IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

CONSORTIUM ATLANTIC REALTY TRUST, INC.,	:	
Plaintiff,	:	Case No. 365879-V
v.	:	
PLUMBERS & PIPEFITTERS NATIONAL PENSION FUND, et al.,	:	
Defendants.	:	

AMENDED MEMORANDUM AND ORDER

Pending before the court is the plaintiff's motion to dismiss the defendants' counterclaims. (DE # 61) The defendants filed a written opposition, (DE # 69), and the court held a hearing on January 11, 2013. For the reasons I discuss below, I will grant the motion to dismiss in part and deny it in part.

Factual Background

The plaintiff in this case is Consortium Atlantic Realty Trust, Inc. ("CART"). The defendants are union pension funds, namely the Plumbers & Pipefitters National Pension Fund, United Mine Workers of America 1985 Construction Workers Pension Plan, Sheet Metal Workers Local No. 100 Washington, D.C. Area Pension Fund, Communication Workers of America Plan for Employees' Pension, Communications Workers of America,[1] Communications Workers of America, AFL-CIO, U.A. Local Union Officers and Employees Pension Fund and National Retirement Fund (collectively

[1] This defendant is a union which holds the securities in issue for the benefit of two union pension funds.

the "Funds").[2] Also sued as defendants are Goodloe E. Byron, Jr. ("Byron") and Potomac Asset Management Company ("PAMCO"), the Funds' investment advisors.

Before CART was formed, the Funds had invested in limited partnerships allegedly controlled by the Bernstein Companies. These limited partnerships owned three office buildings in the Washington, D.C. area. In 2005 and 2006, by the express terms of the limited partnership agreements, these entities were to terminate and the Funds' investment in the limited partnerships was to be returned to them in cash. According to the counterclaim (¶ 24), the Bernstein Companies -- no specific individuals are identified -- solicited the Funds to "roll" their limited partnership investments into a new real estate investment trust ("REIT") which would be formed to hold the same three office buildings.[3]

Defendant Marc N. Duber ("Duber") is a managing director of the Bernstein Companies and a member of CART's Board of Directors. (¶¶ 11, 28).

After the formation of the REIT, the Funds, in the aggregate, would own the majority of the shares, but the REIT would be managed by Consortium Atlantic Management LLC ("CAM"), in which Duber would be the managing member. Duber also would own a minority interest in the new REIT.

The Bernstein Companies initially proposed a structure in which it and certain of its affiliates would control a majority of the seats on the board of directors and another affiliate would receive fees for managing the real estate. (¶46-47). The Funds did not agree to this proposal because, first, they would be locked into an illiquid investment

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[2] All of the Funds are organized under and governed by the Employment Retirement Security Act of 1974, 29 U.S.C. § 1001, *et seq*. ("ERISA").

[3] The Bernstein Companies have not been named as defendants to the counterclaim. Neither has Consortium Atlantic Management LLC, the manager of CART.

vehicle, a REIT, which had perpetual life, and, second, the Funds would have no management rights or right to receive management fees. The Bernstein Companies then proposed that the Funds be granted an express withdrawal right six years after the execution of the Shareholders' Agreement so that the Funds would not be perpetually "locked" into this investment.[4] According to the Funds' counterclaim, this withdrawal right was a material inducement to invest in CART and the Funds would not have done so but for the existence of the withdrawal right. (¶¶52-56).

CART was formed on March 3, 2005. The Shareholders' Agreement at issue in this case is dated February 28, 2006. Each investor paid $10.00 per share. The Bernstein Companies had issued two Regulation D Private Placement Memoranda "Offering Memoranda," one dated August 14, 2004 and one dated October 15, 2006, both of which were reviewed by the Funds before investing in CART. The Funds also alleged that on March 1, 2005, Landon Butler & Company, a sponsor of the REIT, issued a letter to one of the Funds (the Plumbers & Pipefitters National Pension Fund), which described two options: Option One, receive cash or, Option Two, receive shares in the new REIT to be valued at the full amount of the cash that would have been distributed upon the wind up of the limited partnerships. Similar letters allegedly were sent to the other Funds.

In short, the message of these letters and the Offering Memoranda was that if the Funds decided to invest in the new REIT, they would receive shares valued at the same amount of cash as would have been distributed to them had they selected Option One. According to the counterclaim, the Funds collectively invested over $80 million into CART, which accounted for 93.8% of the initial ownership. The remaining 6.2% was owned by Duber directly or indirectly through affiliates.

[4] CART is not publically traded. Hence, there is no ready market for its stock.

Under the Shareholders' Agreement, each Fund was granted the unilateral right to withdraw as a shareholder six years after the effective date of the Shareholders' Agreement, which was February 28, 2006. By February 28, 2012, each Fund had given notice of the exercise of its withdrawal right under Section 5 of the Shareholders' Agreement. A dispute immediately arose over the valuation of the Funds' shares under the withdrawal right, which precipitated a host of litigation, including this case.

Section 5(a) of the Shareholders' Agreement provides, in pertinent part that, upon timely notice of withdrawal by a shareholder, CART is required to redeem all of the shares held by the withdrawing shareholder "at a price equal to the Fair Market Value (as defined below) of [the withdrawing shareholder's securities.]" Section 5(d) of the Shareholders' Agreement states: "As used in this Section 5, the phrase 'Fair Market Value' shall mean *the fair market value as determined by a qualified third party appraiser* acceptable to the withdrawing Shareholders and the Corporation *consistent with the valuation methodology previously used by the Corporation in prior appraisals*." (Emphasis added).

In June of 2011, two smaller shareholders had accepted CART's offer to redeem their shares at $7.93 per share, the price set forth in a December 2010 appraisal done solely for purposes of complying with ERISA. This price was based on an appraisal of one share of stock as of December 31, 2010. The Funds which are parties to this case refused to accept any "discounted" value for their shares, insisting on redemption at $10.00 per share.

On July 19, 2012, CART filed a three-count complaint against the Funds for the alleged breach of a Shareholders' Agreement entered into between CART and the Funds

on February 28, 2006. CART also sued Byron and PAMCO for the tortious interference with CART's Shareholders' Agreement with the Funds.

In Count I, CART sued the Funds for the alleged breach of Section 5 of the Shareholders' Agreement regarding the implementation of Funds' exercise of its withdrawal right from Cart, including the valuation of the Funds' shares. According to CART, the Funds have wrongfully refused to participate in the contractually mandated appraisal process under Section 5 of the Shareholders' Agreement and have wrongfully disputed the meaning of the term fair market value, as defined in the Shareholders' Agreement, regarding the valuation of the Funds' shares upon the exercise of their withdrawal right. In Count II, CART sued the Funds for allegedly misrepresenting to third parties that CART either was for sale or that it would be liquidated. In connection with those statements, the Funds allegedly disclosed CART's confidential business information. In Count III, CART sued Byron and PAMCO for allegedly interfering with CART's Shareholders' Agreement with the Funds.

On October 12, 2012, the defendants moved to stay this case pending the outcome of a case they filed on that same date in the Superior Court of the District of Columbia. On October 26, 2012, I denied the defendants' motion for a stay.

On November 15, 2012, the defendants filed a counterclaim against CART raising a host of claims regarding the Shareholders' Agreement and its interpretation. The specifics of the counterclaim will be discussed below. On December 18, 2012, CART moved to dismiss the counterclaim. On January 7, 2013, the defendants' filed a brief in opposition to CART's dismissal motion. The court held a hearing on January 11, 2013,

and heard argument of counsel. Although each side has filed an additional written submission, no further hearing is necessary.

Legal Standard

In ruling on a motion to dismiss under Md. Rule 2-322(b), I accept as true all well-pled facts in the counterclaim, and any reasonable inferences derived from those facts, in a light most favorable to the non-moving party. My review is cabined to the pertinent pleading, and any document attached to or incorporated into that pleading by reference. The counterclaim repeatedly and specifically references, and quotes from, the Shareholders' Agreement and the Offering Memoranda, so I may consider these documents on a motion to dismiss. Md. Rule 2-303(d). My object at this point simply is to see whether relief can or cannot be granted on the basis of the facts alleged in the counterclaim as a matter of law. *Converge Services Group, LLC v. Curran*, 383 Md. 462, 475 (2004); *Kendall v. Howard County*, 204 Md. App. 440, 446-47 (2012).[5]

However, boilerplate or conclusory statements do not receive the benefit of this forgiving standard. *RRC Northeast, Inc., v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010). "[A]ny ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Sharrow v. State Farm Mutual*, 306 Md. 754, 768 (1986); *Cf. Berman v. Karvounis*, 308 Md. 259, 263 (1987)("what we consider are allegations of fact and inferences deducible from them, not merely conclusory charges."). In Maryland, a claimant must allege sufficient facts to constitute a cause of action. *Ver Brycke v. Ver Brycke*, 379 Md. 669, 696-97 (2004); *Scott v. Jenkins,* 345 Md. 21, 27-28 (1997). Consequently, "a pleading that fails to allege facts, or that fails to demand a particular form of relief, fails to fulfill the purposes of

[5] The Shareholders Agreement provides in §14 that it is to be governed by Maryland law.

pleading." P. NIEMEYER & L. SCHUETT, MARYLAND RULES COMMENTARY at 180 (3d ed. 2003).

In addition, to withstand the dismissal of a fraud claim, the pleader must set forth its claim with particularity. Charges of fraud, absent specific allegations which, if true, would constitute fraud, does not sustain a fraud-based claim in the face of a motion to dismiss. *Brack v. Evans*, 230 Md. 548, 553 (1963); *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 473-74 (1977).

Discussion

The Funds' counterclaim has 295 paragraphs. It is 80 pages long and contains 12 separate claims. The claims are summarized below.

Count I alleges that CART and Duber, a CART inside director, fraudulently induced the Funds to invest in CART by failing to disclose that they would apply discounts when valuing shares redeemed under the withdrawal right. Count II accuses CART's outside directors, including Kenneth Samet, of aiding an abetting this fraudulent inducement, regarding the Funds' initial investment on February 28, 2006, as outlined in Count I.

Count III is a claim against all counter-defendants for breach of the fiduciary duty "to maximize" shareholder value. According to this claim, the counter-defendants breached a fiduciary duty they owed to the Funds by failing to pursue a sale of CART.

In Count IV, the Funds seek a declaratory judgment against all counter-defendants stating that they breached the fiduciary duties outlined in Count III.

In Count V, the Funds seek a declaratory judgment that the exercise of the Funds' withdrawal rights constitutes a "change of control" transaction and that all defendants

breached their fiduciary duties for failing to sell CART and otherwise maximize shareholder value. In Count VI, which rests on the same theory as Count I, the Funds seek a declaratory judgment that CART and the individual defendants improperly have sought, or will seek, to apply various discounts in calculating fair market value under Section 5 of the Shareholders' Agreement. Count VII seeks a declaratory judgment, also in connection with the Funds' exercise of their withdrawal right, based on the theory that the Funds' withdrawal amounted to a change in control. Count VIII requests a declaratory judgment against CART for breach of the Shareholder Agreement in calculating the fair market value of the Funds' shares upon redemption.

In Count IX, the Funds have accused CART of the anticipatory breach of the Shareholders' Agreement, again in connection with the exercise of the Funds' withdrawal right and the valuation of its shares upon withdrawal. Count X seeks the specific performance by CART, and an order requiring it to apply a certain methodology in valuing the Funds' shares. Count XI claims that Duber has tortiously interfered with the Funds' Shareholders' Agreement with CART, again largely regarding the valuation methodology.

In Count XII, the Funds allege that CART and Duber fraudulently induced the Funds to sign the Shareholders' Agreement by falsely representing in the Offering Memoranda, that CART would acquire additional real estate assets and raise additional capital through subsequent equity offerings.

A. Fraudulent Inducement

Counts I, II and VI hinge on the contention that the Funds were fraudulently induced by the counter-defendants to purchase their shares for $10.00 per share when the counter-defendants knew, but did not disclose, that discounts would be applied to any share redeemed under the withdrawal right afforded by Section 5 of the Shareholders' Agreement. According to the Funds, the counter-defendants omitted to disclose that valuation on the exercise of a withdrawal right would be discounted to a value (for matters such as lack of marketability and lack of control), of less than the $10.00 per share, which was what they paid when they initially bought shares in CART. Count XII alleges fraudulent inducement by reason of the counter-defendants failure to keep certain promises which were made in the Offering Memoranda, namely that CART would acquire additional real estate and would raise additional capital.

As pled, all of the counts in the counterclaim based on fraud fail to state sufficient facts which, if proven by clear and convincing evidence, would warrant relief. Md. Rule 2-303(b).[6] To be sure, Maryland recognizes as actionable under certain circumstances both an obligation to disclose material facts and an obligation to avoid making misleading partial disclosures. *Walsh v. Edwards*, 233 Md. 552, 557 (1964); *Fowler v. Benton*, 229 Md. 581-82 (1962); *Dynacorp Ltd. v. Aramtel Ltd.,* 208 Md. App. 403, 452-54 (2012). *See also Zirn v. VLI Corp*., 681 A.2d 1050, 1053-56 (Del. 1996). As a consequence, my decision to dismiss these counts is not based on the absence of a viable legal theory. It is based on a failure to plead sufficient facts.

[6] I do agree with the Funds contention that the integration clause in the Shareholders' Agreement is not necessarily a bar to fraud claims. *Greenfield v. Heckenbach*, 144 Md. App. 108, 122-25 (2002).

Despite its length, the counterclaim is sorely lacking in any specificity or particularity as to who, what, when and where any alleged misstatement was made or, similarly, when and by whom any material omission or non-disclosure occurred. Further, when the counterclaim mentions fraudulent inducement in connection with the signing of the Shareholders' Agreement, it does not identify any individuals who were responsible for any material omissions or non-disclosures. The only specifically named declarants are the Bernstein Companies and Landon Butler & Company, neither of which is named as counter-defendants. There are no specific allegations as to CART, Duber or Samet despite their being the only defendants sued in these counts.

I am not unmindful that many paragraphs of the counterclaim loudly refer to the non-disclosure or concealment of valuation discounts (*e.g.*, ¶¶38-40, 44-45, 54, 59). But mere repetition is not sufficient, if what is repeated are generalities.[7] Counts I, II and VI, will be dismissed without leave to amend.

Additional considerations underlie my decision with respect to Count XII, which is based solely on statements attributed either to the Bernstein Companies or Landon Butler & Company. (e.g., ¶¶ 26, 27, 30, 126-129). None are attributed to Duber or CART. These statements are that once formed, CART intended to acquire additional real estate assets (¶ 127) and that CART would undertake additional equity offerings. (¶ 139).

Certainly a representation made without the present intention to perform, particularly one which is made to induce another to sign a contract, is actionable.

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[7] It is not altogether clear that Duber was under some special duty, fiduciary or otherwise, to the Funds given that the parties rights and obligations were set forth in a written Shareholders Agreement, but I need not resolve that issue at this time. *See Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 232 (1984). Samet did not become a director until after the Funds invested in CART, so I do not see what role he played, or how he was part of, any fraudulent scheme to induce the Funds to invest in CART.

Bocchini v. Gorn Management Co., 69 Md. App. 1, 19 (1986). Even if these statements could be attributed to CART or Duber, the statements on which Count XII is based, are in my judgment not sufficiently definite and are too general to be actionable. Further, when viewed in the context of the Regulation D Offering Memoranda, the statements are simply aspirational goals or predictions about future events. Given the sophistication of the parties they are not actionable. *Appel v. Hupfield*, 198 Md. 374, 379 (1951); *First Union National Bank v. Steele Software Systems Corp.,* 154 Md. App. 97, 161-64 (2003). Count XII will be dismissed, without leave to amend.

B. Failure to Maximize Shareholder Value.

Count III alleges a breach of fiduciary duty by CART, Duber and Samet by failing to sell CART *before* the Funds exercised their withdrawal rights. Count IV asks for a declaratory judgment that CART, Duber and Samet breached their fiduciary duties by failing to market CART *after* the Funds exercised their withdrawal rights. Count V also seeks a declaratory judgment against CART, Duber and Samet by failing, after a "change of control," occasioned by the exercise of the Funds' withdrawal rights, to maximize shareholder value.

The Funds contend in Count III that, before the Funds exercised their withdrawal rights, Duber and Samet refused to sell CART to potential buyers so that Duber and Samet could obtain a "windfall" when the Funds redeemed their shares for a discounted value. (¶¶ 152-156). The allegations of Count IV mirror those of Count III, except that they relate to the time after the Funds exercised their withdrawal rights. (¶ 172). In Count V, the Funds contend that the exercise of their withdrawal rights, which collectively amounts to 93% of CART's shares, constituted a change-in-control transaction under

Maryland law. In short, the Funds are attempting to impose *Revlon*[8] duties on CART, Duber and Samet.

In *Shenker v. Laureate Education, Inc*., 411 Md. 317, 337 (2009), the Court of Appeals imposed *Revlon* duties on directors of a Maryland corporation "at least in the context of negotiating and amount shareholders will receive in a cash-out merger transaction." As a consequence, "in a cash-out merger transaction *where the decision to sell the corporation already has been made*, shareholders may pursue direct claims against directors for breach of their fiduciary duties of candor and maximization of shareholder value." *Shenker*, 411 Md. at 342.(Emphasis added).[9] I agree with the leading commentator on Maryland corporate law that *Shenker* is limited, until the Court of Appeals says otherwise, to "a cash-out merger when the decision to sell the corporation has already been made." J. HANKS, MARYLAND CORPORATION LAW § 6.6A at 192 (2012 Supplement).

I have several conceptual problems with the Funds' arguments about value maximization and change of control. First, in this case it is the shareholders, not the board of directors, which made the decision to "sell," *i.e*. to exercise their put rights under Section 5 of the Shareholders' Agreement. Much like a tender offer situation, the decision to be made, to withdraw or remain a shareholder, does not implicate the duties

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[8] In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173, 182 (Del. 1986), the Supreme Court of Delaware held that once the decision to sell the company is made, or a sale otherwise becomes inevitable, the directors have a duty to obtain the best price for the benefit of the shareholders. The Delaware Supreme Court has identified at least three scenarios in which a board might face *Revlon* duties: (1) when the company initiates an active bidding process to sell itself; (2) where, in response to a bidder's unsolicited offer, the company abandons its business strategy and seeks an alternative transaction; or (3) when the company's approval of a transaction results in a sale or a change in control. *In re Santa Fe Pac. Corp. Shareholder Litigation*, 669 A.2d 59, 71 (Del. 1995).

[9] The Court of Appeals noted in *Shenker* that its holding was consistent with *Revlon*, 411 Md. at 340.

or functions of the board of directors. In connection with the Funds' economic decision to withdraw, CART's board has neither asked the Funds to do anything nor recommended any particular course of action. The triggering decision was made solely by the Funds. I do not see how the Funds can impose *Revlon* duties on the board when the board had nothing to do with the decision to "sell." *See Paramount Communications, Inc. v. Time Inc*., 571 A.2d 1140, 1150 (1990).

Second, I question the Funds' theory of aggregation under the Shareholders' Agreement so as to constitute a change of control or to implicate duties respecting a change of control. Under the Shareholder Agreement, each shareholder has the right, but nor the obligation, to withdraw after six years. That right is individual to each shareholder and is not dependent in any way upon the decision of any other shareholder, or the board. So while it may be that, as a result of the Funds' exercise of their individual withdrawal rights, 93% of the stock will be returned to CART, it is not a decision in which CART's board played any role.

Third, in my view, shareholders cannot unilaterally "create" a change of control implicating *Revlon* solely by virtue of their own decisions. The whole notion of *Revlon* duties, duties extending beyond those set forth in Section 2-405.1(a) of the Md. Corporations & Associations Article, is premised upon action taken by the board, which results in a change from managing the company to selling the company. In Maryland, a board may "just say no" to any proposed corporate action that would result in a change of control. *See* J. HANKS, MARYLAND CORPORATION LAW § 6.6A at 189 (2012 Supplement). But if the board says "yes" it assumes additional duties and must protect individual shareholders. *See Shenker*, 411 Md. at 338-39. Here, CART's board made no

decision to sell, merge or otherwise re-organize the business of the REIT. The shareholders cannot impose additional duties on a board solely by reason of their own economic decisions to invoke Section 5 of the Shareholders' Agreement. *See Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009)("The duty to seek the best available price applies only when a company embarks on a transaction – on its own initiative or in response to an unsolicited offer – that will result in a change of control)(footnote omitted). It was the Funds themselves, not the board, which eliminated their ability to share in any future growth or profits. The board did not put CART up for sale. There was no change of control by reason of the Funds' exercise of their withdrawal rights under Section 5; there simply were fewer shareholders in an on-going enterprise.

For the above reasons, Counts III, IV and V will be dismissed.

C. Fair Market Value and the Use of Discounts

Counts VII, VIII, IX and X of the counterclaim all concern the meaning of fair market value, as used in Section 5 of the Shareholders' Agreement and the use by appraisers of discounts in determining the value of the Funds' shares when the shares are redeemed after the exercise of withdrawal rights.

The issue of valuation permeates this case and largely will turn on the interpretation of Section 5 of the Shareholders' Agreement. Had the Shareholders' Agreement simply said that the put price would be "fair market value" as of some certain date, there would be no real issue at this stage. *Cf. East Park Ltd. Partnership v. Larkin*, 167 Md. App. 599, 621 (2006)(generally disapproving the use of discounts in determining fair value in a non-open market transaction). However, the Shareholders' Agreement adds to the well-settled concept of fair market value the requirement that any

valuation for withdrawal purposes be "*consistent with the valuation methodology previously used by the corporation in prior appraisals*."(Emphasis added) The Funds clearly allege in the counterclaim that no relevant prior appraisals involved "discounts" of any kind. (¶¶ 41-45). The Funds may or may not be correct but for purposes of a motion to dismiss I must credit these assertions.

The motion to dismiss Counts VII, VIII, IX and X will be denied.

D. Tortious Interference

Count XI charges Duber with tortiously interfering with CART's contract with the Funds, namely the Shareholder Agreement. Duber is a member of CART's board of directors. There are no allegations that he has acted outside the scope of this role or his authority as a director. To the contrary, he was sued for breaching his duties as a director. As a consequence, the claim fails as a matter of law, *see K&K Management, Inc. v. Lee*, 316 Md. 137, 170-71 n. 14 (1989), and will be dismissed without leave to amend.

Conclusion

For the reasons set forth above, the motion to dismiss Counts I, II, III, IV, V, VI, XI, and XII is granted, with prejudice and without leave to amend. The motion to dismiss Counts VII, VIII, IX and X is denied. It is SO ORDERED this 5th day of February, 2013.

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Ronald B. Rubin, Judge