. v. Northway, Inc.*, 426 US 438, 449 (1976) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."). Directors need not disclose so much information as to enable stockholders to duplicate the directors' efforts or "bury the shareholders in an avalanche of trivial information"; rather, directors need only provide "sufficient information to enable a reasonable investor to make an informed decision on the matter presented." *Hudson*, 2004 WL 1982383, at *13; *see also TSC Industries, Inc*, 426 US at 448-49.

To state a claim for a breach of the duty of disclosure, a plaintiff must: (1) allege that facts are missing from the definitive proxy statement; (2) identify those facts; (3) state why they meet the materiality standard; (4) state how the omission caused injury; and (5) allege that the missing information was known to the directors, or within their control. *Hudson*, 2004 WL 1982383, at

*13-14. A plaintiff is thus required to explain *how* omitted material would have significantly altered the total mix of information. It is not enough for a plaintiff to provide conclusions and speculations regarding the materiality of the alleged deficiencies in disclosure. *See In re Nationwide*, 2011 WL 10603183, at *18 (citing *Skeen v. Jo-Ann Stores, Inc*. 750 A.2d 1170, 1173 (Del. 2000).

Against these pleading requirements, Plaintiff's allegations are insufficient as a matter of law. Plaintiff claims that disclosure deficiencies in the Proxy Statement prevented stockholders from fully and fairly evaluating the Merger prior to the December 2, 2021, stockholder vote. Specifically, Plaintiff alleges that several pieces of information were missing from the Proxy Statement in violation of Defendants' duty of disclosure. First, Plaintiff contends that Defendants failed to disclose information regarding what Plaintiff describes as a "manipulation" of projections. Plaintiff also argues that stockholders were entitled to review a standalone joint venture plan referred to as "Project Pangea". Plaintiff's final categories related to alleged deficiencies in the Proxy statement are "process misdisclosures" and "favoritism and bias misdisclosures."

The Court notes that some of these allegations are simply untrue with a plain reading of the Proxy statement.[2] In addition to the inaccuracies of some of Plaintiff's claims, the Court notes that Plaintiff fails to state *how* or *why* such alleged non-disclosed or "misdisclosed" information was in fact material, or how it would have altered the total mix of information already made available to stockholders. Merely claiming that this missing information was vital to examine is

[2] For example, Plaintiff alleges that the "Proxy failed to disclose the early and aggressive outreach by Arkhouse and its counsel." AC ¶ 138(a). This allegation is refuted by the Proxy, wherein Arkhouse's actions and the Board's response is outlined. D. Ex. 1 at 29. Plaintiff alleges that the "Proxy failed to disclose that Goldman Sachs was working as Arkhouse's financial advisor throughout the vast majority of the sales process, to only then suddenly jump ship and work for PIMCO." AC ¶ 138(b). This allegation is refuted by the Proxy, which explicitly sets forth Goldman Sachs' involvement with both Arkhouse and PIMCO. D. Ex. 1 at 29-30, 32.

not enough to satisfy the pleading requirements. Moreover, a review of the Proxy Statement reveals that it contains information relating to the background of the Merger, discusses Arkhouse and its threat of a proxy contest, and provides financial analyses from Morgan Stanley. Considering the material presented to stockholders in the Proxy, the Court fails to find a permissible inference that the allegedly missing information is relevant or "important" to a reasonable investor, or that the information would be anything other than simply cumulative. Without establishing how the allegedly undisclosed material would have significantly altered the total mix of information available to stockholders, Plaintiff's disclosure claims are speculative and wholly insufficient to sustain a claim.

d. Exculpation Clause

Paragraph nine of Columbia's corporate charter contains the following exculpation clause: "To the maximum extent that Maryland law in effect from time to time permits limitation of the liability of directors and officers, no director or officer of the Corporation shall be liable to the Corporation or its stockholder for money damages."

Section 5-418(a) of the Courts & Judicial Proceedings Article provides that:

> (a) The charter, as defined under § 1-101 of the Corporations and Associations Article, of a Maryland corporation may include any provision expanding or limiting the liability of its directors and officers to the corporation or its stockholders for money damages, but may not include any provision that restricts or limits the liability of its directors or officers to the corporation or its stockholders:
>
> > (1) To the extent that it is proved that the person actually received an improper benefit or profit in money, property, or services for the amount of the benefit or profit in money, property, or services actually received;
> >
> > (2) To the extent that a judgment or other final adjudication adverse to the person is entered in a proceeding based on a finding in the proceeding that the person's action, or failure to act, was the result of active and deliberate dishonesty and was material to the cause of action adjudicated in the proceeding; or

> (3) With respect to any action described in subsection (b) of this section.[3]

MD. CODE ANN., CTS. & JUD. PROC. § 5-418(a). Furthermore, the Corporations and Associations article of the Maryland Code states that a corporation may include in its charter, "[a] provision that varies in accordance with § 2-405.2 of this title the standards for liability of the directors and officers of a corporation for money damages." MD. CODE ANN., CORP. & ASS'NS § 2-104(b)(8). The Code further states that "[t]he charter of the corporation may include any provision expanding or limiting the liability of its directors and officers to the corporation or its stockholders as described under § 5-418 of the Courts and Judicial Proceedings Article." MD. CODE, CORP. & ASSN'S § 2-405.2.

When viewing the exculpation clause in Columbia's charter together with the above-quoted statutory language, it is clear that Plaintiff would need to plead the Defendants' receipt of an improper benefit or active and deliberate dishonesty on the part of Defendants to avoid dismissal.[4] The Amended Complaint alleges that the Merger provided the Defendants with "easy liquidity" and "protected their reputations and other lucrative employment and board positions." AC ¶ 125. The Amended Complaint further asserts that the Defendants received consideration from the transaction itself. None of these allegations adequately plead the receipt of an improper benefit. With respect to the protection of reputation and employment positions, the Court finds that this is

[3] Subsection (b) pertains to actions against banking institutions, credit unions, or savings and loan associations.

[4] Plaintiff argues that Defendants' exculpation argument is not appropriate for the motion to dismiss stage of litigation. Plaintiff is incorrect. The exculpation issue can be considered under the motion to dismiss standard and will be considered herein. *Grill v. Hoblitzell*, 771 F. Supp. 709, 712 (D. Md. 1991); *Witchko v. Schorsch*, No. 15 Civ. 6043, 2016 WL 3887289, at *8 (S.D.N.Y. June 9, 2016) (applying Maryland law); *Hayes v. Crown Cent. Petrol. Corp.*, 78 F. App'x 857, 865 (4th Cir. 2003); *Kurlander v. Kaplan*, No. 8:19-cv-00742-T-02AEP, 2019 WL 3944338, at *5 (M.D. Fla. Aug. 21, 2019) (applying Maryland law).

does not satisfy the requirement that Plaintiff plead the receipt of an improper benefit or profit in money, property, or services. *In re Tangoe, Inc. S'holders Litig*, No. 2017-0650-JRS, 2018 WL 6074435 at *14 (Del. Ch. Nov. 20, 2018). Likewise, the "easy liquidity", alleged by Plaintiff is not the actual receipt of an improper benefit.

In addition to Plaintiff's failure to plead the receipt of an improper benefit, the Amended Complaint is completely devoid of facts that would support a finding that Defendants engaged in active and deliberate dishonesty. Plaintiff's assertions that "Defendants engaged in active and deliberate dishonesty when they knowingly engaged in a sale when selling was not in shareholders' best interests," Opp. at 47, and that it is "plausible that Defendants knew of the Proxy's material omissions and misleading statements, yet did nothing to remedy them," Opp. at 46, do not adequately plead active and deliberate dishonesty. These statements amount to nothing more than bald assertions and speculative claims, neither of which adequately support a finding of active and deliberate dishonesty. *Hayes v. Crown Cent. Petrol. Corp.*, 78 Fed App'x. 857, 865 (4th Cir. 2003) (dismissal was appropriate when plaintiffs failed to allege fraud to support a finding of active or deliberate dishonesty).

e. Declaratory Relief

As the Court has concluded that there is no basis for Plaintiff's claims for breach of fiduciary duty, there is likewise no viable path to maintain a claim for declaratory relief.

V. Conclusion.

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

January 4, 2023
Date

_____
Judge Jeffrey M. Geller
Circuit Court for Baltimore City

DENNIS WHITLOW, Individually and on behalf of all others similarly situated,	**IN THE**
Plaintiff,	**CIRCUIT COURT**
v.	**FOR**
CARMEN BOWSER, *et al.*	**BALTIMORE CITY**
Defendants.	**Case No. 24-C-21-004813**

ORDER

Upon consideration of Defendants' Motion to Dismiss, Plaintiff's Opposition thereto, Defendants' Reply Brief, and the oral argument presented to the Court on November 14, 2022, and for the reasons set forth in this Court's January 4, 2023 Memorandum Opinion, it is this 4th day of January, 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 Plaintiff.

_____
Judge Jeffrey M. Geller
Circuit Court for Baltimore City