IN RE ALCENTRA CAPITAL CORPORATION SHAREHOLDER LITIGATION	*	**IN THE**
	*	**CIRCUIT COURT**
	*	**FOR BALTIMORE CITY**
	*	**Case No.: 24-C-19-006847**

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MEMORANDUM OPINION

This matter is before the Court on Defendant's Joint Motion to Dismiss. The Court has considered the briefs of the parties and sets forth its analysis below.

I. Procedural Background

On December 23, 2019, Plaintiffs Robert Blazina and Steve Duncan ("Plaintiffs") brought suit on behalf of the former common stockholders of Alcentra Capital Corporation ("Alcentra" or "Alcentra Capital") in response to Alcentra's merger agreement ("Merger") with Crescent Capital BDC, Inc. ("Crescent" or "Crescent Capital"). Plaintiffs each filed a class action suit on behalf of themselves and all similarly situated former stockholders of Alcentra Capital.[1] Plaintiffs then moved for limited expedited discovery in advance of a specially set stockholder meeting scheduled for January 29, 2020 at which Alcentra stockholders would vote on whether to ratify the merger. Defendants Edward Grebow, Douglas J. Greenlaw, Suhail A. Shaikh, William H. Wright II, and Frederick Van Zijl ("Defendants") moved for a protective order staying discovery. This Court in its January 23, 2020 order denied Plaintiffs' motion for expedited discovery and further denied Defendants motion to stay discovery. A majority of Alcentra stockholders ratified the Merger on January 29, 2020.

[1] Originally filed under Case Numbers 24-C-19-006847 and 24-C-19-006849, the Court consolidated the matters into a single action as captioned above.

Defendants filed a Joint Motion to Dismiss on February 3, 2020. Plaintiffs filed an Opposition on February 18, 2020 and Defendants filed a Reply Brief on February 28, 2020. The arguments raised by Defendants in their motion and reply memorandum, and those of Plaintiffs in their opposition, are discussed below.

II. Factual Background

Prior to its merger with Crescent Capital BDC, Alcentra Capital was a publicly-traded, closed-end management investment company that originated and managed investments in middle market companies. The company was incorporated in Maryland, with its principal place of business in New York.

On April 30, 2018, the Alcentra Board of Directors created an Advisory Agreement Oversight Committee ("Independent Director Committee" or "Committee") to review, among other things, inquiries that had been received from third parties regarding potential strategic transactions. No such proposals were deemed by the Committee to be in the best interests of the stockholders at that time. In November 2018, the Committee hired Sullivan & Worcester as independent outside legal counsel, and engaged Houlihan Lokey as its financial advisor to explore potential strategic opportunities. Houlihan Lokey's review consisted of two phases, during which time they were in contact with more than 95 parties. Ultimately, proposals from five parties, including Crescent Capital, were sent to the Committee for review in May 2019. Crescent's proposal represented $11.12 per share, approximately 100% of Alcentra's net asset value as of the last trading day prior to the Merger. In August 2019, the Board of Directors approved and adopted the Merger Agreement. On December 11, 2019, Alcentra and Crescent filed an 845-page Definitive Proxy Statement which set a special meeting of the stockholders for January 29, 2020

to consider and vote on the Merger. At the January 29 meeting, a majority of stockholders voted to approve the Merger.

The Merger with Crescent Capital closed on January 31, 2020, with Crescent Capital BDC merging with and into Crescent Capital Maryland BDC, of which Alcentra is now a wholly owned subsidiary.

III. <u>Plaintiffs' Allegations</u>

Plaintiffs allege that Defendants breached their fiduciary duties in connection with the merger between Alcentra and Crescent Capital to the detriment of Alcentra's stockholders. Specifically, Plaintiffs claim that Defendants breached their duties of good faith and loyalty by allowing an activist investor, Stilwell Funds, to bully them into a merger with Crescent Capital, resulting in Plaintiffs receiving less than the fair value of their shares. Further, Plaintiffs allege that Defendants breached their duty of disclosure by withholding certain information about the proposed merger from the stockholders, preventing Plaintiffs 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 Plaintiffs have failed to allege facts that overcome the statutory presumption in favor of the directors. Defendants further argue that Plaintiffs' duty of disclosure claim fails, as Plaintiffs have not established how any information allegedly omitted from the Definitive 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.

The Court takes as true all well-pled allegations and reviews them in the light most favorable to the Plaintiffs. *Lloyd v. General 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 Plaintiffs. Md. Rule 2-322(b)(2); *see also Hogan v. Maryland 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 Financial 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 that they have failed to state a claim for which relief can be granted, and sets forth its reasoning below.

IV. Analysis

a. Applicability of the Business Judgment Rule

The Court concludes that the business judgment rule applies to Plaintiffs' claims, and finds that Plaintiffs have not pled sufficient facts to overcome that rule's presumption in favor of Defendants.[2] 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. Corp. & Assn's Art., §§ 2-405.1(c)(e). A director's actions are "presumed to be in accordance" with this standard. Md. Corp. & Assn's Art., §§ 2-405.1(g).

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[2] While the parties spent considerable effort in their briefs debating whether Plaintiffs' claims are direct or derivative, the Court's ruling as to the applicability of the business judgment rule defeats Plaintiffs' claims regardless of how they are classified. Therefore, the Court need not reach the issue of whether a sufficient, distinct injury was suffered by Plaintiffs to support a direct claim.

A plaintiff must produce evidence 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*, 2018 MDBT 7, at *12 (Cir. Ct. Montg. Cty. 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; *see also In re Nationwide Health Properties, Inc.*, 2011 WL 10603183, at *13 (Cir. Ct. Baltimore City May 27, 2011) (a plaintiff must plead specific facts alleging that directors acted fraudulently, with self-interest, or with gross negligence).[3]

Here, the facts alleged by Plaintiffs are insufficient to support an inference that the actions of the Board of Directors in merging with Crescent Capital were not independent, undertaken in good faith, or made in the Directors' own self-interest. Plaintiffs contend that Defendants were inherently conflicted because an activist stockholder placed pressure on Defendants to sell and threatened a proxy fight, thereby bullying Defendants into a hasty sale in order to protect their reputations and avoid a proxy contest. Compl. ¶ 140. These 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 the lengthy process Alcentra undertook in exploring strategic transactions, which involved several phases and consultation with independent legal counsel and financial advisors. The Board engaged Houlihan Lokey in February 2019 to begin exploring potential strategic transactions, and considered more than 95 proposals from interested parties until deciding to proceed with Crescent Capital's

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[3] Although Plaintiffs argue that the applicability of the business judgment rule is not appropriately determined at the motion to dismiss stage, Maryland precedent supports the dismissal of complaints for failure to overcome the business judgment rules presumption. *See Oliveira*, 451 Md. at 554; *see also Penchuk,* 2018 MDBT 7 at *17.

proposal – the proposal that objectively offered the most value to Alcentra stockholders – in July. Compl. ¶¶ 53, 57, 60, 70, 73, 79. The Complaint further describes a diligence process beginning in July 2019, which included a review of Crescent's financial performance and future projections from Houlihan Lokey and a review of the proposed transaction by independent legal counsel, to ensure that a merger with Crescent was indeed in the best interest of the company. Compl. ¶¶ 117-118, 108.

There is no indication that this process was "hasty", "fundamentally flawed", or undertaken in bad faith. Opposition to Defendants Motion to Dismiss, 1. Plaintiffs ask the Court to assume that because Stilwell Funds purchased 8.6% of common stock over the period of more than a year, advocated for a sale, and threatened a proxy contest, 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). Plaintiffs' claims as stated in the Complaint simply do not lead to a reasonable 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.

Plaintiffs cite *In re American Capital* in support of their argument that Defendants breached their fiduciary duties. The facts presented in *American Capital*, however, are readily distinguishable from the facts presented by Plaintiffs in the instant litigation. In *American Capital*, the complaint demonstrated that Elliott, an activist stockholder, triggered the sale of the company

and had "regular, detailed and intimate knowledge of nearly every facet of the board's decision making process," that Elliott acted as a de facto member of the board, and that Elliott was paid $3 million for its role in the merger process. *In re American Capital, Ltd*., No. 422598-V, 2016 MDBT 3 (Cir. Ct. Montg. Cty Oct. 6, 2016). Plaintiffs have made no showing of similarly egregious behavior on the part of Stilwell Funds.

b. Ratification of Merger Extinguishes Claims

Plaintiffs' claims also fail as a result of the January 29, 2020 stockholder vote in favor of the Merger. Even if Plaintiffs 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. Maryland Publishing Co.*, 167 Md. 275, 289 (1934)); *see also Penchuk v. Grant*, 2018 MDBT 7, 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 Financial Holdings LLC*, 125 A.3d 204 (2015)).

c. Duty of Disclosure

Plaintiffs allege that Defendants omitted material information from the Definitive Proxy Statement provided to stockholders, constituting a breach of their duty of disclosure.[4] Directors

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[4] While Plaintiffs again argue that breach of the duty of disclosure is not appropriately decided in a motion to dismiss, the Court disagrees and relies on persuasive authority for dismissing claims when a plaintiff fails to sufficiently state a claim for breach of duty of disclosure. *See Penchuk*, 2018 MDBT 7, at *15; *In re Nationwide*, 2011 WL 10603183, at *19.

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); *Hudson v. Prime Retail, Inc.*, 2004 WL 1982383 at *13 (Cir. Ct. Baltimore City, Apr. 1, 2004); *TSC Industries, Inc. v. Northway, Inc.*, 426 US 438, 449 (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; *TSC Industries, Inc*, 426 US at 448.

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. Plaintiffs are 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. *In re Nationwide*, 2011 WL 10603183 at *16 (citing *Skeen v. Jo-Ann Stores, Inc*. 750 A.2d 1170, 1173 (Del. 2000).

Against these pleading requirements, Plaintiffs' allegations are insufficient as a matter of law. Plaintiffs claim that disclosure deficiencies in the Definitive Proxy Statement prevented stockholders from fully and fairly evaluating the Merger prior to the January 29, 2020 stockholder vote. Specifically, Plaintiffs allege three pieces of information were missing from the Proxy Statement in violation of Defendants duty of disclosure. First, Plaintiffs contend that Defendants failed to disclose information regarding unsolicited proposals received by Alcentra prior to beginning the Strategic Alternatives Review Process that were rejected. Plaintiffs argue that stockholders were entitled to review the rejected proposals, as well as the reasons why the proposals were rejected, in order to fairly evaluate the proposed transaction with Crescent. Second, they assert that Defendants failed to disclose material communications between Alcentra and Stilwell Funds in order to evaluate whether the Directors were acting in the best interest of the company. Finally, Plaintiffs allege that Defendants failed to disclose information regarding all of the financial analyses considered by Defendants and Houlihan Lokey in reference to the proposed merger.

Although they claim each piece of information was crucial to fairly evaluate the proposed merger transaction, Plaintiffs fail to state *how* or *why* such 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 not enough to satisfy the pleading requirements. Moreover, a review of the Definitive Proxy Statement reveals that it contains information relating to the background of the Merger, discusses Stilwell Funds and their threat of a proxy contest, and provides financial analyses from Alcentra, Crescent, and Houlihan Lokey. Considering the material presented to stockholders in the Proxy Statement, the Court fails to see how the allegedly missing information would not simply be cumulative or that investors might

merely find it helpful if offered. Without establishing how the allegedly undisclosed material would have significantly altered the total mix of information available to stockholders, Plaintiffs' disclosure claims are speculative and wholly insufficient to sustain a claim.

V. Conclusion.

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

April 22, 2020
Date

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Judge Jeffrey M. Geller
Circuit Court for Baltimore City

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ORDER

Upon consideration of Defendants' Joint Motion to Dismiss, Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss, and Defendants' Reply Memorandum in Support of Defendants' Joint Motion to Dismiss, it is this ___ day of April, 2020,

ORDERED that Defendants' Joint 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