Circuit Court for Baltimore City
Case No. 24-C-15-005482

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 599

September Term, 2021

SOUTH MIAMI PENSION PLAN

v.

STARWOOD WAYPOINT RESIDENTIAL, TRUST, *et al.*

Graeff,
Arthur,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: October 3, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from a stock-for-stock merger between Starwood Waypoint Residential Trust ("SWAY") and Colony American Homes, Inc. ("Colony"), which was conditioned on SWAY's acquisition of its external management company, SWAY Management LLC (the "Manager"). The proposed merger and SWAY's internalization of the Manager were presented to SWAY's Shareholders, who voted in favor of the transactions.

Appellant, South Miami Pension Plan, subsequently filed a Stockholder Class Action Complaint in the Circuit Court for Baltimore City. The Complaint alleged that SWAY's Board of Trustees (the "Board") breached their fiduciary duties "by failing to act reasonably to maximize value for SWAY's public stockholders and by failing to disclose all of the material information to stockholders prior to the stockholder vote" on the transactions. Appellees, the individual trustees, moved to dismiss the complaint for failure to state a claim. On June 1, 2021, the circuit court issued an order granting appellees' motion to dismiss.

On appeal, appellant presents three questions for this Court's review[1], which we have consolidated, as follows:

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[1] The questions set forth in appellant's brief were as follows:

1. Did the trial court err in concluding that SWAY stockholders were fully informed of Mr. Sternlicht's conflict, where the Proxy falsely misrepresented the timing and manner of how that conflict arose?
2. Did the trial court err in concluding that SWAY stockholders were fully informed of Mr. Sternlicht's self-interested negotiations in selling the Manager to SWAY, when the Proxy called Mr. Sternlicht's first proposal

Did the circuit court err in dismissing the complaint on the grounds that the SWAY stockholders ratified the transactions after a fully informed vote?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Merger and Internalization Agreement

SWAY was a Maryland Real Estate Investment Trust ("REIT") formed in 2012. Its objective was to "acquire, renovate, lease and manage residential assets in select markets throughout the United States," with the objective to generate "risk-adjusted returns for its shareholders . . . through dividends and capital appreciations." SWAY was externally managed; it did not have employees of its own and paid an external Manager to manage its properties. The Manager was owned by Starwood Capital Group Global, L.P., ("Starwood Capital"), a privately-held firm owned by Barry Sternlicht. Mr. Sternlicht served as SWAY's chairman. Three other trustees of SWAY were connected with the Manager.

Colony was an internally managed Maryland REIT "focused on the acquisition, ownership, renovation, leasing and management of single-family residential ("SFR") homes in the United States." Thomas J. Barrack was Colony's chairman.

merely "illustrative," and then hid the fact that all of the ensuing offers and counter-offers between ISC and Mr. Sternlicht were for values above that initial proposal?

3. Did the trial court err in concluding that SWAY stockholders were not entitled to Colony's standalone financial projections, when those projections would have cast doubt on the Board's recommendation that SWAY stockholders receive just 34% of the combined company's equity?

On November 13, 2015, Mr. Sternlicht sent a letter with a lengthy Proxy Statement to the shareholders, inviting them to vote, in person or by Proxy, at a special shareholders meeting to be held on December 17, 2015. The vote concerned "a proposal that will allow SWAY to internalize its management [] and a proposal that will allow SWAY to merge [Colony] with and into a wholly owned subsidiary of SWAY." The statement advised that the Internalization Proposal and the Merger Share Issuance Proposal were "related and interdependent proposals," which meant that each proposal must be approved for the plan to proceed.

The Internalization Agreement provided that SWAY would internalize its Manager by acquiring the Manager through a wholly owned subsidiary, Starwood Waypoint Residential Partnership, L.P. (the "Operating Partnership"). In return, SWAY would issue 6.4 million units of the Operating Partnership ("OP Units"), to Starwood Capital.[2]

The Merger Agreement provided that Colony would merge into SWAY Holdco, LLC, a wholly owned subsidiary of SWAY "formed for the purpose of effecting the [m]erger." SWAY would issue 64,869,583 of its common stock to Colony stockholders in exchange for existing Colony shares. Following the merger, the combined company would be named Colony Starwood Homes ("Combined Company").

[2] Appellant alleges that, as a result of his ownership and control of Starwood Capital, Mr. Sternlicht was the beneficial owner of the OP Units that Starwood Capital received from the internalization.

The Proxy advised that, although there were risks, the Board recommended that the shareholders vote for the internalization and merger because they would cut expenses and provide strategic and financial opportunities. SWAY stockholders would own approximately 35.2% of the Combined Company, Colony stockholders would own approximately 59.0% of the Combined Company shares, and Starwood Capital, owner of the Manager, would own the remaining 5.8% shares, assuming the issuance of 6.4 million OP Units it received from the internalization. The Combined Company's Board of Trustees would consist of twelve (12) individuals, with Mr. Sternlicht and Mr. Barrack appointed as co-chairmen. Six of the Board members would be designated by Colony, and the remaining four would be designated by SWAY. The letter stated that the Board unanimously approved the merger and internalization. It advised that the merger would "provide a number of strategic and financial opportunities."

II.

Proceedings Below

On October 30, 2015, after the Board voted to approve the merger and internalization, and approximately six weeks before the scheduled stockholder vote, appellant filed, on behalf of itself and other similarly situated SWAY stockholders, a Stockholder Class Action Complaint. The Complaint alleged, among other things, that: (1) the SWAY board, which consisted of seven (7) members, including Mr. Sternlicht as the chairman, "breached their fiduciary duty to maximize stockholder value in agreeing to the [i]nternalization and [m]erger following a single-bidder sales process led by [Mr.]

Sternlicht"; and (2) the Board "breached their fiduciary duty of candor by failing to disclose material information in connection with the proposed" transactions. Appellant sought to enjoin the stockholder vote on the transactions. On December 16, 2015, the circuit denied appellant's request.

On December 17, 2015, SWAY held a special meeting of stockholders to vote on the transactions. The shareholders voted in favor of the internalization and the merger. Both transactions closed on January 5, 2016.

On February 3, 2016, appellant filed a 61-page Amended Stockholder Class Action Complaint.[3] As relevant to this appeal, the Complaint alleged that individual Board members "breached their fiduciary duties in connection with the [t]ransaction[s] by failing to act reasonably to maximize value for SWAY's public stockholders and by failing to disclose all of the material information to stockholders prior to the stockholder vote" on

[3] Although the amended complaint listed corporate entities as defendants, counsel for appellant stated at oral argument that the appeal related only to the individual trustees. The trustees listed in the Complaint were as follows:

(1) Barry Sternlicht, chairman of the SWAY Board of Trustees (the "Board"), chairman of the Manager, founder, president and Chief Executive Officer ("CEO") of Starwood Capital, and chairman of Starwood Property Trust, Inc.;
(2) Andrew Sossen, member of the Board, executive vice-president and director of the Manager, and general counsel and Chief Operating Officer ("COO") of Starwood Property Trust, Inc.;
(3) Douglas Brien, member of the Board, and CEO and director of the Manager;
(4) Richard Bronson, member of the Board, director of Starwood Property Trust, Inc.;
(5) Michael Fascitelli, member of the Board and chair of the Board's Internalization Special Committee ("ISC");
(6) Jeffrey E. Kelter, member of the Board and member of the Board's ISC;
(7) Stephen H. Simon, member of the Board and member of the Board's ISC;

the transactions. Appellant requested equitable relief and damages to compensate appellant and other SWAY stockholders, "who suffered harm by virtue of the individual [appellees'] breaches of their fiduciary duties."

Appellant alleged that,

> [a]s a result of the [t]ransaction[s], [Mr.] Sternlicht received 6.4 million OP Units, which increased his ownership interest in [SWAY] to 7% . . . on a fully diluted share basis. Meanwhile, Colony's stockholders took a 59% interest in the [Combined] Company, leaving SWAY's public stockholders with approximately 34% of the fully diluted public float.

Appellant argued that the transactions resulted in a change-of-control that triggered the Board's fiduciary duties to maximize stockholder value and disclose all material information related to the transactions. It alleged that the Board members breached their fiduciary duties in this regard.

With respect to the duty to disclose, appellant alleged that the Board members breached their fiduciary duties "by issuing a Proxy that failed to disclose all material information to SWAY stockholders in advance of the [v]ote." Specifically, with regard to the negotiation process, appellant alleged that the Proxy was a "materially misleading and incomplete recount" of Mr. Sternlicht and Mr. Barrack's discussions regarding the internalization. Appellant asserted that the Proxy falsely stated that the Board was apprised of the negotiations as early as February 24, 2015, but the record indicted that the Board did not learn of the negotiations until the "Heads-Up Memo" on July 22, 2015. Additionally, appellant asserted that the Board failed to disclose that the initial $180 Million valuation for the Manager equated to 5.4 Million OP Units, which was relevant to Mr. Sternlicht's

ultimate receipt of 6.4 Million OP Units. Appellant also alleged that the Board failed to disclose certain financial projections, including stand-alone projections for Colony.

On March 21, 2016, appellees filed a motion to dismiss the amended complaint, arguing that appellant lacked standing to assert a direct claim against the Board because Maryland law provides that members of the Board of Directors of a Corporation "owe fiduciary duties only to the corporation, *not* to its shareholders, and those duties are enforceable only by or on behalf of the corporation itself." They asserted that a claim for breach of fiduciary duties by the Board must be brought as a derivative suit on behalf of the corporation, and not as a direct suit by the stockholders on their behalf.

Appellees recognized that there were exceptions to the rule against direct actions by stockholders set forth in *Shenker v. Laureate Educ., Inc.*, 411 Md. 317 (2009) and *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46 (2015).[4] Appellees argued, however, that the

[4] In *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 345 (2009), the Court of Appeals held that "a shareholder may bring a direct action, either individually or as a representative of a class, against alleged corporate wrongdoers when the shareholder suffers the harm directly or a duty is owed directly to the shareholder, though such harm also may be a violation of a duty owing to the corporation." Where corporate directors exercise non-managerial duties outside the scope of their typical duties, "such as negotiating the price that shareholders will receive for their shares in a cash-out merger transaction, after the decision to sell the corporation already has been made, they remain liable directly to shareholders for any breach of [] fiduciary duties. *Id*. at 328-29. In the context of a cash-out merger, the directors owe the stockholders the "common law fiduciary duties of candor and maximization of shareholder value," and stockholders may pursue direct claims for the breach of those duties. *Id*. at 336, 342.

In *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 85 (2015), this Court held that the duty recognized in *Shenker* applied to other situations, including a stock-for-stock merger resulting in a change-of-control. When the directors are acting pursuant to their

exceptions did not apply to appellant's action because the stock-for-stock merger between SWAY and Colony did not result in a change of control that triggered the Board's common-law fiduciary duties of "candor and maximization of shareholder value."

Moreover, appellees argued that "the actions challenged by the complaint were ratified by SWAY's shareholders" after a fully-informed vote. Accordingly, they argued that the complaint should be dismissed.

B.

Circuit Court Hearing

On June 1, 2016, the parties appeared in the circuit court for a hearing on appellees' motion to dismiss. No witnesses were called.

Counsel for appellees stated that there were multiple arguments in support of dismissal. First, counsel argued that the doctrine of ratification barred claims challenging transactions approved by the stockholders. He acknowledged, however, that the controversy in this case was "whether the stockholder vote was fully informed." Counsel argued that it was, and appellant failed, as a matter of law, to sufficiently plead that facts omitted in the Proxy rose to the level of materiality. The Proxy Statement included more than 400 pages, and counsel argued that appellant failed to show that "the omitted information would have made a significant difference to the total mix of information and take on real importance for an investor deciding how to vote." Counsel next argued that

managerial duties, however, the director's duty was merely to act in good faith, and they were entitled to the business judgment rule. *Id.* at 98.

dismissal was warranted for other reasons, including: (1) the transaction was approved by a majority independent board; and (2) pursuant to statute and SWAY's charter, the trustees were immune from any damages.

Counsel for appellant argued that the ratification doctrine did not apply for several reasons. First, if *Shenker* duties applied, which counsel argued they did, the ratification doctrine did not apply. Second, the Proxy Statement omitted all material information and made misleading statements, including: (1) stating that the transactions were discussed at the February 24, 2015 Board meeting, which was false and misleading; (2) with respect to the agreed 6.4 Million OP Units that Mr. Sternlicht received, omitting that he initially asked for 5.4 million OP Units, misleading the stockholders to believe that the Board did a good job negotiating the OP Units paid; and (3) failing to disclose Colony's stand-alone value.

Counsel for appellees stated during rebuttal argument that the reason the February 24, 2015 Board minutes did not reflect that Mr. Sternlicht informed the Board of his merger discussions was because the discussion occurred at "an executive session at the end of [the] meeting." Counsel argued that the initial discussion of the amount Mr. Sternlicht would receive by the internalization was a "placeholder" only for "modeling purposes." With respect to appellant's argument that the Proxy failed to disclose Colony's standalone projections, counsel noted that the shareholders were given the choice to retain their company or "enter the combined company," and those projections were provided.

The court took the matter under advisement.

C.

Circuit Court's Findings and Determinations

On June 1, 2021, the circuit court issued its Memorandum Opinion, stating that it assumed "the truth of the well-pleaded facts and allegations in the Amended Complaint" and accepted all "reasonable inferences from those facts[,] but not conclusory charges that are not factual allegations." In a thorough 51-page opinion, the court concluded that appellant's complaint should be dismissed with prejudice. As discussed in more detail *infra*, with respect to the issues raised on appeal, the court rejected appellant's claim that the stockholders' ratification of the transactions was not made with sufficient information. It found that, considering the "total mix" of information provided in the Proxy, the specific information that appellant alleged was omitted was "insubstantial and immaterial as a matter of law."

This appeal followed.

STANDARD OF REVIEW

We review a circuit court's grant of a motion to dismiss *de novo*. *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. at 74. We must determine whether the circuit court was legally correct. *Kumar v. Dhanda*, 198 Md. App. 337, 342 (2011). *Accord Forster v. State, Off. of Pub. Def.*, 426 Md. 565, 579 (2012).

> A trial court may grant a motion to dismiss if, when assuming the truth of all well-pled facts and allegations in the complaint and any inferences that may be drawn, and viewing those facts in the light most favorable to the non-moving party, "the allegations do not state a cause of action for which relief may be granted."

Sutton, 226 Md. App. at 73-74 (quoting *Latty v. St. Joseph's Soc. of Sacred Heart, Inc.*, 198 Md. App. 254, 262-63, (2011)). "The facts set forth in the complaint must be 'pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.'" *Id.* at 74 (quoting *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 644 (2010)).

DISCUSSION

In Maryland, a director of a corporation has a duty to act: (1) in good faith; (2) in a manner the director reasonably believes to be in the best interests of the corporation; and (3) with the care that an ordinarily prudent person in a like position would use under similar circumstances. MD. CODE ANN. CORPS. & ASS'NS ("CA") § 2-405.1(a) (2014 Repl. Vol.). Pursuant to CA § 2-405.1(c), a director who acts in accordance with these standards has immunity from liability, as provided in MD. CODE ANN., CTS. & JUD. PROC. ("CJ") § 5-417(b) (2016).[5] The "business judgment rule," which provides "a presumption that directors of a corporation acted in good faith and the best interest of the corporation," *Wittman v. Crooke*, 120 Md. App. 369, 376-77 (1998), has been incorporated in the statute. *See* CA § 2-405.1(e) ("An act of a director of a corporation is presumed to satisfy the standards of subsection (a) of this section."). A contract or transaction of a corporation

[5] MD. CODE ANN., CTS. & JUD. PROC. ("CJ") § 5-417(b) (2020) provides: "A present or former director of a corporation who while a director acts or acted in accordance with the standard of conduct provided in § 2-405.1 of the Corporations and Associations Article has no liability in any action based on an act of the director."

may be ratified by a vote of the majority of stockholders entitled to vote. CA § 2-419(b)(ii).[6]

Appellant argued below that, because the merger here resulted in a change of control, the Board of Trustees had an additional common law duty to the shareholders, pursuant to *Shenker*, 411 Md. at 339, "to maximize shareholder value and make full disclosure of all material facts concerning the merger." It asserted that the individual trustees breached this duty.

On appeal, appellant contends that the circuit court erred in granting the motion to dismiss on the ground that the "stockholders ratified Defendant's conduct in a fully informed vote." It argues that the court erroneously concluded that the stockholders were fully informed when they voted to approve the transactions, asserting that the Proxy Statement "provided materially false, misleading and incomplete disclosure." Appellant focuses on three statements or omissions in the Proxy. It asserts that the Proxy: (1) falsely

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[6] References to MD. CODE ANN. CORPS. & ASS'NS ("CA") § 2-405.1 are to the statute in effect at the time of the 2015 shareholder vote at issue. The statute subsequently was amended in 2016. The amendment added § 2-405.1(h), which provides:

> An act of a director of a corporation relating to or affecting an acquisition or a potential acquisition of control of the corporation or any other transaction or potential transaction involving the corporation may not be subject to a higher duty or greater scrutiny than is applied to any other act of a director.

Whether this amendment affects the holding of *Shenker* is not relevant to this appeal because, it was not enacted until after the proceedings at issue here took place and the issue on appeal concerns the court's conclusion that the transactions were approved by the shareholders after a fully informed vote.

misrepresented the timing and manner of Mr. Sternlicht's conflict; (2) did not accurately describe the negotiations for OP Units and what the Board knew about it; and (3) omitted Colony's financial projections.

Appellees argue that the law provides that a board of directors is not "liable to the stockholders for acts ratified by them." *Wittman*, 120 Md. App. at 377 (quoting *Coffman v. Md. Pub. Co.*, 167 Md. 275, 289 (1934)). They do not dispute that individual directors owe a duty to disclose to stockholders material information within the directors' control regarding transactions on which stockholders will vote. They contend, however, that the court properly determined that the merger was ratified by a stockholder vote after a full and fair disclosure, and it correctly held that "the additional details [appellant] claim[ed] should have been disclosed were insubstantial and immaterial as a matter of law."[7]

Before addressing appellant's specific claims, we note that "Maryland has long recognized that a board of directors is not 'liable to the stockholders for acts ratified by them' . . . after a full and fair disclosure to the stockholders." *Wittman*, 120 Md. App. at 377-78 (quoting *Coffman*, 167 Md. App. at 289). The Supreme Court of Delaware has explained the policy to avoid

> 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. There are sound reasons for this policy. When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of

[7] Appellees also argue that the circuit court's decision "can be affirmed on multiple alternative grounds." Given our disposition on the contention regarding the disclosure, we need not address these alternative grounds.

> litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them. The reason for that is tied to the core rationale of the business judgment rule, which is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders). In circumstances, therefore, where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form.

Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 312-14 (2015).

In assessing the Board's duty of disclosure for an informed shareholder vote, we note that the Board must disclose information that is material to the transaction. Directors must disclose enough information to allow a "reasonable investor" to make an informed decision regarding the transaction. *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994). The test for materiality is whether there is "a substantial likelihood that the disclosure of omitted fact[s] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). A question of materiality may be resolved against the plaintiff on a motion to dismiss if "no reasonable jury could find it substantially likely that a reasonable investor would find the fact at issue material in the 'total mix' of information." *In re Willis Towers Watson plc Proxy Litig.*, 937 F.3d 297, 304 (4th Cir. 2019). *Accord TSC Industries, Inc.*, 426 U.S. at 450 ("materiality [is] appropriately resolved as a matter of law" when "reasonable minds cannot differ on the questions.").

With that background, we assess the information that appellant claims was misleading or omitted.

I.

Disclosure of Mr. Sternlicht's Conflict

A.

Parties' Contentions

Appellant first contends that the Proxy "falsely described how [Mr.] Sternlicht's conflict arose." It asserts that the discussion about the internalization of the Manager began in January 2015, which "put [Mr.] Sternlicht in a conflicted position negotiating the [t]ransaction," and after that, Mr. Sternlicht, without consulting the Board, proposed a valuation method that "grossly favored Colony at SWAY's expense." Appellant argues that the Proxy told "a false narrative that the Board began managing the [m]erger negotiations prior to Mr. Sternlicht's conflict manifesting." In support, it notes that the Proxy Statement described a Board meeting on February 24, 2015, where the Board was briefed on negotiations, and it expressed the view that a "combination should be based upon the relative NAVs of the parties." Appellant asserts that this did not happen, noting that there was nothing in the minutes to reflect that and the minutes of the July 22, 2015 meeting included a "Heads-Up Memo" regarding a potential merger of SWAY and Colony.

Appellees contend that the circuit court "correctly held that all material facts concerning [Mr.] Sternlicht's conflict of interest were disclosed." They argue that, contrary to appellant's contention that the Proxy obscured Mr. Sternlicht's conflict, the Proxy "was

rife with warnings that Mr. Sternlicht was conflicted," and "[n]othing was obscured." It asserts that the disclosure readily satisfied "Maryland law by providing a 'full and fair' disclosure of [Mr.] Sternlicht's conflict."

B.

Circuit Court Ruling

In addressing this claim, the circuit court noted that the Proxy Statement clearly discussed three "bad facts." The court explained:

> First, SWAY acknowledged that Mr. Sternlicht and the two other directors affiliated with the Manager had conflicting personal interests related to the internalization transaction. Second, except for the internalization negotiations between the Special Committee and the Manager beginning in July 2015, SWAY did not hide the fact that the negotiations with Colony [] were conducted primarily by Mr. Sternlicht on behalf of SWAY. Third, aside from a very brief mention of possible interest by another party, SWAY did not suggest that it conducted any kind of sale process with multiple potential suitors. Each of these facts could be viewed by a reasonable shareholder as possibly detracting from a result that would produce top dollar for a SWAY investor, yet SWAY's shareholders overwhelmingly approved the merger.

Given this information, the court assessed appellant's specific claims "to determine the marginal value, if any, that the allegedly omitted information would have provided to a reasonable shareholder deciding how to vote on the transactions." The court concluded that appellant's claims were "insufficient to amount to omissions that would have altered the "total mix" of process information in fact made available to all shareholders in the Proxy Statement." The court explained:

> Any reasonable SWAY shareholder reading the Proxy Statement was well informed that the proposed internalization transaction put SWAY and the Manager adverse to one another and created a conflict of interest for Mr. Sternlicht, the two other Trustees affiliated with the Manager, and all of

> SWAY's officers. SWAY also clearly informed its shareholders that the internalization Special Committee was its means of addressing this conflict of interest.

With respect to appellant's allegation that the Proxy Statement falsely stated that Mr. Sternlicht introduced his discussions with Mr. Barrack and Colony to the Board at the February 24, 2015 meeting, the court stated that it would accept as true, for purposes of the motion, the allegation that there was no documentation of that discussion. It noted, however, that the suggestion that the records demonstrate that there was no such discussion was only "conclusory argument." In any event, even if the allegation was true, and the Proxy was "inaccurate and misleading" on that point, the court found that this statement was immaterial when considered in the "total mix" of information presented in the Proxy about the sale process. Among other things, the court noted that the Proxy

> did not hide the fact that Mr. Sternlicht continued to lead the negotiations for more than four months, carrying them essentially to the point of full tentative terms, with no involvement by the Board. In the Proxy Statement, SWAY did not attempt to suggest that the Board was closely monitoring or involved at all during this period of negotiation. Thus, shareholders were given the information to evaluate whether they were satisfied that the Board's involvement beginning on July 22, 2015 was sufficient to provide the necessary review and approval of the negotiations that came before that date. Whether the Board was or was not informed of the potential transaction on February 24, 2015 has little significance for the ultimate assessment by shareholders.

C.

Analysis

The record supports the circuit court's ruling that any misrepresentation about disclosure at the February 2015 meeting was not material in the "total mix" of all the

information produced. Initially, contrary to appellant's claim, Mr. Sternlicht's conflict was not obscured. It was clearly disclosed. The Proxy Statement advised, on multiple occasions, that the stockholders "should be aware that SWAY's executive officers and trustees may have interests in the [m]erger [and internalization proposal] that are different from, or in addition to, those of SWAY's shareholders more generally. These interests may present such executive officers and trustees with actual or potential conflicts of interests." With respect to Mr. Sternlicht, the Proxy Statement disclosed that he was

> chairman of the Board, the chairman of the board of directors of the Manager and the president and CEO of Starwood Capital Group, the owner of the Manager. As a result of his relationship with Starwood Capital Group, Mr. Sternlicht has interests in the internalization that differs from those of SWAY's shareholders as he will have an indirect beneficial interest in the consideration received by Starwood Capital Group in the internalization.

Moreover, Mr. Sternlicht's November 13, 2015 letter to the shareholders specifically advised:

> All SWAY's officers are employees of the Manager and some of SWAY's trustees are partners or employees of the Manager or Starwood Capital Group. These relationships result in those officers and trustees having a material financial interest in the [i]nternalization. To address these conflicts of interest, SWAY's board of trustees [] formed a special committee comprised entirely of independent and disinterested trustees in connection with the evaluation and negotiation of the proposed [i]nternalization [the ISC]. None of these members of the [ISC] is affiliated with Starwood Capital Group and none have a financial interest in the proposed [i]nternalization that differs from those of SWAY's shareholders. The Board authorized the [ISC] to review, consider, and negotiate the terms and conditions of the [i]nternalization and to make a recommendation to the entire Board as to whether SWAY should pursue the [i]nternalization. In evaluating the [i]nternalization, the [ISC] engaged its own legal and financial advisors.

As the circuit court stated: "Any reasonable SWAY stockholder reading the Proxy Statement was well informed" that Mr. Sternlicht had a conflict of interest.

Moreover, it was clear that there were numerous negotiations between Mr. Sternlicht and Mr. Barrack regarding the potential merger before the Board was involved. The Proxy Statement detailed many calls and conversations, beginning January 2015, prior to the "high-level decision" regarding the potential merger at the July 22, 2015 Board meeting. As the circuit court noted, any reasonable stockholder could conclude that the "SWAY Board did not become actively involved in the negotiations until relatively late, when most of the terms had been at least tentatively agreed upon." And once it became involved, it appointed a special committee to manage the conflict. Whether there were, or were not, discussions about the possible merger at the February Board meeting was not material in the "total mix" of information presented to shareholders.[8]

[8] *Morrison v. Berry*, 191 A.3d 268, 275, 283-84 (2018) and *City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702, 722 (Del. 2020), upon which appellant relies, are distinguishable because, in those cases, there was a failure to disclose material facts, as well as materially misleading disclosures, prior to shareholder ratification. As indicated, we conclude that the information that was omitted or misleading in this case was not material in light of all the information provided in the Proxy Statement.

II.

Disclosure Regarding Negotiations

A.

Parties' Contentions

The Proxy Statement advised that the Internalization Special Committee ("ISC") determined that internalization of the Manager, on the terms and conditions negotiated by the ISC, was advisable and in the best interests of its shareholders. Appellant contends that the Proxy materially misrepresented the negotiations of the ISC and Mr. Sternlicht. It alleges that the Proxy failed to disclose that Mr. Sternlicht initially requested $180 Million, which equated to 5.4 Million OP Units if the value was based on SWAY's NAV.[9] It asserts that this fact was material because Mr. Sternlicht then demanded 7.2 Million OP Units, and because the Proxy did not include the initial demand, the agreed on compensation of 6.4 Million OP Units, with a value between $160 Million and $211.4 Million, made it seem like the ISC's negotiated terms were "reasonable when they were manifestly not."

Appellees contend that the circuit court "correctly held that all material facts concerning the [ISC] negotiations were disclosed." It notes, as the circuit court did, that the Proxy disclosed that Mr. Sternlicht's demand of 7.2 million OP Units "equated to approximately $180 million at a price of $25.00 per SWAY share or $240 million based on SWAY's estimated NAV of $33.04 per share." Appellees argue that, based on that

[9] Net Asset Value ("NAV") "is the sum of all the investment company's assets (generally consisting principally of cash and investment securities) less any liabilities." James J. Hanks, Maryland Corporation Law § 10.02, p. 10-10 (2020 Supp.).

information, stockholders "could readily determine with 'simple arithmetic' that the preliminary $180 million valuation of the Manager equaled approximately 5.4 million OP Units on a NAV basis ($180m/$33.04 = 5.4m)." Accordingly, "nothing was concealed."

B.

Circuit Court Opinion

The circuit court found that the Proxy Statement provided information about the internalization negotiations between representatives of the Manager, which included Mr. Sternlicht, and the ISC. The Chair of the ISC mentioned to Mr. Sternlicht the reference to a $180 million value for the Manager, and Mr. Sternlicht responded that the value "was 'a placeholder to be used for modeling purposes' and was subject to ultimate negotiation with the [ISC]." The court described the negotiation discussions that followed:

> Mr. Sternlicht proposed a value "close to 7.2 million OP Units, which equated to approximately $180 million at a price of $25.00 per SWAY share or $240 million based on a SWAY NAV of $33.04 per share." On September 11, 2015, the [ISC] made a counter-offer of 6.1 million OP Units. . . . [which] would be $152.5 to $201.5 million using the share and NAV values identified in connection with the Manager's initial offer. There were discussions at the same time about a separate net asset adjustment or cash payment as part of the consideration. The Manager responded the next day with a revised demand for 6.8 million [SWAY] OP Units (equal to $170 to $224.7 million, depending on the valuation method). The [ISC] countered with an offer of 5.9 million OP Units (equal to $147.5 to $ 195 million) plus $12.5 million in cash. The [ISC] advanced this as the equivalent of 6.275 million OP Units. In response, the Manager revised its demand to 6.625 million OP Units (equal to $165.6 to $219 million). The [ISC] increased its offer to 6.4 million OP Units, and the Manager accepted that offer. The final agreed amount of 6.4 million OP Units equates to $160 million at a $25.00 per share rate or $211.5 million at a $33.04 NAV per share rate.

(internal citations omitted).

The court rejected the argument that the failure of the Proxy to state "Mr. Sternlicht's initial position that 5.4 Million OP Units would be appropriate consideration for the [M]anager . . . [would have exposed] the ineffectiveness of the [ISC] in its negotiations." The court concluded that "[t]he omission of the 5.4 million OP Unit quantity as opposed to use of $180 million as the placeholder value for the Manager [was] trivial." The court stated:

> Where OP Units rather than cash is used to define the consideration, there will always be debate about how the OP Units should be valued. SWAY fully disclosed the use of the $180 million assumption in the negotiations and then provided the two most obvious conversion alternatives to understand how that dollar figure related to the Manager's starting demand for 7.2 million OP Units. Any reasonable shareholder could use simple arithmetic to understand how these positions related one to the other.

The court concluded "that the Proxy Statement provided ample information about the negotiation process to inform fully shareholders' decision-making ability on those issues."

C.

Analysis

"Directors must [] avoid misleading partial disclosures. Once directors begin to speak on a subject, they assume an 'obligation to provide the stockholders with an accurate, full, and fair characterization.'" *In re Orchard Enterprises, Inc. S'holder Litig.*, 88 A.3d 1, 22 (Del. Ch. 2014) (quoting *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996)). With respect to disclosures regarding the negotiation process, however, "there is no requirement . . . of 'play-by-play' disclosure of merger negotiations because such details would not alter

the 'total mix' of information provided stockholders and thus are immaterial." *Arnold*, 650 A.2d at 1285 (quoting *Bershad v. Curtiss–Wright Corp.*, 535 A.2d 840, 847 (1987)).

The record here supports the circuit court's ruling that the omission of Mr. Sternlicht's initial proposal to be paid in 5.4 Million OP Units was not material. The Proxy provided detailed information about the ISC's negotiations with Mr. Sternlicht and Starwood Capital. The Proxy revealed that, at the July 22, 2015 SWAY Board meeting, representatives of the Manager gave a presentation that provided a "non-binding indicative term sheet," which included an "illustrative value" of $180 million to be paid in consideration for the Manager. The Proxy noted that, during an August 2015 conversation between Mr. Sternlicht and Fascitelli, the chairman of the ISC, Mr. Sternlicht stated that the $180 million

> was a placeholder to be used for modeling purposes, and that it was understood that the consideration to be paid in the [i]nternalization would ultimately need to be negotiated with the [ISC]. Mr. Sternlicht expressed Starwood Capital's [] view that the value of the Manager was close to 7.2 million OP Units, which equated to approximately $180 million at a price of $25.00 per SWAY share or $240 million based on [SWAY's estimated NAV] of $33.04 per share.

In subsequent correspondence, Thomas Bowers, the Managing Director of Starwood Capital, stated that the $180 million value for the Manager that was initially referenced in the non-binding term-sheet "was not intended to be a proposal to the [ISC] but rather a pre-diligence evaluation that SWAY and [Colony] would use for negotiating purposes." The Proxy went on to describe the ensuing negotiations between the ISC and representatives of Starwood Capital, including Mr. Sternlicht in September 2015. The ISC

presented a counter-proposal of 6.1 million OP Units on September 11, 2015. Starwood Capital countered with 6.8 million OP Units. The ISC increased their offer to 6.275 million OP Units based on SWAY's NAV and Starwood Capital countered with 6.625 million OP Units. The parties ultimately agreed to 6.4 million OP Units for the Manager.

The Proxy made clear that the $180 million was "a placeholder to be used for modeling purposes." It subsequently noted that the 7.2 Million OP Unit deal "equated to approximately $180 million at a price of $25.00 per SWAY share or $240 million based on SWAY's estimated NAV of $33.04 per share." As appellees note, that information permits shareholders to determine that the initial $180 million valuation of the Manager "equaled approximately 5.4 million OP Units on a NAV basis ($180m/ $33.04 = 5.4m)." Thus, there was sufficient information for the shareholders to determine that Mr. Sternlicht's demand for 7.2 million OP Units was higher than the preliminary valuation. The disclosures regarding the negotiation process satisfied the requirements for an informed shareholder vote.

III.

Colony's Projected Contributions to the Merger

A.

Parties' Contentions

Appellant's final contention is that "the Proxy misled stockholders about Colony's projected contributions in the merger." It asserts that the "Proxy disclosed projections for

SWAY and the combined company, but not for Colony," and stockholders "were not told that Colony's assets were projected to do less well in the future than SWAY's assets."

Appellees contend that the circuit court "correctly held that Colony's stand-alone financial projections were not material." They argue that the Proxy disclosed ample financial information, and appellant failed to provide authority "holding that an acquiring company's projections must be disclosed."

B.

Circuit Court Ruling

In addressing this claim, the circuit court found that the Proxy provided "extensive historical financial information about" SWAY and Colony's performance. It noted:

> In voting on the merger, SWAY's shareholders were not being asked to consider [Colony's] future prospects as a stand-alone company. Those prospects were relevant only as they informed how [Colony's] business would influence the performance of a [C]ombined [C]ompany. For SWAY's shareholders, the directly relevant comparison was between SWAY as a stand-alone company and SWAY combined with [Colony]—financial information that was given.

The court concluded that, "[f]rom the ample historical and projected financial information that was included, reasonable shareholders had and could derive sufficient information to make a fully informed judgments about the transaction." Appellant failed, "as a matter of law, to allege facts that would support a claim that SWAY shareholders were not fully informed on the financial fairness of the proposed transactions."

C.

Analysis

We agree with the circuit court's decision in this regard. The shareholders were considering the merger of SWAY with Colony, and they were given the financial information for SWAY without a merger and for SWAY merged with Colony. Appellant cites no authority holding that, in this type of circumstance, shareholders must be given the information it asserts was omitted here. As discussed *supra*, appellant needed to show a substantial likelihood that disclosure of Colony's standalone financial information would have significantly altered the "total mix" of information made available to the shareholders. The circuit court properly concluded that appellant failed to do so.

IV.

Conclusion

Under the circumstances here, the circuit court properly concluded that the allegations in the complaint did not state a cause of action for which relief could be granted. It properly granted appellees' motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.