IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT, AT NASHVILLE

In re DOLLAR GENERAL CORPORATION SHAREHOLDER LITIGATION	Master Docket Case No. 07MD-1 (Consolidated Action)
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	Judge Brothers
	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS AND WITNESSES BY DOLLAR GENERAL

Pursuant to Rule 37.01 of the Tennessee Rules of Civil Procedure, Plaintiffs William Hochman, IRA ("Hochman") and City of Miami General Employees & Sanitation Employees' Retirement Trust ("City of Miami") (collectively "plaintiffs") respectfully submit this Memorandum of Law in Support of their Motion to Compel Production of Documents and Witnesses by Dollar General.

Throughout this litigation, defendants have exploited the time constraints facing plaintiffs by delaying the production of discoverable information or refusing to produce that information altogether. As the Court is aware, defendants failed to provide plaintiffs with vital information concerning the notes underlying the Board of Director ("Board") meetings. Indeed, defendants continue to do so. While some of the notes supporting the Board minutes were produced on June 5, 2007, following the Court's order, others were not and the notes concerning the most important Board meeting convened – the one at which a sale of Dollar General Corporation ("Dollar General" or the "Company") was approved – remain undisclosed. These notes must be reasonably within their possession, having used them to recently prepare "final" minutes, but defendants failed to deliver them or acknowledge whether or not they have been destroyed.

In addition, defendants' agents and financial advisors to the Board, Lehman Bros., Inc. ("Lehman") and Lazard Frères & Co. LLC ("Lazard"), have engaged in discovery abuses limiting plaintiffs' ability to elicit information that only those parties would be privy to. Specifically, the witness designated to testify on behalf of Lehman, Dana Perlman, was unable or unwilling to answer a vast number of questions related to matters "known or reasonably available to the organization." Tenn. R. Civ. P. § 30.02(6). And plaintiffs'

examination of the designated Lazard witness was severely hamstrung, when over 100,000 pages of documents were delivered in the twenty-four hours prior to the deposition, 30,000 of those just 12 hours before the start of the deposition – making a complete examination impossible.

Through their abuses, defendants have severely hampered plaintiffs' discovery efforts. Accordingly, plaintiffs respectfully request that the court order: (a) the immediate production of the all outstanding notes to Board minutes, including the notes from the March 10, 2007 Board meeting; (b) the re-deposition of all of the Board witnesses in light of the previously withheld information; (c) the deposition of David Bere, who's post-acquisition role was unknown prior to defendants' production of the notes to the Board minutes; (c) the designation and deposition of a witness from Lehman who possesses the requisite information to answer fully all of plaintiffs' questions under Tenn. R. Civ. P. §30.02(6); and (d) the continuation of the Lazard deposition at a future time which allows for the reasonable review of the documents produced.

I. BACKGROUND

Defense counsel in this action are no strangers to merger litigation. They understand that shareholders challenging a merger, such as plaintiffs here, face substantial time pressure to create the kind of evidentiary record necessary to enjoin a shareholder vote on that merger. Thus, defendants and their counsel knew that if they could just play keep away with the crucial facts, documents and witnesses for a few days or weeks (or even hours, as it turned out), then – like the old "four corners" defense in basketball – they could virtually ensure the failure of any injunction motion, no matter how meritorious it otherwise would have been shown to be if they had but participated in good faith in the discovery process. That is why,

from the outset of this case, defendants and their counsel have engaged in a pattern of delays and other discovery abuses.

To provide the Court with some background, plaintiffs served a set of document demands on defendants on March 14, 2007 – nearly three months ago. Without voicing any issue or objection with respect to those demands, defendants asked for an extension to respond. As a matter of professional courtesy, plaintiffs granted that request.

What followed was, instead of good faith responses and production, either blanket objections or the withholding of the most critical documents, or both.[1] Defendants knew that plaintiffs would have to spend valuable time meeting and conferring and then bringing motions to get defendants to comply with their discovery obligations. And that is exactly what has happened, as defendants have to date forced plaintiffs to bring a series of (ultimately successful) motions to compel.

In the meantime, defendants pulled the trigger on setting a June 22, 2007, shareholder vote on the merger. Defendants also learned shortly thereafter that, because of the Court's schedule, the hearing on plaintiffs' injunction motion would have to be held on June 12, 2007. The situation was ripe to frustrate plaintiffs' injunction efforts, and defendants took full advantage of it, to the virtually insurmountable detriment of plaintiffs and Dollar General's other public shareholders.

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[1] Defendants continue to tout the tens of thousands of pages of lease extracts, and other largely irrelevant documents, that they have produced in this litigation as some sort of shield against the real issue here – defendants' failure to produce in a timely manner the relevant documents and witnesses regarding the fairness of the merger process and price. Defendants' protestations in this regard are a red herring if ever there was one, and should be disregarded by the Court.

A prime example of defendants' discovery misconduct is the belated production – late in the evening on June 4, 2007 – of an April 2007 management presentation to entities that KKR and management are providing with the opportunity to share in the spoils of the merger once it closes. This document was plainly responsive to plaintiffs' document demands to KKR, the Company, and the individual defendants, and should have been turned over by each of them long ago. ***Indeed, it is part of one of the express categories of documents that defendants agreed to produce in proceedings before Special Master Nichols on May 23, 2007, in connection with one of plaintiffs' prior motions to compel.*** Yet KKR waited until the evening ***after*** the deposition of David Perdue – Dollar General's Chief Executive Officer, one of the principal participants in the April 2007 presentation, and the only member of the management team that plaintiffs were scheduled to depose – to hand over the document. Thus, plaintiffs have (to date) been denied the ability to ask Dollar General management about that presentation or the glowing financial prospects for the Company discussed therein ***– prospects that paint a far different picture than shareholders are being led to believe in the merger proxy materials.***

Another example is the failure of defendants to present for deposition representatives of their investment banking agents – upon whom defendants claim to have relied in agreeing to the merger – who actually participated in and/or were knowledgeable about key facts and issues in this case. The Lehman Brothers designated deponent, Dana Perlman, did not even join the Dollar General engagement until mid-February 2007, and could provide no answers about events that occurred and documents that were drafted prior to that time. *See* Perlman Depo. Tr. at 60:12-17. Moreover, Perlman's role with Lehman was limited to discreet issues

dealing with the Dollar General engagement, and professed to lack any knowledge of the actual negotiations or the finance side of Lehman's involvement with the process. *Id.* at 77, 114-15. Thus plaintiffs' counsel could not go into critical Lehman-related issues at the deposition. Perlman could not speak to: (i) Lehman's advice about the Board's evaluation of strategic alternatives for the Company in August 2006, *id.* at 25-31; (ii) Lehman's communication with potential bidders for Dollar General prior to August 2006, *id.* at 40, 103-108; (iii) Lehman's contacts with private equity firms about the Company in September of 2006, *id.* at 46; (iv) Lehman's role in setting up the October meeting with KKR, *id.* at 50, 59; (v) Lehman's decision to provide staple financing to bidders for the Company, *id.* at 50-53; (vi) Lehman's equity investment in the Company post-Acquisition, *id.* at 77-78; (vii) Lehman's advice with respect to a "go-shop" provision in the merger agreement, *id.* at 114-15; and (viii) Lehman's trade-off of advisory fees for financing fees, *id.* at 123-24. All these issues were critical to an assessment of the sales process, and Lehman's conflicted role in that process. All these issues went unaddressed, however, when Perlman repeatedly answered questions but simply stating that she didn't know because she "was not on the account at the time." *See, e.g., id.* at 25:24-25.

Yet another example is defendants' refusal – until ordered to do so by the Court on June 6, 2007 – to turn over the handwritten notes that formed the basis for the (belatedly created and produced) minutes of key Board and committee meetings regarding the merger. Even a quick review of those notes which were produced reveals important issues that are not reflected anywhere in the actual minutes, including what appear to be statements by various Board members regarding conflicts of interest suffered by certain defendants,

conflicts of interest suffered by the Company's investment advisors, the inadvisability of proceeding with a merger at the present time (because the Company is undervalued in the market and shareholders have not yet realized the substantial upside of recent business changes made by the Company), and the apparent emergence of at least one strategic bidder for the Company (which does not appear to have been allowed in the door despite its potential to offer superior consideration to shareholders as a merger partner).

None of the foregoing information from the notes is in the minutes, and none of it is in the merger Proxy materials. Thus, until receiving these notes late in the afternoon on June 6, 2007, neither plaintiffs nor the Company's other public shareholders had any idea about these issues. Yet, because defendants refused to produce them until ordered to do so by the Court – at a time after all the scheduled director depositions had been taken – plaintiffs have been denied the opportunity to inquire into these areas in deposition and obtain a full record for the Court.

As a result of these and other discovery abuses, plaintiffs respectfully request, as argued below, that the Court order defendants to make the appropriate witnesses available to be deposed (or re-deposed, as necessary), and to maintain the status quo by postponing the shareholder vote on the merger unless and until defendants comply with their discovery obligations and afford the Court with the opportunity to consider – on a full and fair record – plaintiffs' request for injunctive relief.

II. ARGUMENT

A. Legal Standards on a Motion to Compel

It is well settled in Tennessee that decisions with regard to pre-trial discovery matters rest with the sound discretion of the trial court. *Roberts v. Blount Mem. Hosp.*, 963 S.W. 2d

744, 746 (Tenn. App. 1997) (overruled on other grounds). The Tennessee Rules of Civil Procedure establish the procedures for utilizing the various discovery methods, all of which require direct proceedings between the parties, through their counsel, if applicable, without the intervention of the Court. *Hampton v. Tennessee Bd. Of Law Examiners*, 770 S.W.2d 755, 758 (Tenn. App. 1988). "Court intervention is contemplated under the rules only when a party does not comply with the rules regarding discovery." *Id.* A motion for an Order compelling discovery is governed by Rule 37.01 of the Tennessee Rule of Civil Procedure, which provides in part:

> [I]f a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request . . . .

Tenn. R. Civ. P. 37.01(2).

In this case, plaintiffs served requests for production of documents pursuant to Rule 34 of the Tennessee Rule of Civil Procedure months ago. Plaintiffs have complied with the Local Rules requiring that the parties make every effort possible to resolve discovery disputes amongst themselves before involving the Court, but to no avail. *See* Local Rule §22.08. Plaintiffs' counsel has had numerous communications with defendants' counsel to timely and complete production of all requested information. *See* Rule §22.08 Declaration of Douglas Johnson. Accordingly, plaintiffs have no alternative but to move the Court for an Order compelling the requested discovery.

B. Production of the Notes to the Board Minutes and Further Depositions of Prior Deponents

On June 6, 2007, the Court ordered the production of all notes underlying the Board minutes. However, defendants have failed to produce the universe of notes. *See* chart attached to Rule §22.08 Declaration of Douglas Johnson. Most strikingly, defendants have failed to produce the notes for what was singularly the most important meeting of all – the March 10, 2007 meeting when a sale of Dollar General to KKR was approved and a $22.00 per share price was recommended to shareholders. And when specifically and repeatedly asked to explain what efforts have been made to locate notes that were recently used to draft "final minutes" or to inform us whether such notes had been destroyed, defendants refused to respond.

As the Court acknowledged in its June 6, 2007 ruling, draft notes to Board minutes prepared in the "ordinary course of business" are not privileged even where those notes are prepared by an attorney. Said differently, the work-product privilege does not extend to documents created by an attorney who acted as a "mere scrivener" of the documents. *See, e.g., Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc.*, 190 F.R.D. 505, 512 (W.D. Tenn. 1999) (applying Tennessee law and holding that, the attorney-client privilege does not apply to documents that "involve ordinary business dealings" and therefore those "documents are discoverable"); *see also* Tenn. Code Ann. § 48-26-101 (stating that in the course of ordinary business a Tennessee corporation "shall keep as permanent records minutes of all meetings of its shareholders and board of directors").

Under Tennessee law, and this Court's June 6th Order, plaintiffs are entitled to ***all*** of the notes underlying Board minutes produced in the year prior to the sale of Dollar General.

This includes notes of meetings of both the regular Board, the Strategic Planning Committee, and any other Committee meeting, as each is simply a subset committee of the larger Board. Defendants' failure to timely produce such notes in light of the Court's Order is not only unjustified, but may constitute grounds for sanctions. *See, e.g., State ex. rel. Comm'r Dept. of Transp. v. Cox*, 840 S.W.2d 357, 366-67 (Tenn. App. 1991) (upholding award of attorney fees and expenses as sanction for failure to comply with a pre-trial order). Similarly, since defendants Purdue, Bowles and Bottorff were deposed before critical notes were provided, plaintiffs should be entitled to re-depose these witnesses. *See Clemons v. General Motors Corp.*, No. 61, 1990 Tenn. App. LEXIS 819, at *3 (Tenn. Ct. App. Nov. 26, 1990).

C. Deposition of David Bere

Defendants' production of some of the Board minutes pursuant to the Court's June 6, 2007 Order, has alerted plaintiffs to the role David Bere actually played in the decision to sell Dollar General. In particular, the notes seem to indicate that Bere was the driving force behind the sale of the Company and even though he at one time seemed to oppose a sale, later acted as lead negotiator for the Board. In other words, it did not seem to be necessary to depose Bere until it became clear that he had been tapped by KKR to acquire equity in the new entity and succeed defendant Purdue as CEO following the completion of the sale.

Plaintiffs are entitled to take depositions of "any person upon oral examination" so long as notice is given in writing of the intention to depose. *See* Tenn. R. Civ. P. §30.02(1). Moreover, the court may "shorten the time for taking the deposition" where the party requesting the examination has shown "cause." Tenn. R. Civ. P. §30.02(3). Here, plaintiffs have shown cause for the deposition of Bere, given that heretofore plaintiffs had no idea of the extent of the role which Bere played in the "process" leading up to the transaction. Such

evidence is vital to plaintiffs' case and to the record in this action. Accordingly, plaintiffs respectfully request that the Court order the deposition of Bere and issue an order to shorten time, making Bere available as soon as possible for oral examination pursuant to Rule §30.02(3).

D. Lehman Deponent

Contrary to the Tennessee requirement that a Rule §30.02(6) witness testify as to "matters known or reasonably available to the organization," the designated Lehman witness, Perlman, was unable and/or unwilling to answer questions on a number of important topics including *inter alia*: (1) the advice Lehman gave the Board concerning the identification of strategic alternatives (including a sale of the Company) and information concerning the preliminary expressions of interests by KKR and other potential buyers and Lehman's advice to the Board on whether to solicit bids and/or conduct an auction of the company; (2) what advice Lehman gave the Board on whether a "go-shop" provision should be included in the merger agreement with KKR and why such a clause was not included; and (3) the events which transpired on the March 10, 2007, Board meeting where KKR's $22.00 bid was accepted and the Board voted to recommend the transaction to shareholders. Accordingly, plaintiffs should be afforded the opportunity to depose another Lehman witness prepared to answer plaintiffs' questions into all relevant subject areas.

Rule 30.02(6) of the Tennessee Rules of Civil Procedure expressly requires that where the deponent is a corporation, partnership or association,

> the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make

> such a designation. ***The persons so designated shall testify as to matters known or reasonably available to the organization.***

Tenn. R. Civ. P. 30.02(6) (emphasis added).

In other words, a deponent designated under Rule 30.02(6) to testify on behalf of an entity may not hide behind answers such as "I don't know" or "I was not on the account at that time," for it is the entity's responsibility to make sure that the designee is prepared to testify "as to matters known or reasonably known to the organization." *Id.*; *see* 8A Wright & Miller, *Federal Practice and Procedure*, Fed. Prac. & Proc. Civ. §2103 (2006) ("If in the course of taking the deposition it becomes apparent that the person or persons designated are not able to provide testimony on the matters specified in the notice, it is the duty of the corporation immediately to make a new designation substituting someone who can give the needed testimony."); *FDIC v. Butcher*, 116 F.R.D. 196, 201-02 (E.D. Tenn. 1986), *aff'd*, 116 F.R.D. 203 (E.D. Tenn. 1987) (holding that it was improper for corporation to designate deponent who was unable or unwilling to answer questions and holding that the corporation had "a duty to prepare its 30(b)(6) witnesses to speak for the corporation on all discoverable information and to give full, complete and unevasive answers"); *see also Resolution Trust Co. v. Southern Union Co.*, 985 F. 2d 196, 197 (5th Cir. 1993) ("When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all."); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996), *aff'd*, 166 F.R.D. 376 (M.D.N.C. 1997) ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the

deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.").

Indeed, Tennessee courts have routinely held that failure to produce a competent and knowledgeable designee pursuant to a court order requiring discovery under Rule 30.02(6) is grounds for sanctions. *See* Tenn. R. Civ. P. 37.01(2); *see also Vanderbilt Univ. v. TechGem Diamond Tools, Inc.*, No. M2001-02505-COA-R3-CV, 2002 WL 31890889, at *3-*4 (Tenn. Ct. App. Dec. 31, 2002) (upholding default judgment ordered as a result of defendant's failure to comply with court's order requiring compliance with Rule 30.02(6)); *Ryan v. Surprise*, No. W2001-02853-COA-R3-CV, 2003 WL 22071005, at *2-*3 (Tenn. Ct. App. Aug. 27, 2003) (upholding trial court's imposition of sanctions for failure to comply with Rule 30.02(6)).

Perlman was unable to testify concerning a number of issues vital to plaintiffs' efforts to present the Court with a full and complete record. For example, in order to determine when the Company was "for sale" (and thus when the Board was first under a fiduciary obligation to obtain the highest value reasonably available for shareholders), plaintiffs' counsel repeatedly asked the Lehman witness to describe the work they performed prior to their formal retention as advisors to the Board in September of 2006. *See Revlon*, 506 A. 2d at 184. However, Pearlman consistently refused to answer such questions, stating that she was "not on the account at that time." *See, e.g.*, Perlman Depo. Tr. at pp. 26-28, 39-40, 45-47, 49-50, 53-54, 59-61. While plaintiffs believe that Lehman had been contacted by a number of parties interested in pursuing a transaction with Dollar General but rebuffed those

parties in favor of KKR, Perlman "was not part of that" and accordingly could not meaningfully respond to plaintiffs' questions on that subject. *Id.* at p. 41.

Also, although Lehman served as advisor to the Board, Pearlman was unable or unwilling to relate what any information regarding Lehman's role in advising the Board that a "go-shop" provision should or should not be included in the Merger Agreement between KKR and Dollar General. *See* Perlman Depo. Tr. at pp. 112-14.[2] A go-shop provision

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[2] The following colloquy is located at pp. 112-14 of the Perlman deposition transcript:

Q: Was there a – was there contemplated putting a go shop provision in this merger agreement at some point?

A. I wasn't part of the contract, putting together the contract.

Q. So do you not know?

A. I do not know.

Q. You don't know whether there was?

A. I do not know.

Q.Is there anyone at Lehman who Perlman – rough would know the answer to that question?

A. The answer to –

Q. Who would know about the negotiations?

A. Relating to the contract.

Q. Relating to this merger agreement, relating to the presence of a go shop provision, so forth?

A. Ken Siegel is the M&A person on the deal. He potentially could talk to it. But Wachtell advised the company and was the one who actually drafted the contract.

would have allowed Dollar General to be actively shopped to potential strategic and financial buyers for a specified period of time following the signing of the Merger Agreement. *See In re NetSmart Techs., Inc. S'holders Litig.*, No. 2563-VCS, 2007 Del Ch. LEXIS 35, at *13 (Del. Ch. Mar. 14, 2007). Indeed, there is documentary evidence which states that Lehman "expected" that a go-shop period would be included in the Merger Agreement. However, Perlman could not inform plaintiffs of any meaningful information concerning why a "go-shop" was not included in the Merger Agreement. As Lehman was potentially the only source of this information, it is imperative that plaintiffs are allowed to question a Lehman witness that will be able to answer counsel's questions.

Perhaps the most blatant deficiency in Perlman's testimony was her lack of knowledge relating to the March 10, 2006 Board meeting, at which the Board approved the sale of Dollar General to KKR for $22.00 per share. Perlman testified that she was present at the meeting, but was unable to recall any of the advice given or questions asked by Lehman representatives or anyone else in the meeting. Perlman Depo. Tr. at pp. 36-37. The centerpiece of that meeting was a presentation on the fairness opinion rendered by Lazard, which concluded that $22.00 was a fair price. Indeed, the Proxy states that at the March 10th meeting, "Representatives of Lehman also provided the board of directors with Lehman's views and advice on the financial aspects of the proposed transaction." However, Perlman

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Q. So you have no knowledge, just to clarify what we are talking about, do you agree, is it correct that you have no knowledge of negotiations concerning inclusion or non-inclusion of a go shop provision in the merger agreement?

A. I wasn't a party to those conversations.

could not "recall" what was told to the Board and was unwilling to discuss any of the vital financial information contained in the March 10th Lazard presentation to the Board. Perlman Depo. Tr. at pp. 36-37.

As noted above, what went on at the March 10, 2007 meeting is perhaps the linchpin of plaintiffs' case. Moreover, the accuracy and reliability of the fairness opinion rendered by Lazard and presented at the March 10th meeting is paramount to plaintiffs' case. However, like the other witnesses, Perlman "did not recall" what was said at that meeting. Accordingly, just as it is important that plaintiffs have the notes from the March 10, 2007 Board meeting, it is also vital that witnesses that were present at that meeting testify as to what was said.

E. Continuation of Lazard Deposition

Just 24 hours before the scheduled deposition of Michael Wilkerson, the person designated to testify at deposition on behalf of Lazard, was to begin, a massive "document dump" of over 60,000 pages was produced to plaintiffs. Half of those documents, over 30,000, were not delivered until a mere 12 hours before the scheduled commencement of the deposition. Thus, while plaintiffs moved ahead with the examination of Wilkerson, plaintiffs were unable to conclude the deposition because less than half of the documents produced by Lazard had been reviewed prior to the commencement of questioning.

In order to have a meaningful opportunity to depose Wilkerson on a full record – which includes a review of all the documents produced by Lazard – plaintiffs are entitled to an opportunity to re-examine Wilkerson. In order to "clarify issues" and provide more complete an accurate record for the Court, it is appropriate for a court to allow a party to "re-depose" a witness. *See Clemons*, 1990 Tenn. App. LEXIS 819, at *3. This is particularly

true where, as here, plaintiffs have been overwhelmed with documents and, thus, were unable to complete an examination of the witness.

Accordingly, plaintiffs respectfully request that the Court order Lazard to produce Wilkerson for a second deposition, covering the remaining issues identified by plaintiffs in their subsequent review of the Lazard Production.

III. CONCLUSION

For the foregoing reasons, plaintiffs' Motion to Compel should be granted.

DATED: June 8, 2007

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