	*	**IN THE**
IN RE AMERICAN REALTY CAPITAL	*	**CIRCUIT COURT**
TRUST, INCORPORATED	*	**FOR**
SHAREHOLDER LITIGATION	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-12-005306**

* * * * * * * * * * * *

MEMORANDUM OPINION

Upon consideration of Defendants' Joint Motion to Stay Discovery and Incorporated Memorandum of Law (docket # 00016000), filed November 8, 2012, Plaintiffs' Motion to Compel Discovery (docket # 00035000), Motion to Expedite Discovery (docket # 00036000), Opposition to Defendants' Joint Motion to Stay Discovery (docket # 00016001), and Request for Expedited Treatment (docket # 00037000) and accompanying Memorandum of Law, filed November 13, 2012, and Defendants' Joint Opposition to Plaintiff's Motion to Compel Discovery, Motion to Expedite Discovery, Opposition to Defendants' Joint Motion to Stay Discovery, and Request for Expedited Treatment (docket # 00035001), filed November 20, 2012, Defendants' Motion to Stay Discovery is **GRANTED.** Plaintiffs' Motion to Compel Discovery and Motion to Expedite Discovery are **DENIED.**

I. FACTUAL/PROCEDURAL HISTORY

On September 6, 2012, Defendants American Realty Capital Trust, Inc. ("ARCT") and Realty Income Corporation ("Realty Income") jointly announced that they were planning to enter a stock-for-stock merger agreement ("Proposed Merger"). Under the terms of the agreement, Realty Income and its wholly-owned subsidiary Tau Acquisition, LLC ("Tau Acquisition") would acquire ARCT for approximately $2.95 billion. ARCT shareholders would receive Realty

Income common stock in exchange for their shares of ARCT stock, at a ratio of 0.2874 Realty Income shares for each share of ARCT common stock.

On September 7, 2012, the day after the announcement, Plaintiff Randell Quaal filed an initial complaint with request for jury trial. Over the next month, other plaintiffs in the associated cases filed their own respective complaints. Plaintiff Sydelle Goldwurm filed her Amended Class Action and Derivative Complaint (case no. 24-C-12-005524, docket # 00025000) on October 3, 2012. By October 19, 2012, Plaintiffs Quaal, Michael Hill, John R. Gregor, Marc and Diane Gordon, and Donald Rooker ("Quaal Plaintiffs") together filed a Second Amended Complaint. In the Second Amended Complaint, Plaintiffs allege that the Proposed Merger is incompatible with the best interests of the Plaintiffs, ARCT's shareholders, and the ARCT company as a whole. Plaintiffs claim that, among other things, the Defendants American Realty Capital Trust, Inc., Nicholas S. Schorsh, William M. Kahane, Leslie D. Michelson, Robert H. Burns, and William G. Stanley ("ARCT Defendants") inadequately negotiated the Proposed Merger by failing to obtain sufficient consideration for ARCT and its shareholders and by using a flawed process. Plaintiffs aver that the ARCT Defendants' and Realty Income and Tau Acquisition's ("Realty Income Defendants") behavior amounted to breaches of Defendants' own fiduciary duties to ARCT and the ARCT shareholders and/or aided the other Defendants' breaches of their fiduciary duties.

This Court consolidated the six actions into the above-captioned case by its Order dated November 19, 2012 (docket # 00004006). This Court designated Brower Piven as interim lead counsel and Randell Quaal as lead plaintiff in an Order and accompanying Memorandum Opinion (docket # 00040000), filed November 21, 2012.

Dispositive motions were also filed in these cases. Realty Income Defendants filed a Motion to Dismiss and Request for Hearing against the Quaal Plaintiffs (docket # 00010000) on October 23, 2012 and joined ARCT Defendants' Motion to Dismiss against Plaintiff Goldwurm (case no. 24-C-12-005524, docket # 0007001) on October 31, 2012. Meanwhile, the ARCT Defendants filed a Motion to Dismiss against the Quaal Plaintiffs on October 23, 2012 (docket # 00011000) and against Plaintiff Goldwurm (case no. 24-C-12-005524, docket # 00007000) on October 24, 2012. The Quaal Plaintiffs filed a Memorandum of Law in Opposition to ARCT Defendants' Motion to Dismiss (not yet docketed) as well as a Memorandum of Law in Opposition to Defendants Realty Income Corporation's and Tau Acquisition, LLC's Motion to Dismiss (docket # 00010002), both on November 13, 2012.

Quaal Plaintiffs filed a Motion for Issuance of a Temporary Restraining Order and Order to Show Cause Regarding Why a Preliminary Injunction Should Not Issue; Request for Expedited Hearing (docket # 00021000) ("TRO Motion") as well as an accompanying Memorandum of Law ("TRO Memorandum") on November 9, 2012. Plaintiffs sought a court order enjoining ARCT from conducting a shareholder vote on the Proposed Merger until (1) ARCT disclosed information that Plaintiffs found sufficient to permit Plaintiffs and other shareholders to make a fully informed vote to either approve or disapprove the Proposed Merger, and (2) until this Court could decide if Defendants needed to "engage in an appropriate sales process." (Pl.'s TRO Memorandum 41). Defendants responded with a Joint Opposition to Motion for Issuance of a Temporary Restraining Order and Order to Show Cause Regarding Why a Preliminary Injunction Should Not Issue (docket # 00021002), filed November 26, 2012. Plaintiff's withdrew their TRO Motion on December 3, 2012 (docket # 00021001), noting in an

accompanying letter that on November 19, 2012, the ARCT shareholder vote on the Proposed Merger was adjourned without date.[1]

Defendants filed a Joint Motion to Stay Discovery and an Incorporated Memorandum of Law on November 8, 2012 against the Quaal Plaintiffs (docket # 00016000) and Plaintiff Goldwurm (case no. 24-C-12-005524, docket # 00010000).[2] Defendants assert considerable Maryland case law and persuasive precedent suggesting that courts should order discovery stayed where dispositive motions to dismiss are pending, because such motions to dismiss could dispose of the case in its entirety. Defendants argue that if the motions to dismiss are ultimately granted – which they claim is a reasonable expectation given the motions' strength and merit – the Court's having allowed futile discovery will have placed an unnecessary burden and expense on both the parties and the Court. Shortly thereafter, on November 13, 2012, Quaal Plaintiffs filed a Motion to Compel Discovery (docket # 00035000), Motion to Expedite Discovery (docket # 00036000), Opposition to Defendants' Joint Motion to Stay Discovery (docket # 00016001), and Request for Expedited Treatment (docket # 00037000). Plaintiffs contend that Defendants should be compelled to comply with Plaintiffs' discovery requests, because Defendants are employing stall tactics when time is of the essence and Defendants will suffer no prejudice as a result of expedited discovery. Plaintiffs state that limited expedited discovery is warranted because Plaintiffs will suffer irreparable injury if a shareholder vote on the Proposed Merger, originally scheduled for December 13, 2012,[3] occurs without a full hearing on Plaintiffs' TRO

[1] Plaintiffs filed a Motion For Issuance Of a Preliminary Injunction; Request For Expedited Hearing (not yet docketed) ("Preliminary Injunction Motion"), and accompanying Memorandum of Law, on December 11, 2012, and informed the Court that a new shareholder vote on the Proposed Merger has been set for January 16, 2013, as per the Defendants' December 6, 2012 Joint Proxy Statement/Prospectus.

[2] Plaintiff Goldwurm filed a Notice of Voluntary Dismissal Without Prejudice (docket # 00042000) on December 3, 2012, leaving only the Quaal Plaintiffs' action still at issue.

[3] As said, this vote has now been delayed until January 16, 2013.

Motion, which is intended to temporarily prevent the Proposed Merger.[4] Defendants responded with a Joint Opposition to Plaintiff's Motion to Compel Discovery (docket # 00035001), Motion to Expedite Discovery (docket # 00036001), Opposition to Defendants' Joint Motion to Stay Discovery (docket #00016002), and Request for Expedited Treatment (docket # 00037001) on November 20, 2012. This Court ordered, on November 29, 2012 (docket # 00033001), that no discovery of any kind would take place until the Court ruled upon any outstanding discovery motions.[5]

II. ANALYSIS

This Court concludes that Plaintiffs have not met their burden of showing that they would suffer irreparable harm if they are not granted expedited discovery. Further, Plaintiffs have not demonstrated that they will not have adequate time to conduct discovery in the proper course. Finally, Defendants have effectively illustrated why a stay of discovery is warranted here.

A. This Court has the authority to compel discovery, to grant expedited discovery, or to stay discovery.

The Maryland Rules govern the scope of discovery that a party may obtain from another party:

> A party may obtain discovery regarding any matter that is not privileged, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, and tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

[4] Of course, Plaintiffs in turn explain that in order to generate a reasonably complete factual picture needed for the Temporary Restraining Order/Preliminary Injunction hearing, at least some limited, expedited discovery is necessary.

[5] On December 11, 2012, Plaintiffs filed a Motion To Renew And Refile Plaintiff's Motion To Compel Discovery, Motion to Expedite Discovery, and Request For Expedited Treatment (not yet docketed).

Md. Rule § 2-402(a). Pursuant to Md. Rule 2-401 this Court can specify a time for discovery to take place in a case, as it sees necessary:

> Unless the court orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. The court may at any time order that discovery be completed by a specified date or time, which shall be a reasonable time after the action is at issue.

Md. Rule § 2-401(b). Maryland Rules § 2-432(a) and § 2-433 confer upon the Court wide-ranging powers to impose sanctions on a party that does not respond to a discovery request. These Rules thereby serve as a strong motivating force that the Court can deploy to compel discovery. For example, Rule § 2-432(a) allows for "immediate sanctions for certain failures of discovery" and permits a party to move for sanctions without first obtaining an order compelling discovery from the court. Likewise, Rule § 2-433 bestows upon the Court power to enforce a variety of sanctions, such as issuing "[a]n order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action . . . ." Through these methods, the Court can effectively compel discovery from the parties.

The Maryland Rules also grant the Court significant power in the area of "halting" or "freezing" discovery – in other words, staying it to a later date. Rule 2-403(a) dictates that:

> On motion of a party or of a person from whom discovery is sought, and for good cause shown, the court may enter any order that justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (1) that the discovery not be had, (2) that the discovery not be had until . . . some other event or proceeding has occurred, (3) that the discovery may be had only on specified terms and conditions . . . .

Md. Rule § 2-403(a)(1)–(3). Indeed, "[t]rial judges are vested with a reasonable, sound discretion in applying [the discovery rules], which discretion will not be disturbed in the absence of a showing of its abuse.'" *Falik v. Hornage*, 991 A.2d 1234, 1246 (Md. 2010) (citing *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129, 1133–34 (Md. 1998)); *see also*

Bacon v. Arey, 203 Md. App. 606, 671-72 (2012) (citing *Gallagher Evelius & Jones, LLP v. Joppa Drive-Thru, Inc.*, 7 A.3d 160, 167 (Md. Ct. Spec. App. 2010)) (emphasizing that " 'the circuit court . . . has the inherent power to control and supervise discovery as it sees fit' "). Thus, this Court may order that discovery commence at any time, and this Court's discretion in setting a timeline for discovery in the instant matter will not be disturbed absent a showing of abuse. This Court recognizes that discovery is not automatically stayed because there is a motion to dismiss pending. *Coca-Cola Bottling Co. of Lehigh Valley v. Grol*, No. 92-7061, 1993 WL 13139559, at *6, 1993 U.S. Dist. LEXIS 3734 (E.D. Pa. Mar. 9, 1993).

B. Plaintiffs did not show good cause by presenting a colorable claim of irreparable harm sufficient for this Court to grant expedited discovery.

Expedited discovery is not the normal procedure and granting of expedited discovery requires a showing of good cause. *Jasinover v. Rouse Co.*, No. 13-C-04-59594, 2004 WL 2747382, at *2, 2004 Md. Cir. Ct. LEXIS 18 (Md. Cir. Ct. Oct. 25, 2004). In an action for expedited discovery, the plaintiff has the burden of showing that expedited discovery is necessary and that there is good cause for granting it. *Greenfield v. Caporella*, 1986 WL 13977, at *2, 1986 Del. Ch. LEXIS 493 (Del. Ch. Dec. 3, 1986). The plaintiff must show that expedited discovery is necessary and material by: (1) pleading a colorable claim of irreparable injury, and (2) demonstrating that there is a "need for careful judicial scrutiny and oversight to ensure that steps of supposed expedition are legitimate and necessary prior to a court ordering a regimen on litigants that departs from normal procedure." *Jasinover*, 2004 WL 2747382, at *2. Because courts have routinely held that extra details are unnecessary and immaterial as a matter of law for a shareholder to make a fair and informed decision whether to approve a recommended transaction, a plaintiff's burden of demonstrating a need for this sort of information is particularly

heavy. *In re Nationwide Health Properties, Inc. S'holder Litig.*, No. 24-C-11-001476, slip op. at 39-45, 2011 Md. Cir. Ct. LEXIS 3 (Md. Cir. Ct. May 27, 2011).

Indeed, the Delaware Court of Chancery, which regularly deals with corporate transactions, has held that it will grant expedited discovery in only those cases where there is a showing of good cause. *Boland v. Boland*, 5 A.3d 106, 121 n.11 (Md. Ct. Spec. App. 2010), *rev'd on other grounds*, 31 A.3d 529 (Md. 2011) (citing Delaware State Courts: Delaware Court of Chancery, http://courts.delaware.gov/Chancery/ (last visited Dec. 10, 2012)) (noting that the Delaware Court of Chancery "is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted. Its unique competence in and exposure to the issues of business law are unmatched."). The Delaware Court of Chancery's position is exemplified by its holding in *In re International Jensen Shareholders Litigation:*

> a party's request to schedule an application for a preliminary injunction, and to expedite the discovery related thereto, is normally routinely granted. Exceptions to that norm are rare. *A paradigm exception, however, arises where the moving papers fail to articulate a colorable claim of irreparable harm and any wrongful conduct can be adequately remedied by a money damages award.*

In re Intl Jensen S'holders Litig., Consol. C. A. No. 14992, 1996 WL 422345, at *1-2, 1996 Del. Ch. LEXIS 77 (Del. Ch. July 16, 1996) (emphasis added).[6] Because of its familiarity with the

[6] Although *Jensen* indicates that if plaintiffs can show good cause for expedited discovery, it should be granted, the court denied expedited discovery. In the case, the plaintiffs alleged that the defendants breached their fiduciary duties of loyalty and care by failing to consider another transaction where a competing bidder was willing to pay $1 more per stock in a potential merger. The court determined that the plaintiffs did not sufficiently show that they would suffer irreparable harm if expedited discovery was not granted, stating "plaintiffs make no claim or showing that the defendants would be unable to respond to a $2.1 million money judgment, there is no reason–equitable or economic–to subject the defendants to the expense and disruption of an expedited preliminary injunction proceeding." *In re Intl Jensen S'holders Litig.*, Consol. C. A. No. 14992, 1996 WL 422345, at *1-2 (Del. Ch. July 13, 1996).

subject matter at issue herein, this Court finds the Delaware Court of Chancery's position highly persuasive.

Therefore, this Court seeks to determine whether Plaintiffs have shown irreparable harm in the instant action. Irreparable harm is harm beyond that which can be compensated by monetary damages. *Alpha Builders, Inc. v. Sullivan*, C.A. No. 698-N, 2004 WL 2694917, at *19, 2004 Del. Ch. LEXIS 162 (Del. Ch. Nov. 5, 2004) (the plaintiff's allegation that defendants would not have sufficient assets to pay a future monetary award absent any actual evidence is "mere speculation [which] is not sufficient to support a finding of irreparable harm."). Such harm "must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice." *State v. Del. State Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974). Thus, when monetary damages are able to adequately compensate the plaintiff, there is no need for expedited discovery. *Foster v. Town and Country Trust*, No. 24-C-06-001442, 2006 WL 991000, at *2, 2006 Md. Cir. Ct. LEXIS 20 (Md. Cir. Ct. 2006). For example, "shareholders would suffer irreparable harm only were they to be forced to vote without knowledge of the material facts relating to the structure of bankers fees and, most importantly, their entitlement to appraisal rights under the transaction as it is presently constructed." *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1192 (Del. Ch. 2007).

Indeed, courts have indicated that the irreparable harm must be sufficient to justify the extra costs associated with expedited discovery, such as preparing for an expedited preliminary injunction hearing. *Giammargor v. Snapple Beverage Corp.*, Civ. A. No. 13845, 1994 WL 672698, at *2, 1994 Del. Ch. LEXIS 199 (Del. Ch. Nov. 15, 1994) (discussing a case where the plaintiffs were asserting that defendants were making side-deals prior to a potential merger). In

the instant case, Plaintiffs have failed to demonstrate a colorable claim that irreparable harm would occur absent expedited discovery. As noted *supra,* such a showing is crucial if Plaintiffs wish to sustain their claim for expedited discovery. Plaintiffs allege that ARCT shareholders will suffer irreparable harm without a full hearing on their Preliminary Injunction Motion[7] because the breaches of fiduciary duty claims cannot be sufficiently remedied through a subsequent damages award. Yet, Plaintiff presents no evidence that the ARCT shareholders cannot be fully compensated via money damages in the event the Proposed Merger is consummated through the shareholder vote on January 16, 2013 and wrongdoing is found after the fact. Assuming, *arguendo,* that this Court were to ultimately hold that ARCT shareholders could have received a "better deal" in the Proposed Merger (e.g., greater consideration for their shares) but for the Defendants' breaches of fiduciary duty, nothing would prevent this Court from later "reimbursing" Plaintiffs the difference in monetary value between what they could have earned (had Defendants not breached their fiduciary duties) and what Plaintiffs actually earned (when Defendants did breach their fiduciary duties).[8]

[7] Resolution of this Motion, Plaintiffs contend, would require some limited expedited discovery because "Plaintiff has a small window within which to conduct the discovery needed to adequately create the factual record necessary to obtain an injnction preventing the shareholder vote from occurring." (Pl.'s Mem. of Law in Support of Pl.'s Mot. to Compel Discovery, Mot. to Expedite Discovery, Opposition to Def.'s Joint Mot. to Stay Discovery, and Request for Expedited Treatment 6).

[8] In support of their reasoning that expedited discovery should be granted because Plaintiffs have shown that ARCT shareholders will suffer irreparable harm absent a full hearing on the Preliminary Injunction Motion, Plaintiffs cite *Rosen v. Wind River Sys., Inc.*, No. 4674-VCP, 2009 WL 1856460, at *2 & n.10, 2009 Del Ch. LEXIS 114 (Del. Ch. June 26, 2009). In that case however, the opinion made clear that the Vice Chancellor "granted the motion to expedite on the basis of apparent presence of *certain colorable disclosure violations in the 14D-9* [an obligatory form to be filed with the Securities and Exchange Commission when a tender offer is made] *and the fact that the California Actions were proceeding on an expedited basis." Id.* at LEXIS *7 - *8 (emphasis added). Here, Plaintiffs do not offer proof of any specific, colorable disclosure violations to support their position – instead supplying very general references to the Defendants breaches of fiduciary duty. Moreover, this Court is not aware of any simultaneous, ongoing actions by Plaintiffs in other states, much less a decision by another court granting expedited discovery.

C. The potentially-dispositive motions to dismiss could fully dispose of the actions without the need for discovery, justifying a stay of discovery.

Although a court does not automatically stay discovery in a case where a dispositive motion remains outstanding and at issue, *see supra* Part II.A, a host of prior Maryland cases show that this course of action is frequently followed by the courts. *See, e.g.*, *Bacon*, 203 Md. App. at 673 (affirming the circuit court's decision to resolve the dispositive legal motions before addressing any factually-intensive discovery motions); *Shade v. Md. State Bd. of Elections*, 930 A.2d 304, 313 (Md. 2007) (describing a situation where a trial court stayed discovery until the motions to dismiss had been ruled upon, in lieu of ruling on the motion for protective order immediately); *Tomran, Inc. v. Passano*, 862 A.2d 453, 457 n.5 (Md. Ct. Spec. App. 2004) (noting that the trial court stayed discovery until it resolved the outstanding, dispositive motions to dismiss); *In re Nationwide Health Props., Inc. S'holder Litig.*, slip op. at 10 (staying discovery in shareholder derivative action until a pending motion to dismiss was resolved).

This Court does not disregard Plaintiffs' argument that none of the above cases present the same exigent circumstances as exist in this case. However, as discussed *supra*, no real showing has been made – Plaintiffs' very broad allegations of Defendants' breach of fiduciary duties notwithstanding – that irreparable harm will befall Plaintiffs if no discovery is permitted to enable a full hearing on the Preliminary Injunction Motion. By all outward appearances, monetary damages would be sufficient to remedy any shortfalls in consideration to ARCT stockholders resulting from wrongdoing in the consummation of the Proposed Merger. It follows that there is no reason to expedite discovery outside of the normal course, especially considering the potentially dispositive nature of the pending motions to dismiss.[9]

[9] The Court would also point out the shareholder vote on the Proposed Merger has already been delayed by approximately one month, from December 13, 2012 to January 16, 2013, which resulted in the Plaintiffs

To be sure, the Maryland Court of Special Appeals opinion filed earlier this year proves particularly instructive.[10] *Bacon v. Arey* held that the trial level court "properly resolved the preliminary motions to strike and dismiss, rather than permit discovery as to factual matters not related to the legal issues raised by the preliminary motions." 203 Md. App. at 673. The Court of Special Appeals reasoned that completing discovery would have "no bearing on the legal issues before the court," and hence there was no reason to delve into it – perhaps unnecessarily – when such "significant legal issues" remained which could ultimately resolve the case without discovery. *Id.* Similarly, in this case, the purely legal – not factual – grounds around which Defendants construct their motions to dismiss prevent any need to begin discovery at this early stage. As substantial Federal precedent, which this Court construes as persuasive, summarizes, "the [moving party has] demonstrated good cause for a . . . stay of discovery," because "[s]hould the [moving party] prevail on their motions to dismiss, no discovery would be necessary and any production of documents would have been a useless and wasteful effort." *In re Harrah's Enter. Sec. Litig.*, No. 95-3925, 1997 U.S. Dist. LEXIS 1256, at *5 (E.D. La. February 3, 1997). This Court therefore holds that discovery in this case shall be stayed pending disposition of the outstanding motions to dismiss.

III. CONCLUSION

For the reasons set forth above, this Court concludes that Plaintiffs have not sufficiently shown that they will suffer irreparable harm if discovery is conducted in the proper course. Defendants, however, have successfully established why this Court should stay discovery. Therefore, Plaintiffs' Motion to Compel Discovery and Motion to Expedite Discovery, be and

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withdrawing their initial TRO Motion. It is not inconceivable that this scenario would repeat itself with the new shareholder voting date and Preliminary Injunction Motion.

[10] The opinion was filed on March 29, 2012. Writ of certiorari was denied by the Court of Appeals on August 21, 2012.

the same, are hereby **DENIED,** and Defendants' Joint Motion to Stay Discovery, be and the same, is hereby **GRANTED.**

IT IS SO ORDERED, this 13th day of December, 2012.

/s/ Audrey J.S. Carrión
The Honorable Audrey J.S. Carrión
Judge, Baltimore City Circuit Court
Case No. 24-C-12-005306

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