JOHN POLING **Plaintiff**	*	**IN THE**
	*	**CIRCUIT COURT**
v.	*	**FOR BALTIMORE CITY**
CAPLEASE, INC., et al. **Defendants**	*	**Case No.: 24-C-13-006178**

* * * * * * *

MEMORANDUM

This is an action brought by a holder of preferred shares in CapLease, Inc., a Maryland real estate investment trust, claiming that the conversion of the shares to cash in connection with a cash-out merger violates the rights of the preferred shareholders. Defendants filed a motion to dismiss, asserting that the complaint fails to state a claim on which relief may be granted. The motion was fully briefed and argued, and the court now rules.

BACKGROUND

John Poling, plaintiff, initiated this action on October 8, 2013. It is a purported shareholder class action brought on behalf of the holders of CapLease's 8.375% Series B Cumulative Redeemable Preferred Stock and 7.25% Series C Cumulative Redeemable Preferred Stock. It arises from CapLease's merger with American Realty Capital Properties, Inc. ("ARCP"). The terms of that merger provide for the acquisition by ARCP of all of the outstanding shares of CapLease, including the preferred stock. Holders of preferred stock receive $25 per share in cash, together with accrued and unpaid dividends up to the date of the merger. Joined as defendants are CapLease; its directors; CapLease, LP, the operating partnership for CapLease; its general partner, CLF OP; ARC Properties Operating Partnership, LP, the operating partnership of ARCP; and Safari Acquisition, LLC, the wholly owned subsidiary of ARCP formed to effect the merger and the surviving entity in the merger. Plaintiff alleges that the merger is a breach of the company's contract with its preferred shareholders and that the directors have violated fiduciary duties.

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. 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). Accordingly, the factual summary that follows is derived from those sources.[1]

Prior to November 5, 2013, CapLease was a corporation incorporated under the laws of the state of Maryland, with its principal executive offices located in New York. CapLease operated as a real estate investment trust (REIT), focused on financing and investing in commercial real estate leased primarily to single tenants with investment grade or near investment grade credit ratings.

By amendments to its charter, CapLease created the two classes of preferred stock that are at issue in this case. On April 18, 2012, CapLease amended its charter by filing Articles

[1] Although not part of the complaint's allegations, there is no dispute that the transaction closed on November 5, 2013. Defendants bring this fact to the court's attention in connection with their contention that plaintiff is not entitled to seek equitable relief because of his failure to seek preliminary injunctive relief to prevent the transaction from closing. Because the court concludes that the complaint fails to state a claim for any relief, it is unnecessary to give separate consideration to the availability of injunctive relief.

Supplementary, which authorized the company to issue shares of Series B Preferred Stock. On January 18, 2013, the company amended its charter again by filing Articles Supplementary that authorized the issuance of shares of Series C Preferred Stock. Section 3 of the Series B Articles Supplementary provides for the payment of cumulative dividends at the yearly rate of 8.375% of the $25.00 per share liquidation preference of the Series B Preferred Stock (equivalent to a fixed annual amount of $2.09375 per share). The Series C Articles Supplementary contain similar terms, with an interest rate of 7.25% (equivalent to a fixed annual amount of $1.8125 per share). The Articles Supplementary further provide that the Series B Preferred Stock is not redeemable prior to April 19, 2017, while the Series C Preferred Stock is not redeemable prior to January 25, 2018. In other material respects, the terms of the Series B and the Series C Articles Supplementary are identical.

On May 28, 2013, it was announced that CapLease and ARCP had entered into a Merger Agreement under which ARCP would acquire all of the outstanding shares of CapLease. The announcement stated that ARCP would pay an amount in cash equal to $8.50 per share for each outstanding share of CapLease common stock, and that each share of preferred stock will be converted into the right to receive the sum of $25.00 in cash plus an amount equal to any accrued and unpaid dividends up to but excluding the closing date of the merger. The Merger Agreement provided:

> Company Preferred Stock issued and outstanding immediately prior to the Effective Time (other than shares to be cancelled in accordance with Section 3.1(a)(I)) shall automatically be converted into the right to receive an amount in cash, without any interest thereon, equal to the sum of (A) $25.00 and (B) all accrued and unpaid dividends on such share of Company Preferred Stock to, but excluding, the Closing Date (the "Preferred Merger Consideration"). At the Effective Time, each share of Company Common Stock and Company Preferred Stock converted into the right to receive the Common Merger Consideration or the Preferred Merger Consideration,

> as applicable, pursuant to this Section 3.1 (a)(ii), when so converted, shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each [shareholder] shall cease to have any rights with respect thereto other than the right to receive the applicable Merger Consideration in accordance with Section 3.2.

Plaintiff identifies himself as a holder of preferred stock, aggrieved because holders of the preferred stock, who purchased the preferred shares with the understanding that they would be receiving a dividend of 8.375% per annum through at least April 19, 2017 for the Series B Preferred Stock and a dividend of 7.25% per annum through at least January 25, 2018 for the Series C Preferred Stock, will lose their right to receive future dividends. Plaintiff alleges that "the redemption" of the preferred stock prior to these dates is not allowed by the Articles Supplementary, which expressly prohibit the redemption of preferred stock except under very limited circumstances, and that no such circumstances apply here. Plaintiff further alleges that defendants have breached their fiduciary duties and violated the Articles Supplementary in order to obtain the substantial financial benefits that the merger would provide at the expense of CapLease's Preferred Shareholders. He notes that the press release announcing the merger touted the benefits of eliminating CapLease's preferred shares.

The complaint contains four counts. Count I asserts a claim for breach of contract against CapLease, its connected entities and its directors. It alleges that by entering into the merger agreement defendants breached the terms of the Articles Supplementary, as well as their duty of good faith and fair dealing. Count II alleges that the directors violated fiduciary duties of care, loyalty, candor and good faith. It asserts that they are attempting "to unfairly deprive [the preferred shareholders] of the true value of their investment." Count III seeks declaratory relief that the merger agreement violates the Articles Supplementary, that the preferred stock should not be redeemed, and that there are breaches of fiduciary duty. Count IV is a claim against the ARCP entities as aiders and abettors of the breach of contract and breach of fiduciary duty alleged elsewhere in the complaint. Plaintiff demands several forms of relief including declaratory, injunctive and rescission relief, as well as damages.[2]

THE PROVISIONS OF THE ARTICLES SUPPLEMENTARY

The parties agree that the rights of the preferred shareholders are governed by the Articles Supplementary. Both parties refer to different provisions of the Articles Supplementary to support their positions, and each asserts that reading the Articles as a whole supports its respective interpretation of the terms of the Articles. In consequence, a summary of the contents of the Articles is helpful.

Section 2 of the Articles Supplementary provides that the preferred stock shall rank senior to all classes or series of common stock with respect to distribution rights and rights upon liquidation, dissolution or winding up of the company. Section 3 makes provision for cumulative preferential cash dividends when and as authorized by the board of directors out of funds legally available for the payment of distributions. Section 4 sets forth the liquidation rights of the holders of the preferred stock in the event of any voluntary or involuntary liquidation, dissolution or winding

[2] The merger agreement was announced on May 28, 2013. The merger was approved by CapLease's common shareholders on September 10, 2013. It provided that the merger would close on November 5, 2013. Plaintiff initiated this action on October 8, 2013, but did not take any action to block the merger through a preliminary injunction. While defendants assert that plaintiff is guilty of laches, even if true, that fact would not bar plaintiff's claim for damages.

up of the company. It provides for the payment of a liquidation preference of $25 per share together with accumulated and unpaid dividends. Section 4(e) states:

> None of a consolidation or merger of the Company with or into another entity, a merger or another entity with or into the Company, a statutory share exchange by the Company or a sale, lease, transfer or conveyance of all or substantially all of the Company's property or business shall be considered a liquidation, dissolution or winding up on the Company.

Section 5 makes provision for redemption of the preferred stock. With certain exceptions the Series B Preferred Stock is not redeemable prior to April 19, 2017. Section 5 goes on to provide that after that date the company may redeem the stock in whole or in part at a redemption price of $25 per share together with accumulated and unpaid dividends. The same is true for the Series C Preferred Stock, except that it is not redeemable prior to January 25, 2018.

Section 6 provides for a "Special Optional Redemption" by the company. In pertinent part it states:

> (a) Upon the occurrence of a Change of Control (as defined below), the Company will have the option upon written notice mailed by the company, postage pre-paid, no less than 30 nor more than 60 days prior to the redemption date and addressed to the holders of record of the shares of [Series B/Series C] Preferred Stock to be redeemed at their respective addresses as they appear on the stock transfer records of the Company, to redeem the share of [Series B/Series C] Preferred Stock, in whole or in part within 120 days after the first date on which such Change of Control occurred, for cash at Twenty-five Dollars ($25.00) per share plus accumulated and unpaid dividends to, but not including, the redemption date ("Special Optional Redemption Right"). . . .
>
> A "Change of Control" is when, after the original issuance of the [Series B/Series C] Preferred Stock, the following have occurred and are continuing:
>
> (I) the acquisition by any person, including any syndicate or group deemed to be a "person" under Section 13(d)(3) of the Exchange Act, as amended (the "Exchange Act") of beneficial ownership, directly or indirectly, through a purchase, merger or other acquisition transaction or series of purchases, mergers or other acquisition

> transaction of shares of stock of the Company entitling that person to exercise more than 50% of the total voting power of all shares of stock of the Company entitled to vote generally in elections of directors (except that such person will be deemed to have beneficial ownership of all securities that such person has the right to acquire, whether such right is currently exercisable or is exercisable only upon the occurrence of a subsequent condition); and
>
> (ii) following the closing of any transaction referred to in (I) above, neither the Company nor the acquiring or surviving entity has a class of common securities (or American Depository Receipts representing such securities) listed on the New York Stock Exchange (the "NYSE"), the NYSE Amex Equities (the "NYSE Amex"), or the NASDAQ Stock Market ("NASDAQ"), or listed or quoted on an exchange or quotation system that is a successor to the NYSE, the NYSE Amex or NASDAQ.

Section 7 relates to voting rights. It states that the preferred shareholders shall not have any voting rights except as set forth in that section. Section 7(b) provides that if dividends are in arrears for a six or more quarters the holders of preferred stock may elect two directors. Section 7(d) states:

> (d) So long as any [Series B/Series C] Preferred Stock remains outstanding, the Company shall not, without the affirmative vote of the holders of at least two-thirds of the [Series B/Series C] Preferred Stock outstanding at the time, given in person or by proxy, either in writing or at a meeting (such series voting separately as a class), (I) authorize or create, or increase the number of authorized or issued shares of, any class or series of equity securities ranking senior to the [Series B/Series C] Preferred Stock with respect to payment of dividends or the distribution of assets upon voluntary or involuntary liquidation, dissolution or winding up of the Company, or reclassify any authorized equity securities of the Company into any class or series of equity securities ranking senior to the [Series B/Series C] Preferred Stock, or create, authorize or issue any obligation or security convertible into or evidencing the right to purchase any such equity securities; or (ii) amend, alter or repeal the provisions of the Charter (including these [Series B/Series C] Terms), whether by merger or consolidation (in either case, an "Event") or otherwise, so as to materially and adversely affect any right, preference, privilege or voting power of the [Series B/Series C] Preferred Stock; *provided, however*, that with respect to the occurrence of any Event set forth in (ii) above, so long as any [Series B/Series C] Preferred Stock (or any equivalent class or series of securities issued by the surviving entity in such merger or consolidation to which the Company is a party) remains outstanding with the terms thereof materially unchanged or the holders of [Series B/Series C] Preferred Stock receive equity securities with rights, preferences, privileges or voting powers substantially the same as those of the [Series B/Series C] Preferred Stock,

> taking into account that upon the occurrence of an Event, the Company may not be the surviving entity and such surviving entity may thereafter be the issuer of the [Series B/Series C] Preferred Stock (or such equivalent class or series), the occurrence of any such Event shall not be deemed to materially and adversely affect such rights, preferences, privileges or voting powers of the [Series B/Series C] Preferred Stock; and *provided further*, that (x) any increase in the number of authorized shares of Preferred Stock or the creation or issuance of any other class or series of equity securities, or (y) any increase in the number of authorized shares of [Series B/Series C] Preferred Stock or any other class or series of equity securities, in the case of each of (x) or (y) above ranking on a parity with or junior to the [Series B/Series C] Preferred Stock with respect to payment of dividends and the distribution of assets upon voluntary or involuntary liquidation, dissolution or winding up of the Company, shall not be deemed to materially and adversely affect such rights, preferences, privileges or voting powers. For the avoidance of doubt, the foregoing voting provisions shall not be deemed to negate any other vote (including, without limitation, the vote of the holders of Common Stock) that may be required by law or the Charter.

Section 9 is entitled "Conversion." It begins: "The shares of preferred stock are not convertible or exchangeable for any other property or securities of the company, except as provided in this Section 9." Section 9(a) states that upon the occurrence of a change of control, if the company has not elected to redeem the shares of stock, each holder of the shares of preferred stock shall have the right to convert some or all of the shares of the stock into common stock.

THE PARTIES' CONTENTIONS

The theory espoused in the complaint was that the Articles Supplementary expressly prohibit the redemption of preferred stock except under very limited circumstances, which are not present here. The complaint identifies as such a circumstance the special optional redemption right set forth in Section 6 of the Articles Supplementary, which permits the redemption of the preferred stock by the company upon the occurrence of a "Change of Control." That section provides that a "Change of Control" occurs when there is the acquisition by any person of beneficial ownership, of shares of stock of the Company entitling that person to exercise more than 50% of the total voting power of all shares of stock of the Company and following the closing of the transaction, neither the Company nor the acquiring or surviving entity has a class of common securities listed on certain public exchanges, including the NASDAQ. The complaint asserts that because shares of the acquiring entity, ARCP, are actively traded on the NASDAQ-GS (the NASDAQ Global Select Market) the merger does not qualify as a Change of Control, and defendants' attempt to redeem the preferred stock under these circumstance is improper.

In their motion to dismiss, defendants take aim at plaintiff's assertion that the merger effected a redemption of the preferred stock. They argue that courts have expressly rejected the argument that a cash-out merger constitutes a redemption of preferred stock, citing *Rauch v RCA Corporation*, 861 F.2d. 29 (2d Cir.1988). Defendants note that a redemption is a transaction in which the corporation obtains shares of its stock, and that in this case the preferred stock was converted into the right to receive $25 in cash plus accrued and unpaid dividends pursuant to an offer provided not by CapLease, but by ARCP. Defendants further suggest that the merger was expressly authorized under Maryland law, which permits corporations to merge into other entities. Defendants attack plaintiff's reliance upon Section 6 of the Articles Supplementary. They suggest that a change of control occurs only on the event of an acquisition of stock by a third party rather than a conversion of stock to cash.

In his response to the motion to dismiss, plaintiff shifts from the characterization of the transaction as a redemption. He asserts that the Articles Supplementary "provide four instances in which preferred shareholders of Series B and C stock may be defeased of their rights as preferred shareholders" – redemption after the redemption dates, to maintain REIT status for federal income taxation purposes, a liquidation, or a change of control. He contends that because a change of control did not occur, the preferred shareholders' rights to dividends survived the merger. He goes on to argue that Section 9 of the Articles Supplementary, which provides that the preferred shares are not convertible into any other property except for the right of the shareholders to convert their shares into shares of common stock on the occurrence of a change of control, precludes the conversion of the stock to cash.

At the hearing, plaintiff pointed to several other provisions of the Articles Supplementary, not previously mentioned, as support for his position. He cites Section 4 relating to liquidation. He also identifies Section 7 relating to voting rights. He notes that this section states that the company is prohibited from adversely affecting any right, preference, privilege or voting power of the preferred shares. He also makes reference to Section 12, which says that the shares have no maturity date. The absence of a maturity date, he says, means that the shares continue to exist forever unless there is a redemption, a liquidation or a conversion at the option of the shareholder.

DISCUSSION

Count I

The gravamen of plaintiff's claim is that the challenged transaction violated the preferred shareholders' contractual rights guaranteed by the Articles Supplementary. There is no disagreement that preferential stock rights are contractual in nature and are governed by the express provisions of the company's charter provisions, which here includes the Articles Supplementary. Therefore, plaintiff must look to the provisions of the Articles Supplementary for any restrictions upon the transaction at issue.

In the complaint, plaintiff purports to find these restrictions in the provisions of the Articles Supplementary restricting the company's right to redeem its stock. Plaintiff argues that Section 6 of the Articles allows the company to undertake a special optional redemption only upon the occurrence of a change of control. Plaintiff argues that because the merger did not satisfy the conditions necessary for a change of control to have occurred, any attempt to redeem the preferred stock is improper.

While the Articles do limit CapLease's right to redeem the preferred stock, the basic flaw in plaintiff's theory is that the transaction at issue did not constitute a redemption, because CapLease did not acquire the stock. A redemption is a transaction in which a corporation uses its own funds to purchase its own stock. Md. Ann. Code, Corp. & Assns Art. §2-310. A redemption of shares is treated as a distribution under Code section 2-301, and such distributions are subject to statutory restrictions. See Code section 2-311. In this transaction, the preferred stock was not acquired by the company, and did not assume the status of authorized but unissued shares. The preferred stock was converted into the right to receive cash pursuant to an offer provided by a third party.

Rauch v RCA Corporation, 861 F.2d 29 (2d Cir.1988) is very similar to this case. That case involved the acquisition of RCA by General Electric Company. In connection with the merger preferred shares of RCA were converted to the right to receive cash. The plaintiff claimed that the merger was a liquidation or dissolution or winding up of RCA and a redemption of the preferred stock, whose nature was not changed by referring to it as a conversion. The court concluded that the argument was contrary to Delaware law. It held that a conversion of shares to cash was authorized by the terms of the Delaware statute authorizing mergers, and that the conversion of shares to cash in order to accomplish a merger was “legally distinct” from a redemption of shares by a corporation. 861 F.2d at 30. The court also cited *Rothschild International Corp. v Liggett Group, Inc.*, 474 A.2d 133 (Del. 1984) for the proposition that a cash-out merger was not the equivalent of a liquidation.

A similar conclusion was reached in *In re Hesston Corporation*, 254 Kan. 941, 870 P.2d 17 (1994). In that case the court rejected the argument that a cash-out merger and a redemption “should be treated as sharing precise identity because [their] purpose and effect . . . is indistinguishable.” The shareholders argued that the only distinction was the source of funds, a fact that they contended was insignificant. The court opined that rather than being insignificant, the source of the funds lay “at the center of the matter.” 870 P.2d at 42.

Md Ann Code, Corps & Assns Art. §3-102 authorizes a Maryland corporation to merge into another entity. The statute provides that in such a merger stock may be converted into money. See Code section 3-103. As such, the transaction was explicitly authorized by Maryland law. As the court stated in *Rothschild*, “where a merger of corporations is permitted by law, a shareholder's preferential rights are subject to defeasance. Stockholders are charged with knowledge of this possibility at the time they acquire their shares.” 474 A.2d at 137-138. *See also Federal United Corp. v. Havender*, 11 A.2d 331, 333 (Del. Ch. 1940). Furthermore, the provisions of the Articles Supplementary specifically contemplate the possibility of a merger. For example, Section 4(e) states that a consolidation or merger shall not be considered a liquidation, dissolution or winding up of the company. See also Section 7.

Any attempt to equate the current transaction with a redemption, notwithstanding the form of the transaction, runs afoul of the basic rule that the preferred shareholders’ rights are to be found in the charter, the contract between the company and them.[3] The provisions of the Articles cited by plaintiff relate to a redemption, which is a term with a defined meaning as discussed previously. The court is not at liberty to disregard these provisions and recast the transaction so as to bring it within restrictions of the charter that do not explicitly forbid mergers. As the court stated in *Hesston*, *supra*, given the fact that a stock purchaser is charged with the knowledge of the possible defeasance of its stock interests upon a merger, "the absence of a Certificate provision for a cash-out merger does not create an ambiguity in the Certificate requiring its redemption provision to be interpreted in the [shareholders'] favor." 870 P.2d at 42-43.

In his opposition to the motion to dismiss, plaintiff turns to the provisions of Section 9 of the Articles, which state that: "The shares of preferred stock are not convertible or exchangeable for any other property or securities of the company, except as provided in this Section 9." As made explicit at the hearing, plaintiff reads this provision as a prohibition on the transaction because it bars the conversion of the stock into other property, including cash.

Contrary to plaintiff's contention, Section 9 does not prevent the conversion of the preferred shares to cash upon a merger. In the court's view, this provision establishes a limitation upon the right of preferred shareholders to convert their stock, distinguishing the shares from convertible

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[3] It is a commonly accepted principle that the provisions of the state corporation statute are incorporated in a corporation's charter. See 7A Fletcher, Cyclopedia of Corporations § 3634. Maryland courts have held that the Maryland corporation statute is incorporated as an express provision of corporate contracts. *Downing Development Corp. v. Brazelton*, 253 Md. 390 (1969). Perforce, this principle applies to the charter, a contract with the shareholders. *Cf. Baker v. Standard Lime & Stone Co.*, 203 Md. 270, 282 (1953); *Maryland Tube & Iron Works v. West End Imp. Co.*, 87 Md. 207, 211 (1898). Accordingly, the Code provisions relating to merger were incorporated in CapLease's charter.

preferred securities, i.e., securities that may be changed into or exchanged for other securities by the holder. While the language of this provision does not expressly specify that the shares are not convertible by the holder, it is language commonly used in charter provisions to denote stock that is not convertible by the shareholder. In addition, the remaining provisions make clear that Section 9 deals with the option of the shareholder to convert her or his stock. Section 6 also refers to the "conversion right" granted by Section 9.[4]

At the hearing on the motion to dismiss, plaintiff's counsel also adverted to Section 7(d) of the Articles Supplementary. Section 7(d) provides that without the affirmative vote of two-thirds of the preferred shareholders the company shall not amend, alter or repeal the provisions of the charter, whether by merger or otherwise, so as to materially and adversely affect any right, preference, privilege or voting power of the preferred stock, but that if the stock remains outstanding with its terms unchanged, albeit in a successor entity, that action shall not be deemed to adversely affect the rights. This provision was not mentioned in the complaint or in plaintiff's response to the motion to dismiss, but was raised at the conclusion of plaintiff's oral argument, as "another provision" that lends additional support to plaintiff's position based on a reading of the entire document. Plaintiff's counsel argued that the significance of this section was not that it provided

[4] Section 12 adds nothing to plaintiff's argument. The court accepts plaintiff's contention that his rights could not be affected except as permitted by the terms of the Articles or otherwise by law. As a result, unless a transaction was so permitted, the preferred stock would continue to exist indefinitely. The statement that the preferred stock had no maturity date states nothing that is not already part of the understanding concerning the duration of the preferred stock.

that the company could not merge or affect the preferred shareholders' rights, but that it established that the shares could continue post-merger in a successor entity.

Section 7 by its terms confers the right to a vote by the preferred shareholders on any change to the charter that will materially affect their rights. Plaintiff has not explicitly contended that the preferred shareholders should have been granted a class vote or that the transaction is invalid because they were not. In response to plaintiff's argument, the court attempted to probe, without success, for a more precise explication of plaintiff's contention concerning the meaning of Section 7(d). However, plaintiff's counsel did not engage with the actual language of the provision. Plaintiff's counsel took refuge in the statement that if the language was not clear it should be construed against the drafter, a statement that is not a substitute for a rigorous analysis of the words. When pressed for their view, defendants' counsel responded that Section 7(d) is aimed at attempts to alter the contractual terms of the shares as prescribed by the Articles Supplementary, which does not happen in a cash-out merger.

The court has examined several cases decided by the Delaware courts relating to charter language such as that of Section 7.[5] *See Warner Communications Inc. v. Chris-Craft Industries, Inc.*, 583 A.2d 962 (Del. Ch.1989); *Elliott Associates, L.P. v. Avatex Corp.*, 715 A.2d 843 (Del.1998); *Greenmont Capital Partners I, LP v. Mary's Gone Crackers, Inc.*, 2012 WL 4479999 (Del. Ch.2012). In *Warner,* the challenged action was the substitution of stock with different terms. The parties stipulated that the action adversely affected the shareholders' rights. In *Elliott Associates*, the stock was converted to common stock, and, again the parties stipulated to the adverse

[5] The language is similar to that of 8 Del. Code § 242(b)(2).

effect. In dicta in that case, the court cited plaintiffs' concession that the preferred stock would not have a class vote on mergers "where they receive the same security in a new entity or are cashed out." 715 A.2d at 852.[6]

What Section 7(d) does not explicitly provide, which it might have, is that without the affirmative vote of the preferred shareholders the company could not consolidate or merge with or into another corporation. Without some more specific indication from plaintiff about exactly what he contends, let alone some citation of authority, the court declines to speculate about the possible ramifications of this provision that have not been expressly argued.

For these reasons, the court concludes that Count I, which asserts a breach of contract claim based on the provisions of the Articles Supplementary, fails to state a claim on which relief may be granted.

Count II

Count II asserts a cause of action for breach of fiduciary duty. This count also fails to state a claim. To a large extent, the claimed breach of fiduciary duty relies upon the allegations that defendants' conduct contravenes the Articles Supplementary. Beyond that, the allegations are largely conclusory and unsupported by specific factual allegations. The statement of the claim seems to rest on the contention that the transaction is unfair to the preferred shareholders. The mere statement that a transaction is "unfair" is insufficient to sustain a plaintiff's duty to plead specific facts, and

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[6] While the *Elliott* court found irrelevant the plaintiffs' argument that the transaction under challenge in that case was simply an attempt to change the terms of the preferred stock, it is to be noted that the merger that is the subject of the case before this court has "economic and business substance . . . beyond an effort to do indirectly what could not be done directly." 715 A.2d at 849.

note merely conclusory allegations. *See RRC Northeast, LLC v. BAA Maryland, Inc., supra*, 413 Md. 638, 644.

In the opposition to the motion to dismiss, plaintiff identifies two theories. The first is a breach of the duty of good faith and fair dealing. The duty of good faith and fair dealing finds its source in contract law. *See, e.g., Questar Builders, Inc. v. CB Flooring, LLC*, 978 Md. 241, 273 (2009). As such, a breach of this duty is not equivalent to a breach of fiduciary duty. But in any event, this theory fails to state a claim because "the covenant of good faith and fair dealing 'does not obligate a [party] to take affirmative actions that the [party] is clearly not required to take under [the contract]… Rather, the duty simply prohibits one party to a contract from acting in such a manner as to prevent the other party from performing his obligations under the contract." *Blondell v. Littlepage*, 413 Md. 96, 114 (2010) (*quoting Parker v. Columbia Bank,* 91 Md. App. 346, 366 (1992)). While the duty prohibits a party from doing anything to prevent other parties from receiving the benefits and entitlements of the agreement, it "is not understood to interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise." *Parker*, 91 Md. App. at 366.

The other basis for the claim of breach of fiduciary duty is the assertion that defendants' conduct violated the terms of the company's contract with the preferred shareholders. The court has rejected plaintiff's contention that the merger violated the Articles Supplementary. With this conclusion, this theory necessarily falls.

Count III

Count III seeks declaratory relief. Defendants argue that the resolution of the other claims, which have an identical basis, renders the demand for declaratory relief moot.

As stated in countless appellate opinions, dismissal of a declaratory judgment action is rarely appropriate. *120 West Fayette Street, LLLP v. Mayor & City Council*, 413 Md. 309, 355 (2010). Where a controversy is appropriate for resolution by declaratory judgment, the trial court's rejection of the plaintiff's position on the merits furnishes no ground for dismissal. *Id.* at 356; *Christ ex rel. Christ v. Maryland Dept. of Natural Resources*, 335 Md. 427 (1994). The test for sufficiency of the complaint is whether the plaintiff shows a subject matter within the declaratory judgment statute, regardless of whether the plaintiff is on the winning side of the dispute.

However, a court may decline to grant a declaratory judgment in certain circumstances. It is within the discretion of the circuit court to refuse a declaratory judgment when it does not serve a useful purpose or terminate controversy. *See Polakoff v. Hampton*, 148 Md. App. 13 (2002). *See also Fertitta v. Brown*, 252 Md. 594 (1969)(holding that once a controversy has been finally adjudicated by a court with jurisdiction of the subject matter and the parties, the controversy is no longer alive and therefore is not the proper subject for a declaratory judgment action).

In this case, the court has concluded that the applicable legal principles do not support plaintiff's claims that the challenged transaction is invalid. That holding concludes the controversy between the parties concerning the legal effect of the transaction. Affording plaintiff an unfavorable declaration would serve no useful purpose, and defendants have not requested such a declaration. For this reason, the court will exercise its discretion to decline declaratory relief.

Count IV

The final claim is Count IV, which asserts aiding and abetting liability against ARCP and its entities. This count alleges that these entities aided and abetted the breach of fiduciary duty by the CapLease directors. This claim must fail because of the court's resolution of the other claims. One of the requirements for aiding and abetting liability is the underlying culpability of the principal wrongdoers. *Alleco Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 340 Md. 176, 200-201 (1995). Because the court has concluded that the claims against the other defendants raise no illegality, there can be no liability for aiding and abetting.

CONCLUSION

For these reasons, the motion to dismiss will be granted. It is the court's conclusion that plaintiff should not be given leave to amend the complaint. In the course of the briefing and argument upon the motion to dismiss, plaintiff made several arguments that were not articulated in the complaint. The court has analyzed each of those arguments and found them insufficient to state a claim. Because the essential basis of plaintiff's claim is the provisions of the Articles Supplementary, whose application has been resolved as a matter of law, there are no additional facts that plaintiff could allege that would rectify the deficiencies in the claims asserted. Accordingly, there is no reason to grant leave to amend.

Dated:______________

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Judge W. Michel Pierson

JOHN POLING **Plaintiff**	*	**IN THE**
	*	**CIRCUIT COURT**
v.	*	**FOR BALTIMORE CITY**
CAPLEASE, INC., et al. **Defendants**	*	**Case No.: 24-C-13-006178**

* * * * * * *

ORDER

Defendants' Motion to Dismiss (Pleading No. 2) having come before the court for hearing, it is this _____________ day of May, 2015, for the reasons in a Memorandum of even date,

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

ORDERED that this action is DISMISSED with prejudice.

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Judge W. Michel Pierson