U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **11-03216-hb**
Adversary Proceeding Number: **11-80212-hb**

ORDER DENYING MOTION TO DISMISS

The relief set forth on the following pages, for a total of 16 pages including this page, is hereby ORDERED.

FILED BY THE COURT
08/14/2012

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA
SEAL

Entered: 08/14/2012

US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, TMG Liquidation Company, Debtor(s).	C/A No. 11-03216-HB Adv. Pro. No. 11-80212-HB Chapter 11
J. H. Cohn, LLP, as Plan Administrator, on behalf of the estates of the above-captioned Debtors, Plaintiff(s), v. National Patent Development Corporation Jay Baker E. Fort Wolfe, Jr. Caleb C. Fort, Defendant(s).	**ORDER DENYING MOTION TO DISMISS**

THIS MATTER came before the Court for hearing on the *Motion to Dismiss* filed by Defendants Jay Baker, E. Fort Wolfe, Jr., and Caleb C. Fort (collectively the "Individual Defendants").[1] Plaintiff, J.H. Cohn, LLP (the "Plan Administrator" or the "Plaintiff") filed a *Memorandum of Law in Opposition to Individual Defendants' Motion to Dismiss Count Two of the Complaint*,[2] to which the Individual Defendants filed a Reply[3] and the Plan Administrator filed a Surreply in response.[4] The Motion and responsive pleadings involve Count II of the Plaintiff's Complaint.

[1] Doc. No. 19, filed Jan. 31, 2012. A hearing on the Motion to Dismiss was delayed due to various matters in this adversary proceeding, including the Individual Defendant's Motion for Withdrawal of Reference (Doc. No. 21, filed Jan. 31, 2012), and the resolution of those matters. *See* Doc. No. 50, entered Feb. 27, 2012 (Order Granting Mot. to Stay the Adv. Pro.).
[2] Doc. No. 40, filed Feb. 17, 2012. Because this pleading was submitted prior to the confirmation of Merit's Chapter 11 Plan, it was initially filed by the Official Committee of Unsecured Creditors. *See infra* at 8.
[3] Doc. No. 76, filed June 22, 2012.
[4] Doc. No. 78, filed July 6, 2012.

ALLEGATIONS OF THE COMPLAINT

On December 14, 2011, the Plaintiff initiated this adversary proceeding by filing a Complaint asserting two causes of action. Count I asserts the avoidance and recovery of a constructively fraudulent transfer pursuant to 11 U.S.C. §§ 548, 550, and 551 against Defendant National Patent only. Count II asserts a cause of action for breach of fiduciary duties pursuant to S.C. Code Ann. §§ 33-8-300 and 33-8-420 against the Individual Defendants only. The following is a summary of the allegations of the Complaint[5], as they pertain to the Individual Defendants:

1. Defendant Baker, at times relevant to this proceeding, was the Chief Executive Officer and President of The Merit Group, Inc. (n/k/a TMG Liquidation Company) ("Merit"). On behalf of Merit, Baker executed the Stock Purchase Agreement dated November 24, 2009, under which Merit agreed to purchase the stock of the Five Star Group, Inc. (n/k/a FSG Liquidation Company) ("Five Star") from Defendant National Patent.

2. Defendants Fort and Wolfe, at all times relevant to this proceeding, were members of Merit's Board of Directors (the "Merit Board").

3. In July 2008, Merit contacted National Patent to discuss a potential merger transaction between Merit and Five Star. Merit believed the merger would further its business plan by eliminating a long-standing competitor from the industry.

4. After various discussions, Merit decided it wanted to pursue an acquisition of Five Star as opposed to a merger transaction. Merit, without conducting any due diligence,

[5] "In ruling on a 12(b)(6) motion, a court 'must accept as true all of the factual allegations contained in the complaint' and 'draw all reasonable inferences in favor of the plaintiff.'" *Kensington Volunteer Fire Dept., Inc. v. Montgomery Cnty., Md.*, 684 F.3d 462, (4th Cir. 2012) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)).

initially suggested an acquisition of Five Star at a price of approximately $7.5 million of value to Five Star's equity holders after subtracting Five Star's revolving credit facility. National Patent informed Mitch Jolley—Merit's Chief Executive Officer at the time—that the offer would have to substantially increase in order for it to be seriously considered by the National Patent board of directors. In response, in December 2008, Merit indicated an interest in acquiring Five Star at a price of between $13 – $16 million in value to Five Star's equity holders and sent National Patent its request for due diligence materials.

5. In January 2009, Merit sent National Patent a letter confirming its high level of interest in acquiring Five Star's assets for $34 million, based on Five Star's September 30, 2008, net working capital level. The $34 million purchase price represented a multiple of 6.6 times Five Star's 2007 earnings before interest, taxes, depreciation, and amortization ("EBITDA"), which was Merit's frame of reference at the time. However, some issues arose in April 2009 after Merit visited the Five Star distribution centers, resulting in Merit deciding to revisit the proposed transaction from a valuation standpoint.

6. Despite this, later that month Merit agreed to increase the purchase price to $34.7 million and to assume Five Star's interest rate swap liability, which was "under water" by $1.1 million at the time. Additionally, Merit agreed to amend the deal structure from an asset purchase to a stock purchase and to switch from a working capital to a cash flow adjustment mechanism. However, this transaction was halted when Merit's mezzanine debt provider was no longer interested in funding the transaction, and Merit requested additional time from National Patent in order to put together a new financial package.

7. By letter dated August 12, 2009, Jolley again revisited the purchase price for the Five Star stock and proposed a lower purchase price of $30 million. The letter explained

that Merit was receiving resistance from its financial partners to finance such a high purchase price. The National Patent board of directors, however, flatly rejected Merit's offer.

8. In September 2009, Merit announced that Jolley was leaving the company. Defendant Baker replaced Jolley as the Chief Executive Officer and attempted to renew the negotiations with National Patent. After a series of negotiations, Merit increased its offer to $33,124,000, subject to certain adjustments. That offer represented a multiple of 17.3 times Five Star's EBITDA for the prior 12 months, and 25.3 times projected 2009 EBITDA. Merit's offer of $33,124,000 was based on projected cost savings and revenue enhancements, as a result of the integration of Five Star into Merit's group of companies.

9. On September 28, 2009, National Patent engaged CRT Investment Banking LLC ("CRT") to provide an opinion as to the fairness of the Five Star Acquisition from the perspective of National Patent (the "CRT Report").

10. Based on the different valuation methodologies employed by CRT, the CRT Report concluded that the total enterprise value of Five Star was between $18 and $22 million.

11. On November 23, 2009, the Merit Board approved the terms of the Stock Purchase Agreement for the acquisition of Five Star. They did so despite knowing that the fair value of the Five Star stock was below the offered purchase price. To finance the transaction, the Merit Board also approved Merit's increase in its credit facility with Regions Bank and incurrence of new subordinate indebtedness with Stonehenge Opportunity Fund II, L.P.

12. The Individual Defendants had no prior experience in transactions of this size and nature. They relied on their experience in a variety of much smaller deals. However, the Five Star acquisition was much different and more complicated than the Individual Defendants' prior experiences. This inexperience resulted in lofty financial projections, faulty assumptions in execution, and overpaying substantially for the Five Star stock, despite full knowledge that Five Star was going through its own financial problems and was similarly overleveraged. All this occurred at a time when the Individual Defendants knew that the industry and markets Merit was a part of were suffering.

13. The Merit Board failed to properly test the fairness of the Stock Purchase Agreement or its business projections for Five Star. Moreover, the Merit Board neglected to hire a professional to evaluate the fairness of the Five Star acquisition and whether to proceed with the transaction at such a high purchase price.

14. Other than one individual employed temporarily to assist in information technology issues, the Individual Defendants failed to engage a professional to advise them: 1) on whether to go through with the deal; 2) on the financial projections on which they based their decisions; or 3) to assess the risks and feasibility of their post-closing profitability projections and integration plan.

15. On November 24, 2009, the Stock Purchase Agreement was executed by Baker on behalf of Merit, providing for an aggregate purchase price of $33,124,000 for the Five Star acquisition, subject to certain adjustments. The Five Star acquisition closed on January 15, 2010.

16. Thereafter, the parties also found it necessary to enter into a Settlement Agreement and Mutual Release on May 14, 2010, reducing the offered purchase price by an

aggregate of $1,050,000. As a result of that reduction, the total purchase price for the Five Star stock was $32,074,000 (paid in the form of cash and the assumption of liabilities) (the "Purchase Price").

17. At the time of, and immediately prior to, the Five Star acquisition, Merit was insolvent.[6] The Five Star acquisition deepened Merit's insolvency as a result of purchasing stock that had a value far less than the Purchase Price.

18. After Merit acquired Five Star, Merit failed to achieve the post-closing performances projected, spent far more than anticipated for the consolidation of warehouses and the integration of the companies, and suffered substantial losses. These events and circumstances drained Merit of its limited financial resources, and resulted in the filing of a petition for relief under Chapter 11 of the Bankruptcy Code on May 17, 2011.

19. The Individual Defendants, in their capacities as officers and directors of Merit, owed Merit fiduciary duties, which required that they discharge their duties: (i) in good faith; (ii) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (iii) in a manner reasonably believed to be in the best interests of the corporation.

---

[6] The Complaint specifically alleges that:

> As of December 31, 2009, Merit's financial statements reflected assets totaling approximately $58.1 million, including approximately $1.8 million of cash, and liabilities of approximately $60.6 million, including accounts payable and accrued liabilities totaling approximately $18.0 million. The financial statements further reflect that Merit's net losses in 2008 and 2009 totaled approximately $1 million and $1.6 million, respectively. In 2008 and 2009, Merit reported EBITDA of approximately $4.9 million and $5.3 million, respectively. Based on reasonable valuation of Merit following traditional valuation methodology, the fair value of Merit's property was worth less than the amount of Merit's liabilities by millions of dollars at the time of the Five Star Acquisition.

Doc. No. 1 at 9, ¶ 34.

20. Because of Merit's insolvency at the time of the Five Star acquisition, the Merit Board, acting as trustees of Merit's creditors, also owed Merit's creditors fiduciary duties.

21. The Individual Defendants failed to exercise ordinary care in evaluating and ultimately approving the Five Star Acquisition, by: (i) agreeing to the Five Star transaction despite their knowing that the purchase price was substantially higher than the fair market value of the Five Star stock; and (ii) failing to employ an outside professional to advise the Merit Board on the fairness of the Purchase Price, the reasonableness of Merit's aggressive future revenue and EBITDA projections of the consolidated post-closing enterprise, their due diligence, and the formulation and implementation of a post-closing integration plan that was suitable for Merit, taking into account their limited financial resources.

22. The Individual Defendants' lack of proper due diligence amounted to waste of Merit's corporate assets and they failed to act in the best interests of Merit and its creditors.

23. Merit's creditors reasonably relied on the Individual Defendants to fulfill their fiduciary duties to Merit and its creditors, and suffered injuries based on such reliance.

24. As a result, the Individual Defendants breached their fiduciary duties to Merit and its creditors.

25. As a result of the foregoing, Plaintiff is entitled to a judgment against the Individual Defendants: (a) declaring that they have breached their fiduciary duties to Merit and its creditors; (b) awarding compensatory and consequential damages, in an amount to be determined at trial; (c) awarding costs of suit and reasonable attorneys' fees, in an amount to

be determined at trial; and (e) granting such other and further relief as the Court deems just and appropriate under the circumstances.

26. Lastly, the Plaintiff requests that the money judgment entered against the Individual Defendants for damages be in the amount of no less than $50,000,000.

MOTION TO DISMISS

The Individual Defendants seek dismissal of Count II of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012. First, the Individual Defendants contend that the Plaintiff lacks standing to bring this action because they believe Claim II is a breach of fiduciary duty claim based on deepening insolvency, which only corporations have standing to bring, and this action was brought on behalf of the creditors. The Individual Defendants also assert that the Unsecured Creditors Committee, who initially filed the Complaint, cannot proceed with this lawsuit because it ceased to exist upon plan confirmation.[7] Due to the Court's entry of the *Order Confirming Substitution of Plan Administrator as Plaintiff and Designating Form of Caption*,[8] and the representations made in the pleadings and on the record that the Plaintiff is not pursuing an independent deepening insolvency claim, the Court finds that the Motion to Dismiss should not be granted on these grounds.

Additionally, the Individual Defendants claim that the Plaintiff's Complaint does not meet the particularity requirement pursuant to Fed. R. Civ. P. 8, as construed by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and in *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007). The Individual Defendants assert that the Complaint fails to state an

---

[7] *See supra* note 2.
[8] Doc. No. 83, entered July 26, 2012. This action was initially filed by the Official Committee for Unsecured Creditors for Merit. After the hearing on this matter, the Court signed the Order substituting the Plan Administrator for the Official Committee of Unsecured Creditors.

actionable claim for breach of fiduciary duties and provides few facts that demonstrate how they actually discharged or failed to discharge any duty of care and only offers conclusory statements, which cannot be considered on a Motion to Dismiss. In addition, the Individual Defendants contend that the Complaint fails to plead facts sufficient to overcome the presumption afforded to them by the business judgment rule that they acted in good faith and on an informed basis.

Lastly, the Individual Defendants argue that the Complaint fails to plead damages with particularity and only asserts a group theory of liability, which does not place the Individual Defendants on notice of the conduct specifically at issue.

STANDARD OF REVIEW

A motion filed under Rule 12(b)(6) challenges the legal sufficiency of the complaint. "[I]t does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). The legal sufficiency of the Plaintiff's Complaint is measured by whether it meets the standards for a pleading set forth in Rule 8, which provides the general rules of pleading, and Rule 12(b)(6), which requires a complaint to state a claim upon which relief can be granted. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). Rule 8 provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While Rule 8 may have previously been accepted as setting forth a "notice pleading" standard, the Supreme Court has since amplified this standard.

In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible on its face*.'" *Iqbal*, 556

U.S. at 678 (emphasis added) (quoting *Twombly*, 550 U.S. at 570). While the plausibility standard does not require "detailed factual allegations," *Twombly*, 550 U.S. at 555, it does require a plaintiff to demonstrate more than a "sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. A complaint meets the plausibility standard when it "articulate[s] facts, when accepted as true, that 'show' that the plaintiff has stated a claim entitling him to relief, i.e., the 'plausibility of entitlement to relief.'" *Giacomelli*, 588 F.3d at 193 (quoting *Iqbal*, 556 U.S. at 678).

To further demonstrate the plausibility standard, the Supreme Court stated that the pleader must provide more than mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

> At bottom, determining whether a complaint states on its face a plausible claim for relief and therefore can survive a Rule 12(b)(6) motion will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief,'" as required by Rule 8.

Giacomelli, 588 F.3d at 193 (quoting *Iqbal*, 556 U.S. at 679).

SUFFICIENCY OF THE COMPLAINT

To address the Individual Defendants' remaining arguments, the Plaintiff contends that it has sufficiently pled a plausible claim for relief and has alleged sufficient facts to establish that the Individual Defendants have breached their fiduciary duties. Additionally, the Plaintiff asserts that the allegations set forth in the Complaint establish that the business judgment rule does not apply to this proceeding; therefore, the Plaintiff does not have to recite facts sufficient to overcome any protections of the business judgment rule. Further, even if the business judgment rule does apply, the Plaintiff contends that it has included facts sufficient to overcome it. The Plaintiff also argues that whether the Individual Defendants are protected by the business judgment rule is a factual question that should not be determined at this stage in the proceeding.

In addition, the Plaintiff contends that the dollar amount listed in the demand for damages is only an estimate and is not a part of its claim for relief. Therefore, it is not subject to the plausibility standards under *Iqbal* and *Twombly* and pursuant to Rule 8(a)(3), the Plaintiff is only required to make a demand for relief, which it has done. Finally, the Plaintiff asserts that it is not relying on a group theory of liability because the Complaint identifies each of the Individual Defendants and their respective positions with Merit and sets forth the specific actions, or lack thereof, with relation to the Five Star acquisition.

Under South Carolina law, officers and directors of a corporation have a fiduciary duty to act in the best interests of the corporation and its shareholders. This fiduciary duty has been codified and specifically requires a director or officer to discharge his duties: "(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders." S.C. Code Ann. § 33-8-300(a) (directors); § 33-8-420(a) (officers).

The fiduciary duty of care owed by corporate directors and officers is the duty to make an informed business judgment. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Dockside Ass'n, Inc. v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987) (citation omitted). "The business judgment rule supplies 'a presumption that directors of a corporation act in good faith' and in the best interests of the corporation." *Lyon v. Campbell*, 217 F.3d 839 (4th Cir. 2000) (quoting *Zimmerman v. Bell*, 800 F.2d 386, 392 (4th Cir. 1986)); *see also Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) ("The business judgment rule requires directors to act reasonably and in good faith. It does not expect perfection."). However, "the rule does not apply if the directors have acted in bad faith or engaged in fraud, self-dealing, or unconscionable conduct." *Viera v. AGM II, LLC (In re Worldwide Wholesale Lumber, Inc.)*, 378 B.R. 120, 126-27 (Bankr. D.S.C. 2007) (citations omitted).

The standard of care for determining whether an officer or director has breached his duty of care is one of gross negligence. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). In South Carolina:

> Gross negligence is defined as "the failure to exercise slight care." It has also been defined as "*the intentional, conscious failure to do something which it is incumbent upon one to do* or the doing of a thing intentionally that one ought not to do." Gross negligence "is a relative term, and means the *absence of care that is necessary under the circumstances*."

Doe v. Greenville Cnty. School Dist., 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007) (emphasis added) (quoting *Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999)). If the business judgment rule does not apply, then the standard of care is the ordinary duty of care.

"Notwithstanding the general rule that affirmative defenses should not be considered on a motion to dismiss, the Fourth Circuit allows defenses to be considered if they clearly appear on the face of the complaint." *Campbell v. Cathcart (In re Derivium Capital, LLC)*, 380 B.R. 407, 417 (Bankr. D.S.C. 2006) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)).

> In asserting breach of fiduciary duty claims, it should have been obvious to the [Plaintiff] that the business judgment rule would be implicated. For that reason, the [Plaintiff] was required to plead that he can overcome the presumption created by the business judgment rule in order to survive a motion to dismiss under FRCP 12(b)(6).

Notinger v. Costa (In re Robotic Vision Sys., Inc.), 374 B.R. 36, 48-49 (Bankr. D.N.H. 2007); *see also Derivium Capital, LLC*, 380 B.R. at 417 ("On a motion to dismiss, courts have held that a plaintiff must plead around the business judgment rule to avoid dismissal." (citing *Stanziale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 238 (3d Cir. 2005))). Therefore, in order to survive the Motion to Dismiss, the Complaint must plead facts that, if true, would allow the reasonable inference that the alleged conduct falls outside the protection of the business judgment rule.

In order to plead around the business judgment rule, the complaint must allege, in other than conclusory terms, that relevant parties "failed to act (1) in good faith; (2) in the honest belief that the action was in the best interest of the corporation; or (3) on an informed basis.'" *Official Comm. Of Unsecured Creditors v. Bay Harbour Master Ltd. (In re BH S & B Holdings LLC)*, 420 B.R. 112, 146 (Bankr. S.D.N.Y. 2009) *aff'd*, 807 F. Supp. 2d 199 (S.D.N.Y. 2011) (quoting *Crescent/Mach I Partners L.P. v. Turner*, 846 A.2d 963, 984 (Del. Ch. 2000)).

> "Alternatively, a plaintiff may overcome the presumption that directors and officers acted on an *informed basis* by establishing that a decision was the product of an irrational process *or* that directors failed to establish an information and reporting system reasonably designed to provide the senior management and the board with information regarding the corporation's legal compliance and business performance, resulting in liability."

Id. at 147 (emphasis in original) (quoting *Tower Air*, 416 F.3d at 238). The Complaint does not have to definitely establish that the business judgment rule does not apply. Rather, on a motion to dismiss, the Court examines whether there is a reasonable doubt, considering all the facts alleged by the Plaintiff, that the Individual Defendants' actions are protected by the business judgment rule. *See West v. Avery (In re Norman Res., Inc.)*, Adv. No. 10-03701, 2011 WL 5357895, at *10 (Bankr. S.D. Tex. Nov. 7, 2011) (citing *Seidel v. Byron*, 405 B.R. 277, 290 (N.D. Ill. 2009)).

The Plaintiff concedes that there are no allegations of bad faith or self-dealing.[9] Accordingly, the Individual Defendants may be able to assert the business judgment rule as defense.[10] Therefore, the Court must determine whether the facts alleged in the Complaint are sufficient to "plead around the business judgment rule." Since there are no allegations of bad faith, the Court must determine if the Complaint pleads sufficient facts alleging that the Individual Defendants' actions and/or decisions were taken on an uninformed basis. If not, then the Court must find that the Individual Defendants' actions rose to the level of gross negligence.

Looking to the totality of the allegations, assuming they are true and drawing all reasonable inference in favor of the Plaintiff, and applying other Rule 12(b)(6) standards, the Court finds that the Plaintiff has alleged facts sufficient to plead a plausible claim for breach of fiduciary duties and to plead around the business judgment rule at this stage of the proceeding.[11] Without considering any conclusory allegations, the Complaint alleges that

---

[9] Doc. No. 40 at 29.

[10] The Court notes that whether the business judgment rule actually apples and whether it precludes the Individual Defendants from any liability are issues to be determined by the trier of fact.

[11] At the hearing on this matter, the parties directed the Court's attention to several decisions in support of their respective arguments, including that the actions of the Individual Defendants do or do not rise to the level to constitute a breach of fiduciary duty. However, those cases are of no moment to the instant matter in light of the Court's finding that the Complaint sufficiently pleads around the business judgment rule and sets forth a plausible claim for relief. Further, the Court believes that those cases are distinguishable from the instant matter due to the fact that this proceeding is only at the motion to dismiss stage and because the Plaintiff is only pursuing a breach of the Individual Defendants' duty of care. The parties mentioned the following cases: *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), *overruled on other grounds*, *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), *superseded by statute*, 8 Del. C. § 102(b)(7); *Brandt v. Hicks, Muse & Co., Inc. (In re Healthco Int'l)*, 208 B.R. 288 (Bankr. D. Mass. 1997); and *Bridgeport Holdings, Inc. v. Boyer (In re Bridgeport Holdings, Inc.)*, 388 B.R. 548 (Bankr. D. Del. 2008). These cases were originally cited in the

the Individual Defendants owed fiduciary duties to Merit, its shareholders, and the creditors because it alleges that Merit was insolvent at the time of the transaction. In sum, the allegations assert that the Individual Defendants failed to establish an information and reporting system reasonably designed to provide the board and officers with information to evaluate the purchase price for Five Star and to fully assess the transaction on behalf of Merit prior to executing the deal. *See Tower Air,* 416 F.3d at 238.

In addition, the Court finds that the Complaint does not assert a group theory of liability—precluding the Individual Defendants from being put on notice of the specific conduct at issue—because the Complaint identifies each of the Individual Defendants, their respective positions with Merit, and their involvement with the Five Star acquisition. Such allegations, in addition to the fact that each Individual Defendant is held to the same standard pursuant to S.C. Code Ann. §§ 33-8-300(a) (directors) and 33-8-420(a) (officers), put each Individual Defendant on sufficient notice regarding any objectionable conduct. Furthermore, after considering the Plaintiff's argument that the damages amount set forth in the Complaint is not relevant to this Motion, the Court is not persuaded by the Individual Defendants' argument challenging the sufficiency of the damages demand.

IT IS THEREFORE ORDERED that the Individual Defendants' *Motion to Dismiss* is denied.

Plaintiff's Objection and were referenced at the hearing by the Plaintiff and distinguished by the Individual Defendants in support of their respective arguments.