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IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

IN RE DOLLAR GENERAL	)	Master Docket No. 07MD1
	)	
	)	(Consolidated Action)
	)	
	)	Judge Brothers

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DOLLAR GENERAL AND THE DIRECTORS' MOTION FOR JUDGMENT ON THE PLEADINGS

Copy

Table of Contents

Page

INTRODUCTION 1

STATEMENT OF PLED FACTS 4

ARGUMENT 9

I. The Business Judgment Rule Applies Here And Requires Dismissal Of The Complaint 10

II. Plaintiffs Have Not Pled A Duty Of Loyalty Claim 11

III. Plaintiffs Have Not Pled A Duty Of Disclosure Claim 13

A. Lehman's Fee Structure And Its Role In The Transaction 15

B. The Date On Which Lazard's Agreement Was Reached 16

C. Lazard's Financial Analysis 16

1. Lazard's Hypothetical Project Alpha Numbers 18

2. Lazard's Draft December 2006 DCF Analysis 19

3. The Basis and Assumptions Underlying Lazard's Extrapolated Projections 21

D. KKR's Post-Closing Plans For Dollar General 22

IV. Plaintiffs Have Not Pled A Duty of Care Claim 23

A. The 99% Shareholder Vote In Favor Of The Transaction Extinguished Any Duty of Care Claims 23

B. Plaintiffs Have Not Alleged That The Directors Acted Unreasonably, Much Less Were Grossly Negligent 24

C. The Exculpatory Provision In Dollar General's Charter Bars Plaintiffs' Duty Of Care Claims 28

V. Dollar General Cannot Aid and Abet Its Own Directors' Purported Breaches 29

CONCLUSION 30

Copy

Table of Authorities

Cases

Abrons v. Marée, 911 A.2d 805 n.18 (Del. Ch. 2006) 23

Arnold v. Soc'y for Sav. Banc., 650 A.2d 1270 (Del. 1994) 16

Bayberry Assocs. v. Jones, 783 S.W.2d 553 (Tenn. 1990) 12

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (U.S. 2007) 9, 11

BHC Communs. S'holder Litig., 789 A.2d 1, 10 (Del. Ch. 2001) 24

Burnett v. Tyco Corp., 932 F. Supp. 1039 (W.D. Tenn. 1996) 9

Cherokee Country Club v. City of Knoxville, 152 S.W.3d 466 (Tenn. 2004) 4, 9

Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134 (Del. Ch. 1994) *aff'd* 569 A.2d 53 (Del. 1989) 26

Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53 (Del. 1989) 25

City of Pontiac Gen. Employees' Ret. Sys. v. Thomas Nelson, No. 06-501-I(III) (Tenn. Ch. May 4, 2007) .... passim

Emerald Partners v. Berlin, 1995 WL 600881 (Del. Ch. Sept. 22, 1995), *rev'd on other grounds*, 726 A.2d 1215 (Del. 1999) 30

Globis Partners, L.P. v. Plumtree Software, Inc., 2007 WL 4292024 (Del. Ch. Nov. 30, 2007) 16, 17, 20, 21

Goodwin v. Live Entm't, Inc., 1999 WL 64265 (Del. Ch. 1999), *aff'd*, 741 A.2d 16 (Del. 1999) 19, 28

Hall v. Tennessee Dressed Beef Co., 1996 WL 355074 (Tenn. Ct. App. June 28, 1996) *rev'd in*

Copy

part on other grounds by 957 S.W.2d 536 (Tenn. 1997) 24

Hayes v. Schweikart's Upholstering Co., 55 Tenn. App. 442, 402 S.W.2d 472 (Tenn. Ct. App. 1965) 30

Herd v. Major Realty Corp., 1990 WL212307 (Del. Ch. Dec. 21, 1990) 26

Holmes Financial Assoc., Inc. v. Jones, 1991 WL 263870 (Tenn. Ct. App. Dec. 18, 1991) 30

In re CheckFree Corp. S'holders Litig., 2007 WL 3262188 (Del. Ch. Nov. 1, 2007) 17, 22

In re KDI Corp. S'holder Litig., 1990 WL 201385 (Del. Ch. Dec. 13, 1990) 26

In re Lukens Inc. S'holders Litig., 757 A.2d 728 (Del. Ch. 1999) 24, 29

In re MONY Group Inc. S'holder Litig., 852 A.2d 9 (Del. Ch. 2004) 26

In re PNB Holding Co. S'holders Litig., 2006 WL 2403999 (Del. Ch. Aug. 18, 2006) 17

In re Pure Resources, Inc. S'holders Litig., 808 A.2d 421 (Del. Ch. 2002) 16

In re Transkaryotic Therapies, Inc., Civ. A. No., 2008 WL 2462767 (Del. Ch. June 19, 2008) 12, 14, 29

In re Wheelabrator Techs., Inc. S'holder Litig., 663 A.2d 1194 (Del. Ch. 1995) 23

Indiana State Dist. Council of Laborers and HOD Carriers Pension Fund. v. Brukardt, No. 05-1302-II, slip op. at 2 (Tenn. Ch. Aug. 27, 2007) .... passim

Malpiede v. Townson, 780 A.2d 1075 (Del. 2001) 28

McCarthy v. Middle Tenn. Elec. Membership. Corp., 466 F.3d 399 (6th Cir. 2006) 12

McMillan v. Intercargo Corp., 768 A.2d 492 (Del. Ch. 2000) .... passim

Copy

Memphis Health Ctr., Inc. ex rel. Davis v. Grant, 2006 WL 2088407 (Tenn. Ct. App. July 28, 2006) 10

O'Reilly v. Transworld Healthcare, Inc., 745 A.2d 902 (Del. Ch. 1999) 25

Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002) 12

Ramage v. Logan's Roadhouse, Inc. et. al., No. 99-90-III (Tenn. Ch. Davidson County Feb. 2, 1999) 14

Rosser v. New Valley Corp., 2000 WL 1206677 (Del. Ch. Aug. 15, 2000) 20

Skeen v. Jo-Ann Stores, Inc., 750 A.2d at 1172 (Del. 2000) 19, 23

Toys R' Us S'holder Litig., 877 A.2d 975 (Del. Ch. 2005) 25, 27

Yanow v. Scientific Leasing, Inc., 1988 WL 8772 (Del. Ch. Feb. 5, 1999) 26

Statutes

17 CFR 229.1015(a), (b) 15

Tenn. Code Ann. § 48-12-102(b)(3) 29

Tenn. Code. Ann. § 48-18-302(a)(1) 13

Tennessee Rule of Civil Procedure 12.03 1

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Defendants Dollar General Corporation and its former Directors[1] submit this Memorandum of Law in support of their Motion for Judgment on the Pleadings pursuant to Tennessee Rule of Civil Procedure 12.03, dismissing Plaintiffs' Consolidated Class Action Complaint with prejudice for failure to state a claim upon which relief can be granted. This motion is properly before the Court as Plaintiffs' deadline for making any further amendments to the Complaint passed on June 2, 2008.

INTRODUCTION

On March 12, 2007, Dollar General announced that, subject to shareholder approval, it would be acquired by affiliates of Defendant Kohlberg Kravis Roberts & Co. L.P. for $22 a share – a 31% premium for shareholders. The eleven members of Dollar General's Board of Directors unanimously approved and recommended the transaction. None of the Directors had any relationship (financial or otherwise) with KKR. Nine of the eleven Directors were entirely unaffiliated with management, and all of the Directors owned shares of Dollar General, aligning their interests directly with those of the public shareholders. The Board reached its opinion at the conclusion of its intensive review process that included four bidders. Dollar General formed a strategic planning committee to consider strategic alternatives and retained independent legal and financial advisors as part of its review. The Board, committee and advisors met repeatedly to study and review the process. In the end, Dollar General's financial advisor concluded that KKR's offer exceeded the present value of Dollar General's potential future stock price, even with optimistic assumptions, and was fair to shareholders.

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[1] David A. Perdue, David L. Beré, Dennis C. Bottorff, Barbara L. Bowles, Reginald D. Dickson, E. Gordon Gee, Barbara M. Knuckles, J. Neal Purcell, James D. Robbins, David M. Wilds, and Richard E. Thornburgh.

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Within hours of the March 12 announcement, the first of these lawsuits challenging the transaction was filed in this Court by law firms purporting to represent Dollar General shareholders.[2] Plaintiffs, who collectively held less than 0.016% percent of Dollar General's then outstanding shares, sought on June 9, 2007 to enjoin the shareholder vote and deny thousands of shareholders the opportunity to decide for themselves whether to accept KKR's $22 per share cash offer. One of Plaintiffs' principal arguments was that the disclosures in the May 21, 2007 Proxy Statement were incomplete and misleading – essentially the same claim they continue to pursue today.

At the hearing on June 13, 2007, this Court denied Plaintiffs' motion, concluding that:

> First . . . Plaintiffs have failed to demonstrate irreparable harm. . . . Second, as for a demonstration of a likelihood of success on the merits, Plaintiffs have not clearly shown a likelihood of success. . . . Third, in balancing the harm of granting the injunction against the harm of not granting the injunction, the Court finds it is a significant factor that granting an injunction at this point in time could result in the loss of millions of dollars by the shareholders for the time value of money [and] add risk to the proposed transaction. . . . Fourth, the Plaintiffs have not demonstrated that it is necessary to issue the Temporary Injunction in order to protect any public interest.

Order dated June 26, 2007 at 2 (filed herewith).

On June 21, 2007, ***99%*** of Dollar General's voting shareholders voted in favor of the transaction. With this overwhelming support, the transaction closed on July 6, 2007.

While not necessary for the purposes of deciding this motion, events following shareholder ratification of the transaction re-affirm the virtual unanimous judgment that KKR's offer of $22 per share was a very good deal for the public shareholders of Dollar General. In Summer 2007, the national economy encountered an unprecedented credit crisis and significant

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[2] Plaintiff firms have filed similar litigation throughout the country virtually every time a change-of-control transaction involving a public company is announced.

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downturn that continues to this day. As a result, in the last 12 months, several transactions similar to KKR's acquisition of Dollar General have been withdrawn completely or re-priced lower, often after expensive litigation.[3] . Had this Court enjoined the shareholder vote, as Plaintiffs asked it to do, the result likely would have been the loss of, or very significant reduction in, the $22 in cash per share (plus the time value of that money) received by Dollar General's former shareholders.

On June 22, 2007, the day after the transaction was approved by 99% of voting shareholders, Plaintiffs filed the present Complaint. The crux of the Complaint is the implausible allegation that the Directors (all of whom owned Dollar General shares) were willing to risk their reputations and legal liability by knowingly approving an inadequate transaction for the benefit of KKR, a firm with whom none of the Directors had any involvement or financial interest. Each of Plaintiffs' claims is based on this flawed premise and each claim is facially deficient.

First, Plaintiffs have not pled facts that rebut the business judgment rule's presumption in favor of actions taken by directors of a Tennessee corporation.

Second, the duty of loyalty claims must be dismissed because Plaintiffs have not pled facts that show the Board's approval of the transaction resulted from bad faith or disloyal conduct.

Third, the Complaint does not plead that the Proxy Statement contained even a single material misstatement or omission that injured the putative class.

Fourth, the duty of care claims must be dismissed because any duty of care claims were extinguished by the 99% shareholder vote in favor of the transaction. Further, Plaintiffs have not

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pled facts that show that the Board's decision was the result of gross negligence. In any event, such claims are expressly precluded by Dollar General's charter.

Finally, the aiding and abetting claim against Dollar General fails because a shareholder may not pursue a claim against a corporation for aiding and abetting its own directors' alleged breaches of fiduciary duty.[4]

STATEMENT OF PLED FACTS

Dollar General, a Tennessee corporation, is a discount retailer with approximately 8,000 stores in 35 states. Compl. ¶ 19; Proxy Statement at 11.[5] At all relevant times prior to the announcement of the transaction, nine of the eleven members of the Dollar General Board were non-management directors (Dennis C. Bottorff, Barbara L. Bowles, Reginald D. Dickson, E. Gordon Gee, Barbara M. Knuckles, J. Neal Purcell, James D. Robbins, David M. Wilds, and Richard E. Thornburgh) and only two were members of management (David A. Perdue, David L. Beré). Compl. ¶¶ 20-30.

Late 2006 Expressions of Interest and Dollar General's Institution of a Process to Consider Potential Strategic Matters.

During the latter half of 2006, private equity firms and investment banks contacted Dollar General about a possible transaction. Compl. ¶¶ 49, 59; Proxy Statement at 15. Dollar General

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4 Defendant KKR has filed a separate motion addressing Plaintiffs' aiding and abetting claims as to it.

5 The Proxy Statement (filed herewith) is incorporated by reference into the Complaint, *see, e.g., Compl.* ¶ 1, and, pursuant to Rule 10.03 of the Tennessee Rules of Civil Procedure, "shall be a part of the pleading for all purposes" and the Court may consider it on a motion to dismiss. *See Cherokee Country Club v. City of Knoxville*, 152 S.W.3d 466, 478 (Tenn. 2004) (holding documents referenced in plaintiff's complaint may be considered on a motion to dismiss); *Ind. State Dist. Council of Laborers and HOD Carriers Pension Fund v. Brukardt*, No. 05-1302-II, slip op. at 2 (Tenn. Ch. Aug. 27, 2007) (Chancellor McCoy) *appeal docketed* No. M2007-02271-COA-R3-CV (on motion to dismiss court may review Proxy statement incorporated by reference into complaint).

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engaged Lehman Brothers, Inc. to act as financial advisor with respect to strategic alternatives. Compl. ¶¶ 8, 72; Proxy Statement at 15. KKR was one of the firms that expressed an interest in acquiring Dollar General. Compl. ¶¶ 60-61; Proxy Statement at 15.

Shortly thereafter, Dollar General's Board established the Strategic Planning Committee to assist the Board in considering potential strategic matters, including KKR's expression of interest. Compl. ¶ 61; Proxy Statement at 15. The Committee was comprised of four non-management directors: Dennis Bottorff (Chair), Barbara Bowles, Richard Thornburgh and David Beré. Proxy Statement at 15. At the time, Mr. Beré was not employed by Dollar General in a management position. Compl. ¶ 21. The Proxy Statement discloses that Mr. Beré subsequently resigned from the Committee when he was named President and COO of Dollar General to ensure it was composed entirely of non-management directors. Proxy Statement at 15.

The Committee retained experienced independent counsel, attorneys with Wachtell Lipton, for advice on the Directors' legal and fiduciary duties in connection with considering possible strategic transactions. *Id.* The Committee also retained an experienced independent investment banking firm, Lazard, to advise it and the Board. Compl. ¶¶ 9, 73; Proxy Statement at 15.

November 2006 Committee Meetings and Announcement of Project Alpha.

The Proxy Statement discloses that the Committee first met on November 1, 2006 to discuss strategic alternatives available to Dollar General, including Project Alpha, management's plan to improve the profitability of Dollar General. Proxy Statement at 15. In late November 2006, the Board announced the implementation of Project Alpha, and, contemporaneously, the Board and the Committee decided to obtain more formal expressions of interest from potential acquirers. Compl. ¶¶ 53-54; Proxy Statement at 16.

December 2006 Committee Meetings with Equity Firms.

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In December 2006, the Committee and Lazard met separately with KKR and Bain Capital, another leading private equity firm. Both KKR and Bain provided preliminary indications of interest, including price ranges, predicated on confirmatory due diligence. Compl. ¶ 63; Proxy Statement at 16.

January 2007 Board Meeting with Advisors.

The Proxy Statement discloses that in January 2007, the Board met with Lazard and Wachtell to discuss the potential bidders, market considerations and valuation methodologies. Proxy Statement at 16. The Board consulted with its independent advisors as to whether to continue the process and whether to bring in other potentially interested parties and the Board decided to allow KKR and Bain to conduct further due diligence to obtain firm offers. Proxy Statement at 16.

Due Diligence by Equity Firms in Early 2007.

The Proxy Statement further discloses that after the Board's decision, KKR and Bain each brought in an additional private equity firm as a potential partner. Proxy Statement at 16. There were now four firms participating in the diligence process. *Id.* The four firms, their representatives, and their potential financing sources conducted detailed due diligence for several weeks. *Id.*

March 2007 Bid Submission.

On March 9, 2007, KKR submitted its "best and final" offer to acquire all of Dollar General's outstanding shares for $22.00 per share in cash. Compl. ¶¶ 75, 77; Proxy Statement at 16. KKR's $22.00 per share offer exceeded the top of the preliminary range that KKR had indicated in December 2006 by two dollars per share. Compl. ¶ 75; Proxy Statement at 16. Bain and the other two private equity firms involved in the process "were unwilling or unable to submit an offer that would reach" the lower end of the range they previously indicated. Compl. ¶

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7; Proxy Statement at 16. KKR advised the Committee that its offer would be withdrawn if its contents were discussed with third parties. Compl. ¶ 7; Proxy Statement at 16.

Dollar General's Consideration of the Bid in March 2007.

The Proxy Statement discloses that after receiving KKR's offer, the Committee conferred with its advisors on March 9 and recommended that the Board meet the next day to consider the offer. Proxy Statement at 17. Over the next twenty-four hours:

- Dollar General and its counsel and KKR and its counsel negotiated certain terms of the merger agreement and related documents. *Id.*
- the full Board met with Lazard and Wachtell Lipton. *Id.*
- Wachtell Lipton advised the Directors of their legal duties in considering KKR's offer. *Id.*
- the Board discussed the status of Project Alpha initiatives as well as strategic alternatives available to Dollar General and the benefits and risks associated with each. *Id.*
- the Board considered that no other strategic alternatives were immediately available and risked losing KKR's offer if it chose to attempt to identify and pursue such alternatives. *Id.*
- the Board considered the adverse impact Project Alpha had on Dollar General's short-term financial results and the substantial uncertainty of successful execution in the long-term. *Id.* at 17-18.
- the Board considered Lazard's analysis that KKR's $22 per share offer exceeded the present value of Dollar General's stock price, even using optimistic assumptions, and was fair to shareholders. *Id.* at 18.

At the close of the meeting, the Board unanimously agreed to recommend KKR's offer to shareholders for approval. *Id.*

Announcement of the Merger and Plaintiffs' Suit.

On March 11, 2007, Dollar General and KKR entered into a definitive merger agreement subject to shareholder approval. Compl. ¶¶ 7, 80; Proxy Statement at 18. The transaction was announced the following day. Compl. ¶¶ 57, 80. Plaintiffs filed this lawsuit only hours after that

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announcement. Plaintiffs subsequently moved to enjoin the shareholder vote scheduled to approve the merger. In June 2007, this Court rejected Plaintiffs' attempt to prevent the shareholder vote.

The May 2007 Proxy Statement:

On or about May 21, 2007, Dollar General sent to each shareholder a Proxy Statement describing the proposed merger. Among other disclosures, the Proxy Statement included:

- a summary term sheet describing the merger agreement and disclosing the Board's recommendation, Lazard's opinion, the Directors' interests in the merger, the financing for the merger, the so-called "no shop" provision and termination fee, and a comparison of the offer to the market price of Dollar General's stock. Proxy Statement at 1-8.

- a description of the background of the merger, describing in detail KKR's offer and the process Dollar General instituted to evaluate its possible strategic transactions, including Project Alpha. Proxy Statement at 15-20.

- a seven-page description of Lazard's analysis of the merger based on two sets of management projections, including a discounted cash flow analysis of Dollar General's shares of common stock, an analysis of the present value of the future stock price, a comparable company analysis, and a precedent transaction analysis. ***In every analysis Lazard performed, KKR's $22 per share bid exceeded Lazard's top range.*** Proxy Statement at 20-26.

- Dollar General financial information for two different sets of projected future cash flows, an "Alpha Case" and a more optimistic "Alternative Case" for the fiscal years 2007-2009; and Lazard's extrapolated projections for the Alpha Alternative cases for the fiscal years 2010-2011. Proxy Statement at 26-27.

- a copy of Lazard's March 11, 2007 fairness opinion. Proxy Statement at Annex B.

- disclosure of Lazard's fee in connection with its services, including its $10 million contingent fee for the merger. Proxy Statement at 25.

- information on the debt and equity financing of the merger. Proxy Statement at 27-31.

- disclosure of the interests of the Directors in the merger, including a description of equity awards. Proxy Statement at 32-38.

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- a description of the litigation related to the merger, enumerating the alleged claims and explicitly referencing the case number and Court of the instant action. Proxy Statement at 40.
- details of the so-called "no shop" provision whereby KKR would withdraw its bid should Dollar General solicit alternative bids. Proxy Statement at 50-51.
- a description of the $225 million fee payable by Dollar General in the event of termination. Proxy Statement at 58-60.
- the 49-page merger agreement itself. Proxy Statement at Annex A.

Ninety-nine percent of voting Dollar General shareholders voted to approve the transaction at the special shareholder meeting on June 21, 2007. Compl. ¶ 1; Proxy Statement, Notice of Special Meting of Shareholders. On June 22, 2007, Plaintiffs filed their amended Complaint. The Defendants answered the Complaint on July 10, 2007. The deadline for amending pleadings passed on June 2, 2008, and Plaintiffs declined to file an amended complaint prior to that time.

ARGUMENT

The Complaint should be dismissed as it provides nothing more than conclusory allegations and implausible assumptions that fail to state a claim upon which relief can be granted. On a motion for judgment on the pleadings a court should not accept conclusory allegations or unreasonable factual inferences. *See Cherokee,* 152 S.W.3d at 470 ("conclusions of law are not admitted") (citation omitted); *Burnett v. Tyco Corp.*, 932 F. Supp. 1039, 1040 (W.D. Tenn. 1996) (on a motion to dismiss "legal conclusions or unwarranted factual inferences need not be accepted as true"). Moreover, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Where plaintiff's theory of the case does not present a "plausible" ground for recovery, the complaint must be dismissed. *Id.*; *see also Ind. State Dist. Council of Laborers and HOD*

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Carriers Pension Fund. v. Brukardt, No. 05-1302-II, slip op. at 10 (Tenn. Ch. Aug. 27, 2007) (Chancellor McCoy). Plaintiffs' Complaint fails this standard.

I. The Business Judgment Rule Applies Here And Requires Dismissal Of The Complaint

As this Court recognized, "the business judgment rule has been adopted in Tennessee and continues to be followed." Excerpt of Transcript at 89-90 (filed herewith). Tennessee's business judgment rule "posits a powerful presumption in favor of actions taken by the board" and assumes that the "directors of a corporation act on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." *See City of Pontiac Gen. Employees' Ret. Sys. v. Thomas Nelson*, No. 06-501-I(III), slip op. at 2 (Tenn. Ch. May 4, 2007) (Chancellor Lyle), *appeal dismissed* (2008). Accordingly, Tennessee courts follow a "non-interventionist policy" with regard to internal corporate matters and are "reluctant to interfere with the internal workings of corporations or intrude on the managerial responsibilities of directors." *Memphis Health Ctr., Inc. ex rel. Davis v. Grant*, No., 2006 WL 2088407, at *8 (Tenn. Ct. App. July 28, 2006).

Tennessee courts do not hesitate to dismiss claims where a plaintiff's factual allegations challenging a merger transaction do not rebut the presumption of the business judgment rule. In *Thomas Nelson*, Chancellor Lyle was presented with conclusory allegations similar to those here (*i.e.,* that process failures resulted in a transaction that was "unfair" to shareholders, that directors were interested in the transaction and that the board did not provide full disclosure). *See Thomas Nelson*, slip op. at 5-6, 10, 12. Chancellor Lyle found that the board's decision to approve the transaction was protected by the business judgment rule, and, as a result, the decision could not be attacked "absent an irrational sale, waste, a gift or that a person of ordinary sound business judgment could not consider the purchase price fair." *Id.* at 2. Chancellor Lyle dismissed with

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prejudice the complaint because the plaintiff did not allege facts establishing that a majority of the board was interested in the transaction or that the board failed to disclose material facts relating to the transaction which would suggest the shareholder ratification of the transaction was not fully informed. *Id.* at 11, 20, 23. In *Brukardt*, Chancellor McCoy was presented with conclusory allegations similar to those currently before the Court. Chancellor McCoy expressly adopted the legal standards recited by Chancellor Lyle in *Thomas Nelson* and dismissed the plaintiff's claims with prejudice for failure to plead facts rebutting the presumption of the business judgment rule. *See Brukardt*, slip op. at 7, 10, 34.

Plaintiffs' claims fail for the same reasons the claims failed in *Thomas Nelson* and *Brukardt*: the Complaint does not allege facts that show a majority of the Board was interested in the transaction or that the 99% shareholder ratification of the transaction was not fully informed. The justification for dismissal here is even more compelling than in *Thomas Nelson* and *Brukardt* because Plaintiffs' theory is simply implausible. Plaintiffs must plead – then try to prove – that these Directors were deliberately disloyal and intentionally engaged in bad faith misconduct, or that the Directors improperly procured shareholder approval through materially misleading statements, in order to benefit KKR, a private equity firm with whom no Directors are even alleged to have had any involvement. *See* Compl. *generally*. As explained below, Plaintiffs do not and cannot provide a basis for either allegation, thus warranting dismissal of their claim. *See Twombly*, 127 S. Ct. at 1965 (in order to survive a motion to dismiss plaintiffs must plead facts sufficient to provide "plausible grounds to infer" the elements of a claim).

II. Plaintiffs Have Not Pled A Duty Of Loyalty Claim

Plaintiffs have not pled disloyalty on the part of the Board. To overcome the business judgment rule, a plaintiff challenging a merger under a duty of loyalty theory must "demonstrate that a majority of the board . . . was interested in the transaction." *Brukardt*, slip op. at 12;

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accord Thomas Nelson, slip op. at 10 ("The plaintiff, however, must plead facts that a ***majority*** of the Board was interested or lacked independence to avoid application of the business judgment rule.") (citing *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002)) (emphasis added).[6] Plaintiffs have not alleged that a single Director – let alone a majority of the Board – stood on both sides of the transaction nor do they include a single factual allegation suggesting that any of the Directors had financial or even social ties to KKR or its representatives when they approved the transaction. *See* Compl. *generally*. The only interest the Directors had in the transaction was ***as Dollar General shareholders***. Proxy Statement at 34. This interest only served to confirm the Directors' loyalty to Dollar General: "Where the director receives for his stock what other shareholders are receiving . . . the director's interest is aligned with the shareholders to obtain the highest value and is not adverse." *Thomas Nelson*, slip op. at 11; *see also In re Transkaryotic Therapies, Inc.*, 2008 WL 2462767 at *13 (Del. Ch. June 19, 2008) (holding that duty of loyalty claims against directors of a merged corporation were inapplicable as the "normal presumption" is that a shareholder director has "interests that are aligned with the other shareholders" and plaintiffs failed to show that directors were "willing to leave a substantial sum of money on the table . . . simply to rid themselves of [merged corporation].") (internal citations omitted).

Plaintiffs' allegation that Dollar General ***management*** was "given the opportunity to rollover their equity in Dollar General" for equity in the new Dollar General does not save Plaintiffs' claim. Compl. ¶ 67. Out of the eleven Directors, only two – Messrs. Perdue and Beré

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[6] Tennessee courts often look to Delaware law when deciding issues relating to corporate fiduciary duties. *See, e.g, Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 560 (Tenn. 1990); *see also McCarthy v. Middle Tenn. Elec. Membership. Corp.*, 466 F.3d 399, 409 (6th Cir. 2006) ("'Courts of other states consider the decisions of Delaware courts on corporate matters to be instructive.'") (citation omitted).

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– were management.[7] The remaining nine Directors are not alleged to (and did not) have a rollover "opportunity."[8] Thus, even if Plaintiffs had pled that Messrs. Perdue and Beré were interested, the approval of the transaction by the remaining nine directors cured any conflict. *See* Tenn. Code. Ann. § 48-18-302(a)(1), (c) (a conflict of interest transaction is valid if it was approved by a majority of disinterested directors); *see also Brukardt*, slip op. at 13 (applying substantially identical provision under Delaware law).

In any event, the Proxy Statement discloses that no rollover opportunity existed at the time the Board approved the transaction on March 10, 2007 and Plaintiffs do not (and can not) allege otherwise. Even as of May 21, 2007, management had not "entered into any agreement, arrangement or understanding with KKR . . . regarding employment with, or the right to purchase or participate in the equity of, the surviving corporation." Proxy Statement at 37.[9]

As a matter of law (and logic), the Complaint's loyalty allegations fail to state a claim sufficient to overcome the presumption of the business judgment rule.

III. Plaintiffs Have Not Pled A Duty Of Disclosure Claim

To state a disclosure claim, Plaintiffs must do more than allege information was not disclosed – they must plead facts to show "***why*** those missing facts meet the materiality standard and how the omission or misrepresentation caused the injury." *Thomas Nelson*, slip op. at 13. A court will not find information to be *material* unless there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having

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7 The Complaint contains virtually no factual allegations of any kind relating to the nine non-management Directors. *See* Compl. ¶¶ 22-30, 62.

8 Indeed, by approving the transaction the non-management directors actually gave up the opportunity to earn future fees for their service as directors.

9 Of course, the "opportunity" to rollover equity into the new Dollar General required management's agreement to forego $22 in cash (or the equivalent thereof) for their shares that other shareholders, including Plaintiffs, received. *Cf.* Proxy Statement at 5.

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significantly altered the ***'total mix'*** of information made available." *Ramage v. Logan's Roadhouse, Inc. et. al.*, No. 99-90-III, slip op. at 5 (Tenn. Ch. Davidson County Feb. 2, 1999) (Chancellor Lyle) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). An omitted fact cannot cause *injury* unless shareholders would likely have rejected the transaction had the omitted facts been disclosed and, further, that shareholders would have been better off had the transaction not gone forward. *Brukardt*, slip op. at 24; *see also In re Transkaryotic Therapies*, 2008 WL 2462767, at *10 n.55 (dismissing duty of disclosure claim in connection with a consumed merger where plaintiffs failed to show "that the vote would have been different but for the allegedly bad disclosure" and instead "merely speculate[d]").

Plaintiffs here have not pled and cannot plead facts that reasonably suggest the alleged nondisclosures would have altered the shareholder vote given the (i) 31% premium paid to the Dollar General shareholders; (ii) the fact that no other bidder emerged after the transaction was announced; and (iii) the 99% shareholder vote in favor of the transaction. *See Brukardt*, slip op. at 24 (failure to allege shareholders would have benefited if deal was rejected "is not surprising, given the substantial premium paid by [the acquirer] and the lack of a viable alternative").

Plaintiffs' duty of disclosure claims have an additional fatal defect. As in *Brukardt*, Dollar General shareholders were on inquiry notice of the claims (including alleged non-disclosures) asserted by Plaintiffs. *See Brukardt*, slip op. at 11. The Proxy Statement summarized the lawsuits, directed shareholders to the Court in which they were pending, and even cited the case name and document number. Proxy Statement at 40. With public disclosure of this information, any suggestion that the shareholder vote was less than fully informed falls flat.

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A. Lehman's Fee Structure And Its Role In The Transaction

Plaintiffs complain that the Proxy Statement failed to disclose: (a) the terms of Lehman's agreement with the Company and (b) that "Lehman attempted to take part in the KKR transaction alongside KKR," (c) "settling instead for issuing the debt in conjunction with the KKR Transaction." Compl. ¶ 95. The Complaint does not even attempt to explain ***why*** these disclosures would matter to a shareholder and, for that reason alone, any failure to include them in the Proxy Statement cannot give rise to a duty of disclosure claim. *See Thomas Nelson*, slip op. at 13.

Nor can Plaintiffs plead the materiality of these alleged nondisclosures. Because Lehman did not provide a fairness opinion relied upon by the Board or included in the Proxy Statement, Dollar General had no duty to include information about any fees Lehman was receiving. *See, e.g.*, Item 1015(b) of Reg M-A, 17 CFR § 229.1015(a), (b) (providing for disclosure in a proxy of compensation received by an advisor giving a fairness opinion but not the compensation of other advisors who provided reports not deemed to be material to the transaction);[10] *see also Brukardt*, slip op. at 21 n.23 (failure to disclose contingent fee arrangement not material). Moreover, it is undisputed, indeed admitted, that the "Board approved the transaction based primarily on the advice and fairness opinion provided by the investment bank ***Lazard***" not Lehman. Compl. ¶ 9 (emphasis added). Having conceded as much in their Complaint, Plaintiffs have no reasonable basis to assert that the amount Dollar General paid for that advice and opinion could change the vote of a reasonable investor.

Not surprisingly, no duty arises under Tennessee state law, federal securities law, or otherwise to disclose an event *that did not occur* – here the alleged "attempt" by Lehman to

[10] Of course, Dollar General was required to submit the Proxy Statement to the U.S. Securities & Exchange Commission before disseminating to its shareholders.

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participate "alongside KKR" in the transaction. Plaintiffs concede, as they must, that it was KKR – acting alone and without Lehman – that acquired Dollar General; and Lehman's role in providing debt financing for the transaction is prominently and repeatedly disclosed throughout the Proxy Statement. Proxy Statement at 5, 28; *see also Brukardt*, slip op. at 21 n.23 (an advisor's involvement in financing the transaction is not a *per se* conflict of interest). For these reasons, the complaint does not plead a non-disclosure claim concerning Lehman.

B. The Date On Which Lazard's Agreement Was Reached

There is no dispute that Dollar General fully disclosed the terms of Lazard's engagement by the Company, including its fee arrangement. Proxy Statement at 25-26. Plaintiffs' allegation that the Proxy Statement was false and misleading because it failed to disclose that Lazard's agreement "was considered and negotiated not later than January, 2007" is puzzling, to say the least. Compl. ¶ 95. The Complaint does not attempt to allege what consequence, if any, the omission of such information had on shareholders' ability to cast an informed vote. Accordingly, this claim must also be rejected. *Thomas Nelson*, slip op. at 13-14.

C. Lazard's Financial Analysis

Where a board relies upon a fairness opinion in approving a merger, the proxy statement relating to the merger need only include "a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely." *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002); *see also Brukardt*, slip op. at 26; *Thomas Nelson*, slip op. at 15-16. Directors are not required to disclose "'inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information.'" *Globis Partner., L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *10 (Del. Ch. Nov. 30, 2007) (quoting *Arnold v. Soc'y for Sav. Banc.*, 650 A.2d 1270, 1280 (Del. 1994)). Tennessee and Delaware courts

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squarely reject the contention that a proxy statement must contain all analyses, projections or work product reviewed by a board of directors or its advisors in connection with a transaction. *See Thomas Nelson*, slip op. at 14-16 (dismissing disclosure claims premised on failure to disclose management projections relied upon by financial advisor evaluating the transaction); *Globis Partners*, 2007 WL 4292024, at *13 (dismissing claim premised on failure to disclose projections); *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007) (finding no duty to disclose "raw [and] admittedly incomplete projections"). To the contrary, "because of their essentially predictive nature" courts have "refused to deem projections material unless the circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment." *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006).

Here, as in *Thomas Nelson* and *Brukardt*, the Proxy Statement provided more than a fair summary of the substantive work performed by the target's financial advisor. In addition to disclosing Lazard's fairness opinion itself, seven pages of the Proxy Statement are devoted to describing the process and results of four different financial analyses that Lazard performed – (1) the "Discounted Cash Flow Analysis," Proxy Statement at 22; (2) the "Illustrative Present Value of Future Stock Price Analysis," *id.* at 22-23; (3) the "Comparable Public Companies Analysis," *id.* at 23-24; and (4) the "Precedent Transaction Analysis," *id.* at 24-25 – and the ranges of values implied by each of those analyses. *Id.* at 22-25. In each of the four different financial analyses Lazard performed, ***KKR's $22 per share bid exceeded Lazard's top range***. *Id.*

Dollar General also included in the Proxy Statement the two sets of financial projections that Lazard used in performing its discounted cash flow analysis. *See id.* at 22, 26-28. One set was referred to as the "Alpha Case." The other set was referred to as the "Alternative Case." Both included projections for 2007-2011. The projections for 2007-2009 were prepared by

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Dollar General management. Lazard prepared projections for 2010-2011 by extrapolating from management's 2007-2009 projections. Importantly, management reviewed Lazard's extrapolated projections and confirmed that they were reasonable. *Id.* at 22.

What Dollar General did not disclose – and what Plaintiffs are now claiming they should have disclosed – are analyses that the Proxy Statement makes clear were ***not*** used by Lazard in its discounted cash flow analysis underlying the fairness opinion or relied upon by the Board in approving the transaction.

1. Lazard's Hypothetical Project Alpha Numbers

Plaintiffs assert in their Complaint, as they did on their motion for a temporary injunction, that the Proxy was incomplete because it failed to incorporate "[r]evised Project Alpha projections" supposedly presented to the Board on March 10, 2007. Compl. ¶ 95. As the Complaint concedes, however, the so called "revised Project Alpha projections" were prepared by Lazard based on the hypothetical assumption that Dollar General had instituted Project Alpha "sooner" than it actually did. *Id.* ¶ 79. In other words, ***these were not projections at all***. They were hypothetical illustrative data based on the counterfactual assumption that Project Alpha, which was not even approved until November 2006 and was not slated to begin until 2007, was instituted "sooner" than it actually was. *Id.* ¶ 53. As a result, Plaintiffs do not, and cannot, explain why the omitted presentation "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available to shareholders." *Thomas Nelson*, slip op. at 13.

Moreover, the projections used to make the calculations were the same numbers that were disclosed to shareholders. Proxy Statement at 26-27. The disclosure of this hypothetical illustration would not have added any new information, would have only caused confusion among shareholders, and would make the Proxy Statement less, not more, reliable. *Goodwin v.*

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Live Entm't, Inc., 1999 WL 64265, at *13 (Del. Ch. 1999), *aff'd*, 741 A.2d 16 (Del. 1999) ("The risk that an unreliable analysis could lead stockholders to reject a good deal based on the false hope that a better deal was around the corner is one a board must consider in assessing whether to disclose."). Dollar General had no duty to disclose this information. In fact, it would have been imprudent to do so.

2. Lazard's Draft December 2006 DCF Analysis

Next, Plaintiffs allege, again as they did on their motion for a temporary injunction, that the Proxy Statement omitted "Projections of financial performance for Dollar General for years 2011 through 2014, which were used by Lazard to prepare a draft DCF analysis reflecting a range of $20.09 to $23.46 per share." Compl. ¶ 95. Plaintiffs further allege, "This earlier DCF analysis . . . is nowhere disclosed in the Proxy." *Id.* ¶ 99.[11] This claim fails for at least three reasons.

First, Plaintiffs allege only that "it is ***highly likely*** that Lazard . . . shared with ***at least one*** Board member (but not with shareholders) its analysis supporting a valuation higher than the $22 per share paid by KKR." Compl. ¶ 4 (emphasis added). This is speculation. The Board cannot be charged with a duty to disclose the contents of a document it is not even alleged to have seen or been aware of, much less the projections relied upon to create it. *See Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d at 1172 (Del. 2000) (finding a duty to disclose extends only to material information in the board's control.) Of course, it is not surprising that the Board was unaware of a draft discounted cash flow analysis prepared by an investment advisor in the very early stages

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[11] Even assuming that Plaintiffs characterization of the omitted information is accurate (which it is not) Plaintiffs do not allege any facts indicating why the failure to omit a valuation range of $20.09 to $23.46 was material – the $22 per share KKR paid is actually in the high end of even this range.

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of its engagement (*i.e.*, December 2006) months before the issuance of any fairness opinion relating to the transaction (*i.e.*, March 2007).

Second, there is no duty to disclose all of an advisor's "work papers." Nothing gives rise to a duty to disclose preliminary projections or analyses that Lazard did not rely upon in issuing its fairness opinion. *See Brukardt*, slip op. at 26-27 (holding that there is no duty to disclose "pages and pages of detailed financial projects" that may have been considered by a financial advisor issuing a fairness opinion). Dollar General had a duty to disclose only a "fair summary" of the work Lazard undertook in issuing its final fairness opinion, *see id.*, which is precisely what Dollar General did.

Finally, Plaintiffs' disclosure claim must be dismissed because the facts alleged suggest the draft analysis and projections are unreliable. *See Globis Partners*, 2007 WL 4292024, at *13 (dismissing disclosure claim because proxy suggested un-disclosed projections were unreliable and plaintiff failed to plead facts suggesting they were reliable); *Rosser v. New Valley Corp.*, 2000 WL 1206677, at *4 (Del. Ch. Aug. 15, 2000) (finding no duty to "disclose ruminations regarding uncertain future value because [those] estimates could be as misleading as helpful"). The fact that the analysis and the underlying projections were a ***draft*** prepared several months before Lazard issued its fairness opinion is clear from the face of the Complaint. Compl. ¶¶ 95, 99. Moreover, the Proxy Statement contained cautionary language relating to the final projections that Lazard relied upon in its discounted cash flow analysis which stated that the 2007-2011 projections were of limited reliability due to their predictive nature and they became "***less reliable with each successive year.***" Specifically, the following disclosure appears in the Proxy Statement:

> The projections reflect numerous estimates and assumptions with respect to industry performance, general business, economic, regulatory, market and financial conditions, as well as matters

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> specific to Dollar General's business, many of which are beyond Dollar General's control. As a result, there can be no assurance that the projected results will be realized or that actual results will not be significantly higher or lower than projected. ***The projections cover multiple years and such information by its nature becomes less reliable with each successive year.***

Proxy Statement at 26 (emphasis added). Given this disclosure, it appears that Lazard's actual discounted cash flow analysis did not incorporate any projections for any years after 2011 because it did not have sufficiently reliable projections after the 2011 projections. Plaintiffs' failure to plead facts suggesting otherwise is fatal to this disclosure claim. *See Globis Partners*, 2007 WL 4292024, at *13; *see also Thomas Nelson*, slip op. at 14 (holding that where, *inter alia*, the Proxy itself "explains the limited reliance an investor could place on [the investment banker's] analysis," it is "not a permissible inference" to conclude that failure to disclose projections underlying that work was material.).

3. The Basis and Assumptions Underlying Lazard's Extrapolated Projections

Plaintiffs allege the Proxy Statement was incomplete because it did not disclose "[t]he basis and assumptions underlying Lazard's extrapolation of management's projections for fiscal years 2009 through 2014." Compl. ¶ 95. Plaintiffs are wrong. The Proxy Statement discloses the "basis and assumptions underlying Lazard's extrapolation of management's projections" for all projections incorporated into Lazard's discounted cash flow analysis relating to its fairness opinion. Specifically, the following disclosure appears in the Proxy Statement:

> Assumptions utilized for the extrapolations for the fiscal years 2010 and 2011 projections included a 9.0% sales growth for the Alpha Case, a 9.5% sales growth for the Alternative Case and EBITDA margin constant at the 2009 level. In calculating the terminal value of Dollar General, Lazard assumed perpetuity growth rates ranging from 2.00% to 2.50% for the projected free cash flows for periods subsequent to 2011. The perpetuity growth rates were applied to the projected free cash flow for 2011, as adjusted to reflect no additional store openings in perpetuity,

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> resulting in a lower sales growth rate and lower capital expenditures. The projected free cash flows were then discounted to present value using a range of discount rates from 10.00% to 10.50%, which was based on Dollar General's estimated weighted average cost of capital.

Proxy Statement at 22. This detailed disclosure more than provides a fair summary of Lazard's work. *See CheckFree*, 2007 WL 3262188, at *2 (finding no duty to disclose "all financial data needed to make an independent determination of fair value.")

The Proxy Statement does not contain assumptions relating to the extrapolation of projections for any projections subsequent to 2011 because, as is discussed in detail above, Lazard only relied on projections for 2007-2011 in preparing its actual discounted cash flow analysis. In addition, the Proxy Statement does not contain any assumptions relating to 2009 projections because management prepared those projections. They were not extrapolated projections. Accordingly, Plaintiff has failed to allege any fact suggesting a material omission.

D. KKR's Post-Closing Plans For Dollar General

Plaintiffs complain, again as they did on their motion for a temporary injunction, that the Proxy Statement fails to disclose information allegedly contained in certain presentations that were made to "bond rating agencies, lenders and potential post-transaction investors in the Company." Compl. ¶¶ 3, 106. There is no dispute that these presentations were made ***after*** the Board approved the transaction and that they concern a "potential post-Transaction" Dollar General. These disclosures would not have been material to Dollar General shareholders in voting on the transaction. The choice Dollar General shareholders faced was either to reject the transaction and have existing management run the corporation, or else accept $22 in cash in

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exchange for their shares. KKR's plans for Dollar General were simply not relevant, and certainly not material, for a shareholder voting on the transaction.[12]

IV. **Plaintiffs Have Not Pled A Duty of Care Claim**

Plaintiffs cannot plead a duty of care claim because any such claim was extinguished by the fully informed 99% shareholder vote ratifying the transaction. In any event, Plaintiffs have not pled facts that show that the Board's decision was the result of gross negligence. Finally, Plaintiffs cannot collect damages for duty of care claims due to the exculpatory clause in Dollar General's corporate charter immunizing the Directors from personal liability.

A. The 99% Shareholder Vote In Favor Of The Transaction Extinguished Any Duty of Care Claims

As a threshold matter, claims based on an alleged breach of a duty of care are entirely ***extinguished*** by informed shareholder ratification. *See Thomas Nelson*, slip op. at 21 ("The duty of care, however, is extinguished by informed shareholder ratification."); *accord Brukardt*, slip op. at 29 (finding that fully informed shareholder vote extinguishes duty of care claims); *In re Wheelabrator Techs., Inc. S'holder Litig.*, 663 A.2d 1194, 1200 (Del. Ch. 1995) (holding that fully informed shareholder vote extinguishes a claim that a board failed to exercise due care in negotiating and approving a merger). Plaintiffs acknowledge in the Complaint, as they must, that the Dollar General shareholders voted in favor of the transaction. Compl. ¶ 1; Directors Answer, Eighth Affirmative Defense, Dollar General Answer, Ninth Defense. As set forth

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[12] The Court should decline any invitation by Plaintiffs to "speculate" that the Company (as a public company) could have implemented KKR's post-transaction plans for a private company. *See Thomas Nelson*, slip op. at 14 ("the Court is not permitted to speculate."); *see also Skeen*, 750 A.2d at 1173 (dismissing disclosure claim premised on failure to disclose plans of an acquirer); *Abrons v. Marée*, 911 A.2d 805, 813-14 n.18 (Del. Ch. 2006) (finding the failure to incorporate post-merger operational benefits into projections did not support granting a preliminary injunction because the potential impact of post-merger operational benefits was too speculative).

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above, any effort to suggest that this vote was uninformed is futile. The 64-page single spaced Proxy Statement was fulsome and contained accurate, material information sufficient to inform shareholders of the merger and the merger process. Accordingly, Plaintiffs have "failed to allege sufficient facts of an uninformed shareholder vote caus[ing] the claim of breach of duty of care, in turn, to fail." *Thomas Nelson*, slip op. at 21.[13]

B. Plaintiffs Have Not Alleged That The Directors Acted Unreasonably, Much Less Were Grossly Negligent

Under Tennessee law, in order to state a claim for breach of a director's duty of care, the plaintiff must establish that the challenged decision resulted from gross negligence. *See Hall v. Tennessee Dressed Beef Co.*, 1996 WL 355074, at *7 (Tenn. Ct. App. June 28, 1996) *rev'd in part on other grounds by* 957 S.W.2d 536 (Tenn. 1997). Plaintiffs' conculsory allegations that the process leading to the Board's approval of the transaction was flawed and resulted in terms that were "unfair" to the shareholders of Dollar General are plainly insufficient.[14]

As Plaintiffs do not dispute, shortly after KKR and other private equity firms and investment banks expressed an interest in the latter half of 2006 in acquiring Dollar General, the Board established a Committee of non-management Directors to assist the Board in considering

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[13] The Directors and Dollar General both raised as an affirmative defense the fully informed shareholder vote ratifying the transaction. Directors Answer, Eighth Affirmative Defense, Dollar General Answer, Ninth Defense.

[14] *See* Compl. ¶¶ 4, 7-11, 13, 59, 63-64, 68-70, 72-74, 76-79, 81, 84-93, 104. While Plaintiffs use rhetoric associated with duty of loyalty claims, these allegations plainly implicate the duty of care, not the duty of loyalty. As shareholders, the Directors had the same incentive as the public shareholders to get the best possible price for the Company. *See, e.g., Thomas Nelson*, slip op. at 10-11. Thus, allegations that features of the transaction or sales process depressed the ultimate transaction value do not implicate any conflict of interest on the part of the Directors, and therefore must be categorized as duty of care claims rather than duty of loyalty claims. *See, e.g., BHC Communs. S'holder Litig.*, 789 A.2d 1, 10 (Del. Ch. 2001); *In re Lukens S'holders Litig.*, 757 A.2d 728, 728-30 (Del. Ch. 1999); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000).

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potential strategic matters. Compl. ¶ 61. The Committee hired independent counsel, Wachtell Lipton, for advice on the Directors' legal and fiduciary duties in connection with considering possible strategic transactions. Proxy Statement at 15. The Committee also retained an independent investment banking firm, Lazard, to advise it and the Board. Compl. ¶¶ 9, 73. The Board and the Committee met on numerous occasions to consider various strategic alternatives. Compl. ¶¶ 53-54, 63; Proxy Statement at 15-16, and considered Lazard's analysis that KKR's offer exceeded the present value of Dollar General's stock price. Compl. ¶ 9; Proxy Statement at 18.

The substantial deliberations of the Board and the fact that they sought independent, experienced financial and legal advisors demonstrate that the Directors acted reasonably. *See Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 67 (Del. 1989) (discussing the fact that the board met three times in three weeks to deliberate supports a finding of reasonableness); *Toys R' Us S'holder Litig.*, 877 A.2d 975, 1008 (Del. Ch. 2005) (finding the fact that the board developed "a rich body of knowledge regarding the value" of the company supported the reasonableness of the board's decision); *McMillan*, 768 A.2d at 505 n.55 (relying on experienced financial advisors supports a finding that the board acted reasonably); *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 925 (Del. Ch. 1999) (dismissing disclosure claim premised on allegations that the board acted in an uninformed manner because the proxy reflected "careful deliberations" over several months).

Plaintiffs' allegation that Dollar General's review process could have been conducted differently is of no moment. As the chart below shows, there is no blueprint as to the exact process a board must follow to fulfill its duties to shareholders. Rather, courts trust disinterested directors (as we have here) to exercise their business judgment.

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Case	Description
Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989)	There is "no single blueprint" by which to measure a directors' decision to approve a merger.
In re MONY Group Inc. S'holder Litig., 852 A.2d 9, 19 (Del. Ch. 2004)	Plaintiff's claim that defendant failed to seek out more than one bidder is insufficient to establish a duty of care claim.
McMillan v. Intercargo Corp., 768 A.2d 492, 505 (Del. Ch. 2000)	"Whether it is wiser for a disinterested board to take a public approach to selling a company versus a more discreet approach relying upon targeted marketing by an investment bank is the sort of business strategy question Delaware courts ordinarily do not answer."
Yanow v. Scientific Leasing, Inc., 1988 WL 8772, at *6 (Del. Ch. Feb. 5, 1988)	Where "the real dispute boils down to what specific methods corporate directors may use it to elicit bids from potential acquirers," the "issue would appear to be normally a matter of director judgment that necessarily must vary with each case."
Herd v. Major Realty Corp., 1990 WL 212307, at *9 (Del. Ch. Dec. 21, 1990)	"[N]o duty to employ a specific device such as the auction or market check mechanism."
In re KDI Corp. S'holder Litig., 1990 WL 201385, at *3 (Del. Ch. Dec. 13, 1990)	"There is *no* requirement that there be a bidding contest or even an active market survey."

As a result of this competitive process, in which the Board worked diligently with independent advisors to solicit "best and final" offers, the Board obtained a bid of $22 per share from KKR, representing a 31% premium. Compl. at ¶¶ 75, 77; Proxy Statement at 16. The size of the premium KKR paid is *prima facie* evidence of the reasonableness of the Board's decision. *See Brukardt*, slip op. at 19 (deciding that the fact that shareholders received a large premium supported dismissal of duty of care claims); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994) *aff'd* 569 A.2d 53, 67 (Del. 1989) (stating that the plaintiff's claim that directors failed to obtain best price reasonably available failed where a "reasonable seller, under all of the circumstances, would regard [the price] as within a range of fair value; one that such a seller could reasonably accept."). In order to survive a motion to dismiss where, as here, a substantial premium was provided to shareholders Plaintiffs must do more than assert that the Board "did not do enough." *Brukardt*, slip op. at 19.

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Plaintiffs' allegations that the transaction contained a termination fee equal to 2.9% of the transaction price and a "no-shop" clause, Compl. ¶¶ 13, 76, 84-93 are unavailing. *See Brukardt*, slip op. at 22 n.25 (holding allegations of deal protections including a 2.4% termination fee are insufficient to plead a duty of care claim and noting that such deal protections would not deter rival bidders); *see also McMillan*, 768 A.2d at 505 ("dismissing claims where merger at issue contained a termination fee of 3.5% and a "no-shop clause" noting "it is difficult to see how a 3.5% fee would have deterred a rival bidder who wished to pay materially more."); *In re Toys R' Us S'holder Litig.*, 877 A.2d at 1018 (3.75% termination fee reasonable); *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *20 (holding that the board was reasonable in approving transaction with a 3.125% termination fee); *In re IXC Commn's v. Cincinnati Bell, Inc.*, 1999 WL 1009174, at *6 (Del. Ch. Oct. 27, 1999) (discussing that allegations that the directors agreed to a "no shop" provision are insufficient as a matter of law where the provision is subject to a fiduciary out).

Moreover, there is no requirement that merger agreements include provisions allowing the board to "go shop" an acquisition offer. *See McMillan*, 768 A.2d at 505. An acquiring company has "a legitimate interest in protecting the time and resources it had devoted to the merger." *Brukardt*, slip op. at 21. It is reasonable, particularly where an offer includes a substantial premium, and coupled with the harm the company could suffer if the deal fell through, for a board to approve a deal containing deal protections. *Id.* Here, the Board discussed and understood that it risked losing KKR's offer if it attempted to identify and pursue alternative bidders. Compl. ¶ 76; Proxy Statement at 16. Nevertheless, the Directors negotiated a so-called "fiduciary out" provision that allowed them to terminate the deal upon receipt of a superior proposal. Compl. ¶ 86; Proxy Statement at 6. Where, as here, a merger agreement contains a fiduciary out provision with a termination fee that is approximately 3%, courts will infer that the

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price is reasonable if alternative bids do not result in the months between announcement of the transaction and closing. *See e.g., Goodwin*, 1999 WL 64265, at *22. In the present case, a rival bidder would have only had to bid 71 cents per share more for Dollar General in order to negate the operation of the termination fee. *See* Proxy Statement at 2 (noting that approximately 315 million common shares of Dollar General were outstanding). This would have been an insubstantial price for any bidder to pay if, as plaintiffs claim, the transaction price was "grossly unfair." Compl. ¶ 112. Yet, no bidder came forward. Moreover, where, as here, Plaintiffs do not allege the existence of a potential bidder who was willing to provide a bid that was materially higher but for the deal protections, plaintiffs' allegations fail as a matter of law. *See Brukardt*, slip op. at 22.

C. The Exculpatory Provision In Dollar General's Charter Bars Plaintiffs' Duty Of Care Claims

Plaintiffs' duty of care and disclosure claims against the Directors must be dismissed for the additional reason that they are barred by the exculpatory provision of Dollar General's charter. Dollar General Amended and Restated Charter filed herewith[15] Tennessee law, authorizes a corporation, through its charter, to immunize its corporate directors from personal liability for money damages arising from breaches of fiduciary duty in connection with the directors' activities as board members. Specifically, the Tennessee Business Corporation Act provides that a corporation's charter may set forth in pertinent part:

> A provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director; provided, that such provision shall not eliminate or limit the liability of a director:

[15] This Court can take judicial notice of Dollar General's charter provision on a motion for judgment on the pleadings. *See Brukardt*, slip op. at 30; *accord Malpiede v. Townson*, 780 A.2d 1075, 1092 (Del. 2001).

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> (A) For any breach of the director's duty of loyalty to the corporation or its shareholders;
>
> (B) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or
>
> (C) Under [the provision of the Tennessee Business Corporation Act covering unlawful distributions].

Tenn. Code Ann. § 48-12-102(b)(3).

At this point – almost a year after the shareholder vote and consummation of the transaction – rescission is "plainly futile" and the only remedy available to Plaintiffs is money damages. *In re Lukens Inc. S'holders Litig.*, 757 A.2d 728 (Del. Ch. 1999) ("[I]t goes without saying that at this juncture [post-shareholder vote] it is 'impossible to unscramble the eggs.' Money damages [are] the only possible form of relief available.") (citation omitted). Such damages are not permissible under Dollar General's charter. Article 10 to Dollar General's Amended and Restated Charter provides:

> To the fullest extent permitted by the Tennessee Business Corporation Act as in effect on the date hereof, and as hereafter amended from time to time, a director of the corporation shall not be liable to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director.

As a result, Plaintiffs' duty of care claims and duty of disclosure claims must be dismissed. *See, e.g.*, *Globis Partners*, 2007 WL 4292024, at *14-15; *McMillan*, 768 A.2d at 501; *Lukens*, 757 A.2d at 734; *see also In re Transkaryotic Therapies*, 2008 WL 2462767 at *11 (explaining that exculpatory provision barring money damages required dismissal of disclosure claims in connection with a consummated merger because "any disclosure violation would implicated only the duty of care and would, therefore, not lead to the imposition of money damages.").

V. **Dollar General Cannot Aid and Abet Its Own Directors' Purported Breaches**

Plaintiffs assert a claim against Dollar General for aiding and abetting ***its own directors'*** alleged breach of a fiduciary duty. This is untenable. A plaintiff cannot state a claim for aiding

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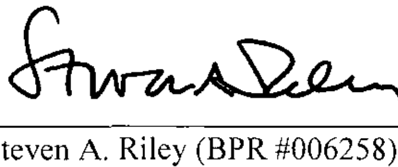
and abetting unless it adequately pleads facts sufficient to establish "a ***third party*** . . . 'knowingly participate[d] with the officers of a corporation in the commission of an act which manifests bad faith or a breach of duty to said corporation.'" *See Holmes Financial Assoc., Inc. v. Jones*, 1991 WL 263870 (Tenn. Ct. App. Dec. 18, 1991) (quoting *Hayes v. Schweikart's Upholstering Co.*, 55 Tenn. App. 442, 402 S.W.2d 472, 478 (Tenn. Ct. App. 1965)) (emphasis added). "The corporation owes no fiduciary duties to shareholders independently from its agents, and the corporation itself is not liable for a breach of fiduciary duties by its directors." *See Emerald Partners v. Berlin*, 1995 WL 600881, at *8 (Del. Ch. Sept. 22, 1995), *rev'd on other grounds*, 726 A.2d 1215 (Del. 1999). As a matter of law, Dollar General cannot be held liable for aiding and abetting its own directors' alleged breaches.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed in its entirety with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,



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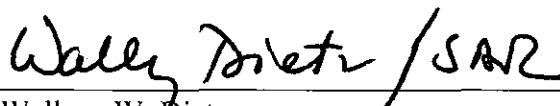

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail and email upon:

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