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HOWARD B. SILBERBERG, et al., Plaintiffs, v. JOANNE S. BECKER, et al., Defendants.

Case No.: 2014 CA 005970 B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

2016 D.C. Super. LEXIS 7

May 27, 2016, Decided

COUNSEL: [*1] For Plaintiffs: Mark P. Friedlander, Jr., Esq., Friedlander, Friedlander & Earman, P.C., McLean, VA.

For Becker and Tacchetti, Defendants: Stephen D. Charnoff, REES BROOME, PC, Vienna, VA.

For Phoenix Tenants' Association, Inc. and New Beginnings Tenants' Association, Inc., Defendants: Eric M. Rome, Esq., Eisen & Rome, P.C., Washington, DC.

JUDGES: MICHAEL K. O'KEEFE, D.C. SUPERIOR COURT JUDGE.

OPINION BY: MICHAEL K. O'KEEFE

OPINION

ORDER

Before the Court are two motions to dismiss filed by Defendants Joanne S. Becker, Brian C. Becker, Robin Tacchetti, and Adam C. Becker (the "Becker Defendants"). The first is *Defendants' Motion to Dismiss Amended Complaint Pursuant to Sup. Ct. Civ. R. 12(b)(6)*, and the second is *Defendants' Motion to Dismiss Amended Complaint as Moot*, both filed on October 29, 2015. Plaintiffs Howard Silberberg, Rachel A. Sulkin, and Jason B. Silberberg ("Plaintiffs") filed their respective oppositions on November 20, 2015. The Becker Defendants filed their respective replies on November 24, 2015.

The *Amended Complaint* brings five counts for declarative and monetary relief against the Becker Defendants and alleges facts as follows. The Becker Defendants together own 52.5% of the issued and outstanding shares of capital [*2] stock of the Shenandoah Corporation ("Shenandoah"), and Plaintiffs together own 47.5%.[1] Shenandoah was formed in 1955 to purchase, manage, and sell real property[2] and as of 2013 held two properties known as the Jefferson Property[3] and the Fifth Street Property[4](collectively, the "Properties"). During 2013, Plaintiffs allege the parties began to disagree about Shenandoah's future: the Becker Defendants wanted to sell the Properties and dissolve the corporation, but Plaintiffs wished to keep the Properties in the corporation to avoid an estimated $900,000 tax consequence.[5] In November 2013, Brian Becker entered a listing agreement with Defendant Allegiance Realty Partners, LLC ("Defendant RE/MAX") on behalf of Shenandoah for sale of the Properties.[6] Around the same time, a stock repurchase agreement (the "Agreement") was drafted between Shenandoah and the Becker Defendants. Plaintiffs allege this Agreement meant to provide the Becker Defendants with quick cash and to honor Plaintiffs' "desire to preserve the corporation in order to continue the ownership of the properties through the corporation."[7] The Agreement was created so that Plaintiffs "would, by virtue of the Agreement[,] become the [*3] 95% owners of Shenandoah."[8] The Agreement "was considered, carefully negotiated with the aid and assistance of the corporation's counsel Stephen Friedman."[9]

1 Am. Compl. ¶ 4-5.

2 Defs.' Mot. Dismiss Moot Ex. 2, at 1.

3 Located at 505 Jefferson St NW, Washington, DC, and known for real estate taxation purposes as Lot 0810 in Square 3208. Am. Compl. ¶ 6.

4 Located at 5400, 5404, and 5408 Fifth Street NW, Washington, DC, and known for real estate taxation purposes as Lot 0849 in Square 3208. *Id.*

5 *Id.* ¶ 13.
6 *Id.* ¶¶ 24, 55. The Court also notes that Plaintiffs voluntarily dismissed Defendant RE/MAX via their praecipe titled *Notice of Dismissal* on November 18, 2015.
7 *Id.* ¶ 14.
8 *Id.* ¶ 44; *see also* ¶ 14 (Plaintiffs "would become the controlling members of the corporation").
9 *Id.* ¶ 14.

On January 15, 2014, a special shareholders meeting was conducted at which Howard Silberberg was re-elected to the board of directors (the "Board") and as president, and Rachel Sulkin was elected as a director and as secretary.[10] On January 16, 2014, the Agreement was signed by Shenandoah and Joanne Becker, Robin Tacchetti, and Adam Becker.[11] On January 28, 2014, Brian Becker sent notification via email of a telephonic shareholders meeting scheduled for January 30, 2014 (the [*4] "2014 telephonic meeting"). At the 2014 telephonic meeting, Joanne Becker was elected as a director; Brian Becker was elected director and then president by the Board; and Robin Tacchetti was elected secretary by the Board. Plaintiffs allege this meeting was improperly conducted because of the improper notice and the fact that only the Becker Defendants participated. Plaintiffs further allege that this meeting was a signal of the Becker Defendants' intent to breach the Agreement, as born out by their subsequent failure to perform.[12]

10 *Id.* ¶ 15.
11 *Id.* ¶ 16.
12 *Id.* ¶¶ 46, 48.

In his purported position as President, Brian Becker further entered agreements to sell the Properties to Defendants Phoenix Tenants' Association, Inc. ("Phoenix") and New Beginnings Tenants' Association, Inc. ("New Beginnings").[13] Brian Becker participated in issuing notices compliant with the D.C. Tenant's Opportunity to Purchase Act (TOPA) to the current tenants to facilitate these sales.[14] In September 2014, Brian Becker also removed $244,572.79 from the corporate bank account with SONA Bank, exposing Shenandoah to tax liability and penalties and fines when outstanding obligations were drawn on the empty account.[15] Dividends were [*5] then issued to the Becker Defendants in the amount of $189,000 and, approximately two months later, to Plaintiffs in the amount of $171,000.[16]

13 *Id.* ¶ 26.
14 *Id.* ¶¶ 25, 40.
15 *Id.* ¶¶ 27, 30-32, 62.
16 *Id.* ¶¶ 27, 30, 32.

On January 28, 2015, "an official annual stockholder meeting" was conducted.[17] According to the minutes of the 2015 annual shareholder meeting and the subsequent 2015 annual Board meeting (collectively, the "2015 annual meetings"), Brian Becker was elected director and president; Joanne Becker was elected director and treasurer; and Robin Tachetti was elected director and secretary.[18] At the 2015 annual shareholders meeting, the shareholders approved by a majority vote the listing agreements with Defendant RE/MAX and the sale agreements with Defendants Phoenix and New Beginnings; to rescind the Agreement; to ratify the 2014 shareholder meeting and subsequent officer elections; and to ratify all actions taken by the Becker Defendants in their director and officer capacities since January 2014.[19] The newly elected Board also ratified all actions taken by the Becker Defendants in their director and officer capacities up to January 26, 2015, the listing and sale agreements, and voted that "Shenandoah's [*6] officers are directed to promptly move forward with the sale of Shenandoah's real property."[20] The Board also voted to deposit the funds withdrawn from the SONA Bank account into a new Bank of America account and to provide director's compensation.[21] Brian Becker began taking an officer's salary of $30,000 per year and Joanne Becker and Robin Tacchetti began taking director's compensation of $15,000 per year.[22]

17 *Id.* ¶ 33.
18 Defs.' Mot. Dismiss Moot Exs. 8, 9.
19 *Id.* at 6-7; Ex. 8.
20 *Id.* at 6; Ex. 9.
21 *Id.* at 9, Exs. 9, 15.
22 Am. Compl. ¶ 33.

Procedurally, this case was dismissed by order of this Court on November 21, 2014, granting the Becker Defendants' original *Motion to Dismiss*, filed October 16, 2014 ("2014 *Order*"). In the 2014 *Order*, the Court dismissed without prejudice Counts I and Counts III-V of the *Complaint*. The Court dismissed Count II with prejudice. Plaintiffs appealed the 2014 *Order* and filed their *Notice of Appeal* on December 8, 2014. Following developments in the case, namely the January 2015 shareholders' meeting and ratification of the complained of actions, the parties represented to the Court of Appeals that appellate review was no longer appropriate and asked that the case be remanded back to this Court. The Court [*7] of Appeals remanded the case on May 18, 2015. At the status hearing on October 2, 2015, Plaintiffs were given leave to amend the complaint, which was filed on October 21, 2015.[23] The Becker Defendants followed with the instant motions to dismiss.

23 Due to technical difficulties with filing, the *Amended Complaint* was not properly before this

Court until November 13, 2015. By *Order* dated November 24, 2016, the Court deemed the *Amended Complaint* properly filed *nunc pro tunc* to October 21, 2015.

Discussion

The Becker Defendants move to dismiss the claims against them under D.C. Superior Court Rule of Civil Procedure 12(b)(6) and on the grounds that the *Amended Complaint* is moot following the properly conducted 2015 annual meetings and ratification of the actions underlying Plaintiffs' claims. Count I alleges Brian Becker illegally acted on behalf of Shenandoah in entering the listing agreement with Defendant RE/MAX and the sales agreements with Defendants Phoenix and New Beginnings. Count II alleges the Becker Defendants breached the Agreement by failing to perform any of their obligations. Count III alleges Joanne Becker breached her fiduciary duties as a director in authorizing Brian Becker as her agent and for the other actions listed. [*8] Count IV similarly alleges Brian Becker breached his fiduciary duties as a director and president. Count V alleges the Becker Defendants breached their fiduciary duties as majority shareholders to Plaintiffs as minority shareholders in taking the above actions. The *Amended Complaint* is nearly identical to the *Complaint* in all respects. In their current pleadings, Plaintiffs have not shown why dismissal of the *Complaint* was improper or that the *Amended Complaint* contains new allegations that survive the present motions to dismiss. For the reasons stated below, the Court therefore grants *Defendants' Motion to Dismiss Amended Complaint Pursuant to Sup. Ct. Civ. R. 12(b)(6)* and *Defendants' Motion to Dismiss Amended Complaint as Moot*.

I. *Defendants' Motion to Dismiss Amended Complaint Pursuant to Sup. Ct. Civ. R. 12(b)(6)*

As a preliminary matter, the Court notes that the addition of Shenandoah as party defendant on November 24, 2015,[24] pursuant to Rule 19, does not resolve Plaintiffs' standing issues. Shenandoah's mere presence does not empower Plaintiffs to advance arguments on Shenandoah's behalf, or provide grounds for Plaintiffs to circumvent the pleading requirements for derivative suits. Plaintiffs have not so argued. Therefore, [*9] the findings and analysis below are not undermined by Shenandoah's presence.

24 This addition was granted by order granting in part, *inter alia*, Plaintiffs' *Motion to Add Party Defendant*, filed October 21, 2015.

A. Standard of Review

A complaint should be dismissed under Rule 12(b)(6) if it does not satisfy the requirement of Rule 8(a) that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief":

> The pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned,
> the-defendant-unlawfully-harmed-me accusation. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Potomac Dev't Corp. v. District of Columbia, 28 A.3d 531, 544 (D.C. 2011) (omitting brackets, ellipses, and quotations from and citations to *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)*, and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007))*. The standard [*10] for evaluating Rule 12(b)(6) motions follows from these principles:

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Potomac Dev't Corp., 28 A.3d at 544 (quoting *Iqbal, 129 S. Ct. at 1950*); *see Papsan v. Allain, 478 U.S. 265, 286 (1986)* ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation."). A complaint should be dismissed only when it is clear be-

yond a doubt that the plaintiff can present no set of facts that would entitle the plaintiff to relief consistent with the allegations.

In the District of Columbia, "[t]he proper interpretation of a contract, including whether a contract is ambiguous, is a legal question[.]" *Abdelrhman v. Ackerman, 76 A.3d 883, 887 (D.C. 2013)*. Under the "objective law" of contracts long followed by this jurisdiction, "the written language embodying [*11] the terms of an agreement will govern the rights and liabilities of the parties [regardless] of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite undertaking, or unless there is fraud, duress, or mutual mistake." *Id.* Without turning a motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56, the Court can consider documents the authenticity of which are not disputed by the parties and that are central to the plaintiff's claim and sufficiently referred to in the complaint. *Hillbroom v. PricewaterhouseCoopers LLP, 17 A.3d 566, 568 n.3 (D.C. 2011)*.

B. Count I: Declaratory and Monetary Relief

Count I of the *Amended Complaint* asks for declaratory and monetary relief on the alleged illegal corporate actions taken by Brian Becker in entering the listing agreement with Defendant RE/MAX, issuing TOPA notices, and entering sales agreements for the Properties with Defendants Phoenix and New Beginnings.[25] Count I of the *Amended Complaint* is essentially identical to Count I of the original *Complaint*.[26] As stated in the 2014 *Order*, the claims that Brian Becker acted improperly on behalf of the corporation belong to Shenandoah and, as such, must be brought derivatively by Plaintiffs. [*12] *Behradrezaee v. Dashtara, et al., 910 A.2d 349, 354 (D.C. 2006)*; *Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95-96 (1991)*. In the District of Columbia, *D.C. Code section 29-305.52* (2013) and Rule 23.1 govern the pleading requirements for a derivative suit and *strictly* require that a complaint must plead with specificity the demand made on the board of directors for the requested relief. Plaintiffs have failed to allege the fulfillment of this condition precedent to filing a derivative suit or that such demand was futile in the *Amended Complaint*.[27] Therefore, Count I is dismissed with prejudice.

25 *Id.* ¶¶ 24, 26, 40.

26 The *Amended Complaint* deleted some information in the original *Complaint* alleging that Brian Becker acted against Howard Silberberg's specific instructions when he signed the listing agreement and the January 28, 2014 email notification of the January 30, 2014 telephonic meeting. Compl. ¶¶ 27, 28. The general thrust of these allegations survive in the *Amended Complaint*. The only new language states that the Becker Defendants' approval of Brian Becker's actions constituted "their own breach of the Agreement." Am. Compl. ¶ 39. This reference to the alleged breach of the Agreement does not create a substantive legal claim in Count I and the Court addresses the alleged breach in Count II.

27 The Becker Defendants argue that the District [*13] of Columbia no longer recognizes demand futility following the passage of *section 29-305.52* in 2011. Plaintiffs did not respond to this argument in their *Opposition*. The Court notes that it is uncertain whether demand futility survives the passage of the statute: there does not appear to have been a demand statute in the D.C. Code prior to its passage, and the leading cases on demand issued prior to 2011 do not reference a statutory basis for demand. *See D.C. CODE § 29-101.01, et seq.; Behradrezaee, 910 A.2d at 354-56*. The Court of Appeals has not yet determined the impact of *section 29-305.52* on our jurisdiction's demand law. Because Plaintiffs have failed to meet the pleading requirements by alleging they made a demand on the Board or demand would be futile, the Court does not need to reach the merits of this issue.

C. Count II: Breach of Contract

Count II of the *Amended Complaint* seeks specific performance of the Agreement between Shenandoah and the Becker Defendants for the resale of the Becker Defendants' shares to the corporation. The 2014 *Order* dismissed *with prejudice* Count II of the original *Complaint* because based on the language of the contract, Plaintiffs could not establish they were the intended beneficiaries of the Agreement. The 2014 *Order* has not been vacated by [*14] this Court or the Court of Appeals and therefore continues to bar Plaintiffs from bringing a claim based on their alleged standing as intended beneficiaries.

Even if Plaintiffs were not barred, however, Count II would still be dismissed with prejudice. The *Amended Complaint* adds additional background information on the formation of the Agreement in an attempt to state a colorable claim. Plaintiffs allege that the Agreement was carefully negotiated to resolve the parties' disagreement about whether Shenandoah should keep or sell the Properties. The Agreement was created as a stock repurchase agreement so that Plaintiffs "would, by virtue of the Agreement become the 95% owners of Shenandoah."[28] To emphasize that Plaintiffs were the intended beneficiaries, the *Amended Complaint* repeats phrases such as "to benefit the Silberbergs,"[29] and that "the intended and direct beneficiaries were all of the Silberbergs[.]"[30]

28 Am. Compl. ¶ 44; *see also* ¶ 14 ("would become the controlling members of the corporation").
29 *Id.* ¶ 14
30 *Id.*; *see also* ¶ 47.

Without reproducing the entirety of this Court's 2014 *Order*, the Court adopts that analysis and reiterates that Plaintiffs have standing only if they are in privity of [*15] contract or third party beneficiaries of the contract. *See Fort Lincoln Civic Assoc., Inc. v. Fort Lincoln New Town Corp., Inc., 944 A.2d 1055, 1064 (D.C. 2008)*. Plaintiffs have not alleged that they are in privity of contract, but that they are intended third-party beneficiaries. "[S]pecifically, in order to make a shareholder a third party beneficiary, the contract must express the intent of the promissor to benefit the shareholder *personally, independently of his or her status as a shareholder*." *Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002)* (emphasis added). Plaintiffs have not identified any provision of the Agreement that expressly or implicitly references them personally or as shareholders. They argue in their O*pposition* that intent to benefit a third party may be adduced even if not expressly stated in the contract. *See Fort Lincoln Civic Assoc. Inc., 944 A.2d at 1066*. However, our Court of Appeals has repeatedly demonstrated that the primary consideration in determining whether a party is an intended beneficiary is to look at the language of the contract.[31] Plaintiffs have not presented any argument to show that the Court may rely on discussion during contract formation alone to create intended beneficiary status. Plaintiffs' very description of the mechanism by which they would obtain control of the corporation--through owning 95% of the outstanding shares of the corporation--further [*16] supports that Plaintiffs would only benefit in their position as shareholders. As a result, Plaintiffs are at most incidental beneficiaries and do not have standing to seek performance of the Agreement.[32] Therefore, Count II is dismissed with prejudice.

31 *See, e.g., A.S. Johnson Co. v. Atlantic Masonry Co., 693 A.2d 1117, 1123 (D.C. 1997)* ("While Johnson was not specifically named as such in the Sigal-Atlantic contract, Johnson fell within a specifically named and designated class of 'subcontractors' that clearly were to benefit from the indemnification agreement."); *Western Union Tel. Co. v. Massman Constr. Co., 402 A.2d 1275, 1277 (D.C. 1979)* (the construction contract stated the parties would perform as to keep existing utilities in operation and to repair at its expense all damage to utilities caused by its work, and created a category of intended beneficiaries including those utility companies whose cables, wires, etc., ran through the subject real property); *Moran v. Audette, 217 A.2d 653, 654 (D.C. 1966)* (finding the contract contemplated a broker as an intended beneficiary, because the only party entitled to the referenced commission was a broker).
32 *See Fort Lincoln Civic Association, 944 A.2d at 1065* (citation omitted) ("incidental beneficiar[ies] [who] acquire[] by virtue of the promise no right against the promisor or promise.").

D. Count III: Breach of Fiduciary Duties by Joanne Becker

Count III of the *Amended Complaint* alleges that Joanne [*17] Becker, as a Director of Shenandoah until January 15, 2014, and thereafter to the extent she holds herself out as a director, violated her fiduciary duties to Shenandoah and its shareholders. Again, the substance of this count is nearly identical to Count III of the original *Complaint*[33] and includes no specific facts as to what actions Joanne Becker took that disregarded Shenandoah's or its shareholders' best interests. Count III merely states that she participated in the actions "of Defendants Becker and Tacchetti,"[34] which presumably include the actions described elsewhere in the Amended Complaint: the election of directors and officers in 2014; authorizing Brian Becker's actions as her agent (the substance of which are discussed regarding Count IV below); and authorizing the issuance of director and officer compensation after the 2015 Board meeting.

33 Count III of the *Amended Complaint* deleted language present in the original *Complaint* about how Joanne Becker was improperly controlled by her husband, Benton Becker.
34 Am. Compl. ¶ 58.

In the District of Columbia, controlling shareholders have a fiduciary duty "to deal fairly, honestly, and openly with their fellow stockholders and to make disclosure [*18] of all essential information." *Town Ctr. Mgmt. v. Chavez, 373 A.2d 238 (D.C. 1970)*. As stated in the 2014 *Order*, however, Count III fails to articulate specific actions taken by Joanne Becker that breached her fiduciary duties to Plaintiffs or how such breach proximately caused Plaintiffs' damages. *See Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 325 (D.C. 2008)* ("for the owners to state a claim for breach of fiduciary duty upon which relief could be granted, it was necessary for them to allege some action on the part of the foreclosure trustees that violated a duty conferred on the trustees by the trust instrument or the foreclosure statute."); *Randolph v. ING Life Ins. & Annuity Co., 973 A.2d 702, 709 (D.C. 2009)* ("[B]reach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby"); *see also Armenian Genocide Museum*

& Mem'l, Inc. v. Cajesjian Family Foundation, Inc., 607 F. Supp. 2d 185, 191 (D.D.C. 2009) (interpreting D.C. law) (listing the factors for a breach of fiduciary duty claim). Nor have Plaintiffs argued how such actions overcome the protection of the business judgment rule, which presumes that corporate directors make business decisions "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." *Behradrezaee, 910 A.2d at 361*.

To the extent that Plaintiffs's additional paragraphs in the factual recital of the *Amended Complaint* challenge Joanne Becker's participation in the allowance [*19] of director and officer compensation following the 2015 annual shareholders meeting, they also fail to state a claim. Pursuant to Shenandoah's By-Laws, directors may receive compensation and officers may be salaried.[35] Plaintiffs argue such compensation is unnecessary because Shenandoah pays a property management company to manage its properties and directors and officers do not do enough work to need compensation.[36] This argument does not show how Joanne Becker's alleged approval of the decision to provide compensation constituted a breach of fiduciary duty, proximately caused damage to Plaintiffs, or undermines the protection of the business judgment rule. Furthermore, to the extent Count III claims Joanne Becker breached her fiduciary duties to Shenandoah, Plaintiffs do not have standing to bring such claims on behalf of Shenandoah, as stated above on Count I. Plaintiffs state they are owed fiduciary duties as minority shareholders in their opposition, but do not address this standing issue. As a result, Count III is dismissed with prejudice.

35 "By resolution of the Board of Directors, each Director may be paid his expenses, if any, of attendance at each meeting of the Board of Directors, [*20] and may be paid a stated salary as director or a fixed sum for attendance at each meeting of the Board of Directors or both. No such payment shall preclude any director from serving the corporation in any other capacity and receiving compensation therefor." Pls.' Opp'n Moot Ex. G, art. III § 10. "The salaries of the officers shall be fixed from time to time by the shareholders and no officer shall be prevented from receiving such salary by reason of the fact that he is also a director of the corporation." *Id.*, art. IV § 9.

36 Am. Compl. ¶ 33.

E. Count IV: Breach of Fiduciary Duties by Brian Becker

Count IV of the *Amended Complaint* similarly alleges that Brian Becker violated his fiduciary duties to Shenandoah and its shareholders and is nearly identical to Count IV of the original Complaint.[37] The specific actions incorporated by reference into Count IV include: the election of directors and officers in 2014; signing the listing and sale agreements; issuing TOPA notices; removing funds from the SONA Bank account and issuing dividends; and authorizing the issuance of director and officer compensation after the 2015 annual Board meeting.

37 Count IV of the *Amended Complaint* deleted language present in the [*21] original *Complaint* about how Brian Becker was improperly controlled by his father, Benton Becker and added language about how Brian Becker and the other Beckers breached statutory and common law fiduciary duties to their fellow shareholders. *Id.* ¶ 61. This new statement essentially replicates the cause of action in Count V and is addressed below.

This count fails to state a claim for the same reasons stated above for Count III and in the 2014 *Order*. Plaintiffs fail to articulate how Brian Becker's actions constitute violations of his fiduciary duties or proximately caused their damages. Similarly, they fail to demonstrate that his actions undermine the protection of the business judgment rule. There is nothing inherent in the acts of issuing dividends at different times to Plaintiffs and the Becker Defendants,[38] withdrawing funds from one bank account and depositing them in a new account, incurring some amount of penalties and fees from withdrawal attempts on an empty bank account,[39] or considering incurring a $900,000 tax liability from the originally contemplated sale of the Properties[40] that constitutes poor business judgment. Nothing in these bald allegations argue that the actions were [*22] against the best interests of Shenandoah or its shareholders, and thus does not destroy the directors' protection under the business judgment rule. To the extent that these claims belong to Shenandoah, Plaintiffs do not have standing to bring them. Therefore, Count IV is dismissed with prejudice.

38 *Id.* ¶ 32.
39 *Id.* ¶ 31.
40 *Id.* ¶ 19.

F. Count V: Breach of Fiduciary Duties by Majority Shareholders

Count V of the *Amended Complaint* alleges "Defendants Becker and Tacchetti, as owners of the majority to [sic] the issued and outstanding shares of Shenandoah, had and have fiduciary duties" which they breached by acting "knowingly, willfully, outrageously, oppressively and in disregard of Plaintiffs' rights as minority share-

holders of Shenandoah."[41]"As a direct and proximate result . . . Plaintiffs have been financially damaged."[42] This count is identical to Count V of the original *Complaint* and is dismissed for the same reasons as stated in the 2014 *Order*: like in Counts III and IV, this assertion is bare and conclusory, unsupported by any factual allegations, and therefore cannot be sustained. Count V is dismissed with prejudice.

41 *Id.* ¶¶ 68-69.
42 *Id.* ¶ 70.

II. *Defendants' Motion to Dismiss Amended Complaint as* [*23] ***Moot***

Even if the *Amended Complaint* were not dismissed under Rule 12(b)(6), it would be dismissed on mootness grounds. The Becker Defendants argue in their *Motion to Dismiss Amended Complaint as Moot* that the *Amended Complaint* is moot following the properly conducted 2015 annual shareholders meeting and subsequent annual Board meeting at which it was voted to rescind the Agreement, ratify the listing and sale agreements, open a new bank account with Bank of America, and generally ratify the Becker Defendant's past actions.[43] Plaintiffs have not challenged the propriety of the 2015 annual meetings in their *Amended Complaint* or oppositions.[44]

43 Defs.' Mot. Dismiss Moot Exs. 8, 9, 15.
44 The Court notes that Plaintiffs' *Opposition* to the motion to dismiss as moot is disorganized and does not address the issue of the effect of the 2015 annual meetings. Instead, Plaintiffs conclusorily state they are intended beneficiary to the Agreement, that rescission of a contract cannot happen after intended beneficiaries have brought suit, and citations to the D.C. code and case law on fiduciary duties without detailed analysis of how the Becker Defendants breached such duties.

Our Court of Appeals has defined mootness as "the [*24] doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Rotunda v. Marriott Int'l, Inc., 123 A.3d 980, 983 (D.C. 2015)* (*citing United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980)*).[45] On these grounds, the *Amended Complaint* is moot to the extent it argues the Becker Defendants acted without proper Board approval, and then such action was ratified at the 2015 annual meetings.[46]

45 "Although we, unlike the federal courts, are not bound by the 'case or controversy' requirement of Article III of the Constitution, we have adopted this requirement for prudential reasons, and therefore we will not normally decide questions that have become moot." *District of Columbia v. Grp. Ins. Admin., 633 A.2d 2, 12 (D.C. 1993)* (quoted favorably in *Bradley v. District of Columbia, 107 A.3d 586, 601 (D.C. 2015)).*
46 Any actions taken by the Board or officers after the 2015 annual meetings-i.e., the issuance of director and officer compensation--are not reached by this motion.

Ratification is grounded in agency law and generally defined as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *RESTATEMENT (SECOND) OF AGENCY § 82* (AM. LAW INST. 2010); *see also Lewis v. Washington Metro. Area Transit Auth., 463 A.2d 666, 672 n.12 (D.C. 1983)* (citing the 1958 version of the Restatement [*25] (Second) for this proposition). An act can only be ratified if the principal could have authorized such an act at the time it occurred. *RESTATEMENT (SECOND) OF AGENCY §§ 82(e), 84*. Therefore, the Court looks at the general grants of corporate authority in the D.C. Code and Shenandoah's Articles of Incorporation and By-Laws to determine whether the Board would have had the authority to authorize the actions in question at the time they were taken.[47]

47 This analysis does not consider whether the Board at the time was *actually* properly elected, but whether the Board as an entity had power to take the respective actions as of January 2014.

Under the D.C. Code, all corporate power is vested in a board of directors. *D.C. CODE § 29-306.01* (2011) ("the corporation shall be managed by or under the direction, and subject to the oversight, of its board"). The powers of a board of directors are generally delineated in the articles of incorporation and By-Laws. Officers are empowered by the By-Laws and as "prescribed by the board of directors[.]" *D.C. CODE § 29-306.41* (2011). According to Shenandoah's Articles of Incorporation, the corporation was formed with the purpose "to buy, sell, rent, mortgage or improve real property" and carry on related business.[48] Under Shenandoah's By-Laws, the corporation is to be managed by the Board.[49] The president is the principal executive officer of the corporation [*26] and empowered to sign contracts that the Board has authorized to be executed,[50] though either the By-Laws or the Board may delegate signatory authority to another officer or agent of the corporation.[51]

48 Defs.' Mot. Dismiss Moot Ex. 2, at 1.

49 "The business and affairs of the corporation shall be managed by its Board of Directors." Pls.' Opp'n Moot Ex. G, art. III § 1.

50 The president "may sign, as authorized by the Board of Directors, contracts, or other instruments which the Board of Directors has authorized to be executed[.]" Pls.' Opp'n Moot Ex. G, art. IV § 5

51 "[E]xcept in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors or by these By-Lawss to some other officer or agent of the corporation[.]" *Id.* "The Board of Directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation, and such authority may be general or confined to specific instances." *Id.*, art. V § 1.

Based on the above, Count I challenging Brian Becker's actions regarding the listing agreement and sale agreements and issuing TOPA notices is dismissed as moot. Brian Becker entered the listing [*27] agreement with Defendant RE/MAX and issued TOPA notices in his capacity as an agent of Joanne Becker, and the sales agreements with Defendants Phoenix and New Beginnings in his capacity as purported president. The Board could have authorized these actions at the time they were taken because they clearly fall within the corporate purpose to engage in the sale of real property and were signed by the purported president or an agent of the corporation. Therefore, subsequent ratification at the 2015 annual meetings was proper and Count I of the *Amended Complaint* is dismissed as moot.

Count II is similarly dismissed as moot. Plaintiffs seek specific performance of the Agreement between Shenandoah and the Becker Defendants for the resale of the Becker Defendants' shares to the corporation. Plaintiffs argue in their opposition that rescission of a contract may not occur once an intended beneficiary has raised a claim under the contract, such as filing a law suit.[52] However, Plaintiffs do not have standing to enforce the Agreement as intended beneficiaries,[53] and rescission of the Agreement is not barred by their present suit. As the manager of Shenandoah, the Board is empowered rescind contracts [*28] it has previously entered on behalf of the corporation. The majority shareholder and Board votes to rescind the contract were therefore proper, and Count II is dismissed as moot.

52 Pls.' Opp'n Moot, at 3-4.

53 *See supra p. 10.*

Counts III, IV, and V are also dismissed as moot. Counts III and IV allege that Joanne Becker and Brian Becker breached their fiduciary duties as directors and officers by approving and take the actions described above. However, the Becker's actions in their corporate capacities have been properly ratified. Specifically, the Court finds that any cause of action based on the alleged impropriety of the 2014 telephonic meeting are mooted by the results of the valid 2015 annual meetings. As stated above on Count I, Brian Becker's actions in signing the listing and sales agreements and issuing TOPA notices were properly ratified. Additionally, Brian Becker's withdrawal of Shenandoah's money from the SONA Bank account was properly ratified because officers and agents can be authorized to withdraw funds via check,[54] and the Board voted to deposit the funds into the new Bank of America account in accordance with their power under the By-Laws.[55] Similarly, the Board is empowered to issue dividends [*29] from time to time.[56] These actions were all individually taken or ratified by the majority shareholder vote or by the Board at the 2015 annual meetings. And both the majority of shareholders and the Board voted to generally ratify all actions taken by the Becker Defendants.[57] In light of the Board's clear authority to take the actions described above, and the fact that the Board properly ratified each action at the 2015 annual Board meeting, Counts III and IV are subsequently denied as moot.

54 "All checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors." Pls.' Opp'n Moot Ex. G, art. 5 § 3.

55 "All funds of the corporation not otherwise employed shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositaries as the Board of Directors may select." *Id.*, art. 5 § 4; Defs.' Mot. Dismiss Moot, at 9, Ex. 9.

56 "The Board of Directors may from time to time declare, and the corporation may pay, dividends [*30] on its outstanding shares in the manner and upon the terms and conditions determined by the Board of Directors." Pls.' Opp'n Moot Ex. G, art. VIII.

57 Defs.' Mot. Dismiss Moot Exs. 8, 9.

Count V alleges the Becker Defendants breached their fiduciary duties as majority shareholders to Plaintiffs as minority shareholders based on all the actions alleged above. As stated above, the *Amended Complaint* does not provide any information on how the Becker Defendants' actions violate such fiduciary duties or proximately caused Plaintiffs damage. To the extent that the *Amended Complaint* argues the Becker Defendants'

violated their fiduciary duties as majority shareholders by taking corporate action without proper authority--i.e., because the 2014 telephonic meeting resulted in improper elections, this count seeks remedy for the same actions considered above and is also dismissed as moot.

WHEREFORE, it is this 27th day of May 2016, hereby

ORDERED, that *Defendants' Motion to Dismiss Amended Complaint Pursuant to Sup. Ct. Civ. R. 12(b)(6)* is **GRANTED**, and it is further

ORDERED, that *Defendants' Motion to Dismiss Amended Complaint as Moot* is **GRANTED**, and it is further

ORDERED, that the Amended Complaint is **DISMISSED WITH PREJUDICE** [*31] .

SO ORDERED.

/s/ Michael K. O'Keefe

MICHAEL K. O'KEEFE

D.C. SUPERIOR COURT JUDGE