JOLLY ROGER FUND, LP, et al.	*	**IN THE**
Plaintiffs	*	**CIRCUIT COURT**
v.	*	**FOR**
PRIME GROUP REALTY TRUST, et al.	*	**BALTIMORE CITY**
Defendants	*	**Case No: 24-C-06-010433**

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MEMORANDUM OPINION

I.

This case is presented to this Court on the Motion to Dismiss of Defendants, Prime Group Realty Trust (hereinafter "PGRT") and Lightstone Group (hereinafter "Lightstone"). Plaintiffs filed a Complaint on November 16, 2006, alleging a breach of contract claim against PGRT, as well as a tortious interference with contractual relations claim and an unjust enrichment claim against Lightstone. Defendants moved to dismiss that complaint on February 5, 2007. On March 2, 2007, Plaintiffs filed an Amended Complaint, dropping the tortious interference claim and adding a breach of fiduciary duty claim against Lightstone. In the Amended Complaint, the Plaintiffs also included an allegation with its breach of contract claim that PGRT breached an implied duty of good faith and fair dealing. On April 2, 2007, Defendants filed the Motion to Dismiss that is presently pending before the Court. On July 24, 2007, this Court held a lengthy hearing on the extant motion.

II.

The putative class of plaintiffs in this case is comprised of a group of shareholders who collectively own nine percent of the outstanding "Series B Cumulative Redeemable Preferred Shares of Beneficial Interest" ("the Series B Preferred Shares"). The Jolly Roger Fund is a fund

management group that pools investor funds to purchase large blocks of publicly traded securities. The claimants allege that PGRT has been liquidated – either actually or constructively – based on events and transactions described below in more detail. Plaintiffs seek the $25 per share "liquidation preference" compensation they claim is due to them as preferred shareholders that is triggered in the event of a dissolution, liquidation, or winding up of PGRT, as provided in the Articles of Amendment and Articles Supplementary.

PGRT is a Real Estate Investment Trust (REIT) that owns and manages office and industrial real estate, primarily in metropolitan Chicago. It conducts its business through its operating partnership, Prime Group Realty, LP. Lightstone is now PGRT's parent company, and is itself a large real estate company based in New Jersey. Lightstone purchased all of PGRT's common stock in 2005 and now wholly owns and controls PGRT.

When PGRT went public in 1997, PGRT owned 25 office properties totaling 5.7 million net rentable square feet, 45 industrial properties totaling 5.8 million net rentable square feet, one parking facility, and one retail center. In 1999, it added 3.8 million square feet of industrial and office space. In 2000, it commenced construction of a 340,000 square foot development of office and industrial space in downtown Chicago. As of 2001, the company owned more than 17.1 million square feet of real estate. After a period of significant growth, PGRT sold most of its industrial properties and undeveloped land in 2004. It retained 11 office properties and one industrial property, comprising 4.6 million rentable square feet of office space and 100,000 square feet of rentable industrial space, amounting to a 60% reduction of net rentable space. These sales all took place within seven months of Lightstone acquiring all of PGRT's common stock. During this time, Lightstone received $106 million in dividends, including one $30 million dividend made only four days after its formal acquisition of PGRT's outstanding

common shares. At the time, these dividends represented half of the Company's unrestricted cash balance. In December 2005 and January 2006, PGRT obtained $113 million in loans collateralized by its ownership in commercial properties, at an interest cost to PGRT of $12 million. In February 2006, the Board of Trustees declared the second distribution to Lightstone, worth $76 million. In 2004, the company was generating $22 million from operating activities. In the first nine months of 2006, it showed a $6.6 million loss. Four months after the $76 million distribution, the Board cited liquidity problems when deciding not to pay a scheduled Series B preferred share dividend in June 2006, even though the amount owed was $2.25 million.[1]

Under its Articles of Amendment PGRT is organized "for the purpose of engaging in any activity permitted to REITs generally" under Maryland REIT law. Its board of trustees has sweeping power to operate the trust per the Articles of Amendment. These Articles also expressly state that their terms "shall be construed with a presumption in favor of the grant of power and authority to the Board of Trustees." Their powers are virtually unlimited so long as they "ensure the Trust satisfies the requirements for qualification as a REIT under the [Annotated Code of Maryland]."

PGRT has issued 3 classes of stock: Series B Preferred Shares, Series A Preferred Shares, and Common Shares. Both parties agree that the Articles of Amendment and Articles Supplementary govern the two classes of currently outstanding stock. The Articles Supplementary set forth the terms and conditions applicable exclusively to the Series B Preferred Shares. Section 4(a) of the Articles Supplementary provides that upon "any liquidation, dissolution or winding up of the Trust," the holders of Series B Preferred Shares shall be entitled

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[1] This Court was informed that, as of the date of the hearing on the motion to dismiss (July 24, 2007), PGRT is fully up to date on all dividends owed to preferred shareholders.

to receive a $25.00 per share "Liquidation Preference," plus an amount equal to all dividends accrued and unpaid on the date of final distribution. Subsection (i) of this clause limits what events can constitute a liquidation, stating that:

> "(i) a consolidation or merger of the Trust with one or more corporations, real estate investment trusts, or other entities, (ii) a sale, lease or conveyance of all or substantially all of the Trust's property or business or (iii) a statutory share exchange *shall not be deemed to be a liquidation, dissolution or winding up, voluntary or involuntary, or the Trust."*

(emphasis added).

III.

In reviewing a motion to dismiss for failure to state a claim under Maryland Rule 2-322(b)(2), a trial court must assume the truth of all well-pleaded relevant, and material facts in the Complaint and all reliable inferences that can be drawn therefrom. Bobo v. State, 346 Md. 706, 708 (1997), citing Stone v. Chicago Title Ins. Co., 330 Md. 329, 333 (1993). It is well-settled that "[d]ismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." See Bobo v. State, supra, 346 Md. at 709, citing Morris v. Osmose Wood Preserving, 340 Md. 519, 531 (1995).

IV.

A. Breach of Contract

i. *Formal vs. De facto Liquidation*

Plaintiffs argue that Lightstone has caused PGRT to systematically liquidate PGRT's property to enrich Lightstone, the sole controlling common shareholder, at the expense of minority preferred shareholders. Plaintiffs concede that PGRT is not formally in liquidation, but argue that the recent events amount to a *constructive* liquidation. Plaintiffs also maintain that if

and when PGRT ever declares itself to be in liquidation, there will be nothing left to distribute.[2] Plaintiffs emphasize that PGRT not only sold and mortgaged the core of its commercial real estate business, but also distributed the proceeds of those sales and mortgages to Lightstone. Thus, Plaintiffs argue that these events have undermined the purpose of the liquidation preference they hold as preferred shareholders. While the plaintiffs acknowledge – as they must – that the Articles Supplementary states that a "sale, lease or conveyance of all or substantially all of the Trust's property or business… shall not be deemed to be a liquidation, dissolution or winding up, voluntary or involuntary, of the Trust," they argue that the Articles are silent as to what more is necessary, in addition to a sale, lease or conveyance in order to constitute a liquidation, dissolution or winding up of the Trust.

Defendants dispute that PGRT has entered any form of liquidation, whether formal, informal, *de facto*, or constructive. Defendants maintain that like any contract, the terms "any liquidation, dissolution or winding up of the Trust," as contained in the Articles of Amendment and Articles Supplementary, are not to be interpreted expansively. As noted above, Section 4(a)(i) of the Articles Supplementary expressly states:

> "a consolidation or merger of the Trust with one or more corporations, real estate investment trusts, or other entities, (ii) a sale, lease or conveyance of all or substantially all of the Trust's property or business or (iii) a statutory share exchange shall not be deemed to be a liquidation, dissolution or winding up, voluntary or involuntary, or the Trust."

Defendants argue this language clearly demonstrates that only a *formal* liquidation, and still subject to the express terms of the contract governing the agreement between the parties, would entitle plaintiffs to the compensation they seek. Under Maryland law, a contract must be construed so that "each and all of its parts and provisions must be given meaning, and force, and

[2] PGRT asserted at the July 24, 2007 hearing that as of that date, it would be able to pay, in full, any liquidation preference payout.

effect." Deleon Enterprises, Inc. v. Zaino, 92 Md. App. 399, 407 (1992), quoting Orkin v. Jacobson, 274 Md. 124, 130 (1975)(internal citations omitted). The rights of preferred shareholders must be clearly expressed with definiteness and certainty, and cannot be presumed. Elliot Assoc. LP v. Avatex Corp, 715 A.2d 843, 852 - 853 (Del. 1998). Defendants thus contend that plaintiffs must therefore allege facts that establish a clearly expressed contractual right to the preference payment.

Plaintiffs do not dispute that the Articles of Amendment and the Articles Supplementary govern their contractual rights. Plaintiffs agree that this Court must give the parties' contract its plain meaning, but add that any ambiguity in the documents should be construed against their drafter, PGRT. L & H Enterprises., Inc. v. Allied Bldg. Prods. Corp., 88 Md. App. 642, 650 (1991). Plaintiffs contend that the word "any" as used to modify "liquidation" in the contract between the parties leads to the conclusion that either a formal, informal, or *de facto* liquidation can be deemed a liquidation that would trigger the liquidation preference. Paraphrasing a statement made by plaintiffs' counsel at oral argument, arguably "97% of this case" comes down to the meaning and effect of the word "any" as used in this contract to modify "liquidation." Plaintiffs maintain that to interpret "any" narrowly would be reading a meaning into the contract that otherwise does not appear. Further, according to the plaintiffs, any such ambiguity should be attributed to PGRT inasmuch as PGRT drafted the agreement by and between the parties. Thus, according to plaintiffs, "any" liquidation should include a *de facto* liquidation.

Regarding the *de facto* liquidation argument, both parties rely heavily on cases from jurisdictions other than Maryland, including several unreported cases. Clearly, this Court need not consider these cases binding, but may give these cases the consideration and weight this Court believes they deserve. That having been said, both parties cite to a tandem of Delaware

Chancery Court decisions that provide a set of factors for determining whether a *de facto* liquidation has taken place. Based on those cases, in order to find a *de facto* liquidation requires a plaintiff to demonstrate significantly more than just the sale or liquidation of some, if not all, of a business' assets. See Quadrangle Offshore (Cayman) LLC v. Kenetech Corp., C.A. No. 16362, 1998 WL 778359 (Del. Ch. Oct. 21, 1998) (hereinafter "Quadrangle I"), and Quadrangle Offshore (Cayman) LLC v. Kenetech Corp., C.A. No. 16362NC, 1999 WL 893575 (Del. Ch. Oct. 13, 1999) (hereinafter "Quadrangle II"). A *de facto* liquidation generally requires showing that a business is "winding up" its affairs and has undertaken an "abandonment" of its corporate identity. Rosan v. Chicago Milwaukee Corp, C.A. No. 10526, 1990 Del. Ch. LEXIS 19 (Del Ch. Feb 6, 1990). Courts also consider whether a business has sold its assets, paid off creditors, otherwise wound up its business affairs, distributed remaining proceeds to shareholders and abandoned its corporate form. Quadrangle II, supra. To find that a *de facto* liquidation has occurred, the business must have "committed unambiguously to a liquidation… and not some other lawful course of action permitted" under the organizing contract. Id. However, not all of these factors have to be met for an informal liquidation to have occurred. Id.

Defendants argue that Section 4(a) of the Articles Supplementary plainly excludes the possibility of a constructive dissolution resulting in a preference payout, and rely heavily on a New York case that involved a similar, if not identical, contractual provision and allegations of a *de facto* liquidation. In Kimeldorf v. First Union Real Estate Equity & Mortgage Invs., 764 NYS2d 73 (NY App. Div. 2003), the New York Appellate Division found that no such liquidation preference had been triggered based on the facts and circumstances as alleged. In that case, plaintiffs sought injunctive relief to prevent a proposed merger. On appeal, the Court held that injunctive relief was not proper because the claim was based on the liquidation

preference contract language, and the events in question did not trigger the liquidation preference payout. In this case, defendants maintain that the Articles Supplementary language is equally controlling and leaves no doubt that only a formal liquidation or dissolution will trigger the preference payout.

The clear and unambiguous language of Section 4(a) of the Articles of Amendment and the Articles Supplementary controls this Court's decision. Equally compelling is the language in the Articles of Amendment that give PGRT's board extremely broad and nearly limitless authority to conduct PGRT's affairs, so long as it does so in accordance with Maryland law. Plaintiffs' expansive reading of the word "any" as it modifies "liquidation" in Section 4(a) is not compelling where, as here, the agreement between the parties clearly limits the scope, even if only in part, of what events constitute a liquidation for purposes of triggering the preference payout. Critically, Section 4(a)(i) of the Articles Supplementary expressly states:

> "a consolidation or merger of the Trust with one or more corporations, real estate investment trusts, or other entities, (ii) a sale, lease or conveyance of all or substantially all of the Trust's property or business or (iii) a statutory share exchange *shall not be deemed to be a liquidation, dissolution or winding up, voluntary or involuntary, or the Trust."*

(emphasis added).

While plaintiffs argue the document is otherwise silent as to what would in fact constitute a liquidation, it is not for this Court to give the parties' agreement any greater meaning than that which is plainly evident. As both parties agree, under Maryland law, a contract must be construed so that "each and all of its parts and provisions must be given meaning, and force, and effect." Deleon Enterprises, Inc. v. Zaino, supra. The plaintiffs, as preferred shareholders, agreed to these terms when they purchased their shares. This Court cannot add terms or clauses to the parties' agreement. The parties' rights are limited to the terms clearly stated in that

agreement, which states unambiguously that only a voluntary or involuntary liquidation can trigger the liquidation preference payout. Simply stated, the clarifying and limiting language of Section 4(a)(i) of the Articles Supplementary controls the outcome of this question, and precludes, as a matter of law, the plaintiffs from prevailing on its argument that an alleged constructive liquidation could trigger PGRT's obligation to pay plaintiffs a liquidation preference.

ii. *De Facto Liquidation As Applied to PGRT*

Even assuming *arguendo* that plaintiffs would be entitled to a liquidation preference based on a *de facto* dissolution, defendants contend that plaintiff's factual allegations work entirely against plaintiffs' claims, and establish that PGRT is a fully-operational business with significant assets. Indeed, plaintiffs admit that PGRT currently owns and operates ten office properties and that it has sold only one property since being acquired by Lightstone in 2005.[3] Defendants argue that this directly contradicts that any *de facto* dissolution has taken place.

In Quadrangle II, the Delaware Chancery Court found that the defendant, Kenetech Corporation, had not constructively liquidated, despite facts present in that case far more compelling than those presented to this Court. Indeed, Kenetech had sold the majority of its assets except for one subsidiary, had paid off its largest outstanding creditors, had laid off most of its workers, cancelled new business ventures, and had prepaid its CEO and CFO's severance allowances. Nonetheless, the court found that Kenetech remained a going concern and that the aforementioned steps were all taken in a good faith attempt to salvage the company. While the

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[3] These property sales reduced PGRT's net rentable square footage by more then 60%. While plaintiffs argue that this is a substantial reduction of PGRT's property holdings, defendants emphasize that while 60% of the rentable space has been reduced, the *type* of property sold is a factor plaintiffs ignore. PGRT in fact sold nearly all of its *industrial* rental properties but retained 10 office space rental properties. Defendants contend that one square foot of industrial space is not inherently equal in value to, or even directly comparable with, one square foot of industrial space, where office space typically commands a higher rental value.

transactions and events were perhaps suspicious, the Delaware Chancery Court found that they were all "within the bounds of the board's authority and [could] be plausibly explained." Id.

Defendants argue that based on the facts as alleged, Plaintiffs clearly cannot satisfy any of the Quadrangle factors. Plaintiffs allege that by 2005, PGRT reduced its rental space by 60% from its 1997 level[4], but admit that PGRT retains ten rental properties, and that PGRT has sold only one property in the last two years. Plaintiffs argument hinges on the allegation that PGRT has drained the company's value through mortgaging the balance of the properties and dispensation of the mortgage proceeds to Lightstone as a dividend. Plaintiffs flatly argue that PGRT has substantially reduced its net square footage of rentable space, leading to the conclusion that PGRT is winding up its business operations. Plaintiffs also maintain that PGRT has ceased its real estate acquisition program, decreased its employee numbers by almost 80%, and its cash from operations has dropped from $22 million to negative $6.6 million. PGRT admits it has paid out the $106 million in common stock distributions, which it paid for by mortgaging PGRT's interest in the Citadel Center. The divested property was sold for $560 million, which went into PGRT's accounts.

Defendants contend that PGRT simply has not gone out of the real estate business as plaintiffs allege because it retains ten rental properties. Plaintiffs have not – and cannot – allege that PGRT has fired all of its employees, set up severances for its officers, discontinued board meetings, settled with creditors, or otherwise abandoned the form of the Trust. According to defendants, PGRT is fully operational with substantial properties and assets, and continues to seek new business opportunities. Further, and significantly, there is no allegation that PGRT

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[4] See Footnote 3, supra.

cannot, as of the date of the filing of the Amended Complaint, Motion to Dismiss, and the oral argument in this matter, pay the liquidation preference, should one be owed.

iii. *Breach of Duty of Good Faith and Fair Dealing*

Under Maryland law, a duty of good faith and fair dealing is an implied term in certain contracts. Food Fair Stores, Inc. v. Blumberg, 234 Md. 521, 535-36, (1964). Defendants, however, argue that this duty simply prohibits one party from acting in such a manner as to prevent the other party from performing his obligations under the contract. Parker v. Columbia Bank, 91 Md. App. 346, 366 (1992), citing Automatic Laundry Service v. Demas, 216 Md. 544 (1958). PGRT maintains that plaintiffs have not alleged, and cannot allege, that PGRT has in anyway prevented plaintiffs from performing their contractual obligations. Defendants also maintain that Plaintiffs are trying to rewrite the express terms of the parties' contract and impose affirmative obligations contrary to those contained therein. As detailed above, Maryland law clearly prohibits such alterations. Defendants further contend that plaintiffs' allegations do not state a good faith and fair dealing claim because, in actuality, they amount to an argument that PGRT should have paid the liquidation preference. According to defendants, the implied duty of good faith and fair dealing does not require a party to take any affirmative actions. Id. Defendants maintain that plaintiffs are only entitled to the liquidation preference under the terms of the Articles, and thus cannot use the implied duty of good faith and fair dealing to rewrite those Articles so as to create rights not contained therein. Holland v. Psych. Assessment Res. Inc, Civil No. CCB-040437, 2004 US Dist. LEXIS 11006 (D.Md June 16, 2004).

Plaintiffs argue correctly that there is an implied duty of good faith and fair dealing in all contracts under Maryland law. See Parker, supra. However, plaintiffs maintain that this duty commands more, though, than simply not preventing the other party from performing its contract

obligations. It "prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement." 13 Williston on Contracts 38:11 (4th ed. 1999, updated July 2006); see also Quadrangle II, supra; Parker, supra.

As detailed above, plaintiffs here claim they are entitled to the liquidation preference under the Articles, and contend that PGRT has ceased its real estate acquisition program and has begun to sell its real estate assets. Defendant Lightstone caused these events to take place, and Plaintiffs allege that Lightstone's PGRT stock purchase transaction was specifically structured to fulfill PGRT's goal of avoiding paying the liquidation preference. In addition, PGRT has mortgaged its remaining properties at an annual interest cost of $20 million and used the proceeds to pay additional common stock dividends. Thus, plaintiffs contend that the dividends paid to Lightstone came at the expense of the plaintiffs. Plaintiffs argue that these events equate to bad faith and unfair dealing, especially where the company, only four months after its massive $76 million distribution to Lightstone, informed the plaintiffs it could not make a scheduled distribution that would have cost only $2.25 million. Plaintiffs maintain that PGRT acted in bad faith when it converted company assets into cash and to then diverted that cash to Lightstone.

This Court's analysis of this question starts and ends with the controlling contract between the parties. Under Maryland law, shareholders of preferred stock are only entitled to the preferential rights enumerated in the applicable agreement between the parties. Elliot Assoc. LP, supra. Plaintiffs' claims arise out of its contention that it is owed the liquidation preference as a result of PGRT's dealings that are the subject of this suit. Just as a *de facto* liquidation cannot trigger PGRT's obligation to pay plaintiffs the liquidation preference provided for in the parties' agreement, neither does this implied duty of good faith and fair dealing impose that PGRT take any affirmative action for plaintiffs' benefit. As such, the duty of good faith and fair dealing

cannot be relied on to alter the terms of a contract. Mikeron, Inc. v. Exxon Co., USA, 264 F.Supp.2d 268, 272-73 (D.Md. 2003). As noted above, PGRT's board has extensive authority to conduct PGRT's affairs. None of the transactions, sales, or other related events as presented to this Court demonstrate that PGRT acted in bad faith, or otherwise rendered PGRT an empty shell of a company. PGRT unquestionably remains a going concern. Of special significance in this context is that fact that PGRT is currently able, if necessary, to pay plaintiffs their liquidation preference if ordered to do so. This fact alone defeats plaintiffs' argument that PGRT has effectively prevented plaintiffs from "receiving the benefits and entitlements of the agreement." 13 Williston on Contracts 38:11, supra. Accordingly, as a matter of law, PGRT has not breached an implied duty of good faith and fair dealing. As a result, this Court grants defendants' motion to dismiss the breach of contract claim.

B. Breach of Fiduciary Duty

Defendants argue that the Breach of Fiduciary Duty Claim against Lightstone should be dismissed because Maryland does not recognize a breach of fiduciary duty as an independent cause of action.[5] Further, defendants maintain that because Lightstone, as the common shareholder of PGRT, owes no duty to the preferred shareholders with respect to the payment of a liquidation preference. Defendants claim that their obligations to plaintiffs are limited to those enumerated in the Articles Supplementary, thus limiting Plaintiffs' remedies to an action for a breach of contractual duties. Defendants contend that allegations of a breach of fiduciary duty

[5] Plaintiffs argue that the Maryland Court of Appeals has stated that breach of fiduciary duty claims must be evaluated on a case-by-case basis, and that such a claim can be asserted as a free-standing claim together with a breach of contract claim. Plaintiffs, however, ignore recent case law that attempts to clarify this undoubtedly confused question. See Int'l Brotherhood of Teamsters v. Willis Corroon Corp of Md., 369 Md. 724 (2002) (hereinafter "IBT"), et seq. As best as this Court can determine, while Maryland does not recognize a breach of fiduciary duty as an *independent* cause of action, such claims can be raised *either* in terms of a breach of contract action, or, *in the alternative*, as a claim for negligence. Vinogradova v. Suntrust Bank, Inc., 162 Md. App. 495, 510 (2005), citing IBT, supra at 327. See also Tobacco Technology, Inc. v. Taiga Int'l, N.V., et al., 2007 WL 644463, Slip. Op., (2007), and Discussion, *infra*.

can serve only as a *component* of an independent cause of action. McGovern v. Deutsche Post Global Mail, Ltd., No. Cov. JFM-04-0060, 2004 US Dist. LEXIS 15215 (D. Md. Aug. 4, 2004).

Defendants also argue that Maryland does not otherwise recognize a general "fiduciary duty" claim unsupported by allegations describing the parameters of the fiduciary relationship or explaining how it gives rise to a cause of action that has been recognized under the law. Kann v. Kann, 344 Md. 689 (1997).[6] Defendants note that any such fiduciary duty claim is typically considered duplicative of other available remedies. See IBT, supra. Defendants lastly maintain that plaintiffs' fiduciary duty claim is the same as plaintiffs' breach of contract claim, and therefore, should be dismissed as duplicative.

The Court of Appeals in Kann stated that while there is no universal or omnibus tort for breach of fiduciary duty, "this does not mean that there is no claim or cause of action available for breach of fiduciary duty… Identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion." Kann, supra, 344 Md. at 713. To prove such a claim, plaintiffs must identify the particular fiduciary relationship or duty involved, identify how it was breached, consider the remedies available and select those remedies appropriate to the client's problem. Garcia v. Foulger Pratt Dev., Inc., 155 Md. App. 634, 682 (2003). This Court will therefore analyze this issue in terms of first attempting to establish what, if any, duty Lightstone owed to plaintiffs, and if so, whether Lightstone breached that duty.

i. Lightstone's Duty to Plaintiffs

According to defendants, plaintiffs have failed to describe the nature of the alleged duty Lightstone owed to Plaintiffs. Defendants also argue that Lightstone did not owe the Plaintiffs any fiduciary duty where special rights and benefits given to holders of preferred stock are

[6] See Footnote 5, supra.

governed exclusively by contract law so that no fiduciary duties arise with respect to those rights and benefits. Jedwab v. MGM Grand Hotels, Inc, 509 A.2d 584, 594 (Del. Ch. 1986). Defendants correctly note that a liquidation preference is obviously a right not enjoyed by common shareholders, thus not subject to fiduciary principles. Defendants contend that Lightstone can only be liable to plaintiffs if found to have breached the terms expressed in the Articles Supplementary.

Plaintiffs maintain that Lightstone exercised its control and domination over PGRT's Board to deprive the plaintiffs of their liquidation preference. Plaintiffs add that Lightstone used its power as the controlling shareholder for its own benefit. It is Lightstone's position as the controlling common shareholder that plaintiffs contend imposes a fiduciary duty on Lightstone as owed to plaintiffs as the preferred shareholders. Plaintiffs argue that minority shareholders are entitled to protection against the fraudulent or illegal action of the majority. Lerner v. Lerner Corp., 132 Md. App. 32, 53 (2000). When a majority shareholder abuses its power for its own benefit, it breaches its fiduciary duty owed to the minority shareholders. Twenty Seven Trust v. Realty Growth Investors, 533 F.Supp. 1028, 1034 (D. Md. 1982).

Plaintiffs' argue their cause of action for breach of fiduciary duty should survive because it has brought a breach of contract claim, and that this claim is not duplicative of Plaintiffs' breach of contract claim where it is suing PGRT for breach of contract and Lightstone separately for the breach of fiduciary duty. Further, plaintiffs contend that the two claims turn on distinct factual bases, namely that PGRT is alleged to have breached the Articles while Lightstone is alleged to have breached a duty arising from its standing as the majority shareholder, independent of contract considerations. See Garcia, supra, 155 Md. App. at 682.

Defendants correctly point out that plaintiffs are misconstruing Lightstone's obligations to plaintiffs. In the cases cited by the plaintiffs, the conflicting interests giving rise to causes of action were between shareholders of the same *classes* of stock. Here, while both Lightstone and plaintiffs are shareholders in PGRT, Lightstone owns the common shares, while plaintiffs are preferred shareholders. As stated above, preferred shareholders are entitled to unique rights as compared to common shareholders, and preferred shareholders rights are expressly limited to their preferred shareholder agreement. Therefore, Lightstone, as the controlling common shareholder, owes no duty to plaintiffs as a matter of law. Because Lightstone owes no duty to plaintiffs, this Court need not address whether Lightstone breached any such duty in the context of this claim.[7]

C. Unjust Enrichment

Defendants contend that plaintiffs' unjust enrichment claim cannot stand because plaintiffs admitted that an express contract governs their right to a liquidation preference. To state a claim for unjust enrichment under Maryland law, plaintiffs must allege that a benefit was conferred upon the defendant by the plaintiff, an appreciation or knowledge by the defendant of the benefit, and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. County Commissioners of Caroline County v. J. Roland Dashiell & Sons, Inc., 358 Md. 83, 94 - 95 (2000). However, Maryland law prohibits unjust enrichment claims when an express contract governs the underlying *subject matter*. FLF, Inc. v. Wold Publ'ns, Inc., 999 F. Supp. 640, 642 (D. Md. 1998)(internal citations omitted)(emphasis added).

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[7] This Court is also concerned about plaintiffs' ability to bring this claim as pled. While plaintiffs contend that a breach of fiduciary duty action can stand alone as a claim, Maryland law seems to suggest otherwise. See Footnote 5, supra. In that context, plaintiffs have alleged a breach of contract action, but not as against Lightstone. Plaintiffs also have not alleged any action sounding in negligence against Lightstone. Plaintiffs thus fail to satisfy the requirements as set forth in IBT, supra, et seq., for pleading a cause of action of this nature.

Accordingly, and subject only to limited exceptions that do not apply in this case, the existence of a valid and controlling contract precludes recovery in quasi-contract. County Commissioners, supra, 358 Md. at 96.

Plaintiffs argue that its claims in this case are against two separate defendants, such that they can maintain a breach of contract claim against PGRT and the unjust enrichment claim against Lightstone. Plaintiffs' argument on this issue essentially mirrors its breach of fiduciary duty claim as against Lightstone, wherein they argue that Lightstone essentially pilfered money from PGRT to which it was not entitled. Plaintiffs maintain that Lightstone caused these distributions to be made to it at the expense of the preferred shareholders, and that these allegations properly form the basis of an unjust enrichment claim. Bank of America Corp. v. Gibbons, 173 Md. App. 261, 270 - 271 (2007).

Because the contract at issue is between PGRT and plaintiffs, this Court must address whether plaintiffs can bring an unjust enrichment claim against Lightstone, a third party not in privity to the original contract, but more importantly, where that claim is directly related to the plaintiffs' contractual relationship with PGRT.[8] There can be no doubt that in this case, an applicable contract governs the underlying subject matter. Plaintiffs, as preferred shareholders, have no rights other than those created by the express agreement between the parties. Despite Lightstone's lack of privity to that contract, it undoubtedly governs the subject matter of this claim. Thus, plaintiffs cannot maintain an unjust enrichment action against Lightstone as a matter of law.

Further, even assuming *arguendo* that plaintiffs could proceed on an unjust enrichment claim against Lightstone, the plaintiffs have failed to show that Lightstone *unjustly* retained any

[8] Under Maryland law, parties need not be in privity for one party to maintain a colorable claim based on unjust enrichment against another. Bank of America Corp. v. Gibbons, supra, 173 Md. App. at 271 - 273.

benefit. Defendants note that distributions to Lightstone are authorized under the terms of the Articles of Amendment. Furthermore, PGRT's Board of Trustees possesses "full, exclusive and absolute power to authorize and declare to shareholders such dividends or distributions" under the Articles. Moreover, defendants contend that no dividends were owed to preferred shareholders at the time of the distribution to common shareholders.

This Court finds that plaintiffs have failed to show that Lightstone was in any way *unjustly* enriched. The transactions in which PGRT engaged, including its decisions to sell properties, were all within its expansive rights under the Articles of Amendment. As the controlling common shareholder, Lightstone was entitled to receive distributions from PGRT. Furthermore, this Court can find no basis for concluding that plaintiffs directly conferred any benefit upon Lightstone, let alone an unjust benefit. Lastly, plaintiffs have failed to adequately allege in either of its complaints any form of harm they may have suffered as a result of these transactions where PGRT remains able to pay a liquidation preference payout should one come due.

V.

For the reasons stated in this Memorandum Opinion and Order, this Court grants Defendants Prime Group Realty Trust and Lightstone Group's Motion to Dismiss the Amended Class Action Complaint filed by Jolly Roger Fund LP and Jolly Roger Offshore Fund Ltd.

The Court must now address whether the dismissal shall be with prejudice, and therefore, without leave to amend, or without prejudice, thereby permitting the plaintiffs leave to file an Amended Complaint. Initially, this Court notes that plaintiffs filed an initial Complaint against PGRT and Lightstone in November, 2006. After PGRT and Lightstone filed a Motion to

Dismiss all three counts of plaintiffs' original Complaint, plaintiffs filed their Amended Complaint on March 2, 2007.

Inasmuch as plaintiffs have now been afforded two opportunities to present legally viable claims, this Court does not believe it is appropriate to grant the plaintiffs leave to amend, and thereby file another Complaint. Accordingly, this Court grants Defendants' Motion to Dismiss with prejudice and without leave to amend for the reasons stated in this Memorandum Opinion.

August 16, 2007
Date

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Stuart R. Berger
Judge, Circuit Court for Baltimore City

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Plaintiffs	*	**CIRCUIT COURT**
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Defendants	*	**Case No: 24-C-06-010433**

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ORDER

Upon consideration of Defendants, Prime Group Realty Trust and Lightstone Group's Motion to Dismiss, the Plaintiffs' Opposition thereto, and the arguments presented by counsel on July 24, 2007, it is this 16th day of August, 2007, by the Circuit Court for Baltimore City, hereby, **ORDERED** that:

(1) For the reasons stated in this Court's Memorandum Opinion, Defendants' motion be, and the same hereby is **GRANTED** with prejudice and without leave to amend; and it is further **ORDERED** that:

(2) All costs associated with this appeal be, and the same are, hereby assessed against the plaintiffs.

August 16, 2007
Date

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Stuart R. Berger
Judge, Circuit Court for Baltimore City

cc: All Counsel of Record