



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
REDACTED -- PUBLIC VERSION  
1/10/08

IN RE: TRANSKARYOTIC )  
THERAPIES, INC. ) Cons. C.A. No. 2776-CC

**OPENING BRIEF OF DEFENDANTS  
TRANSKARYOTIC THERAPIES, INC. AND SHIRE PLC  
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

After more than a year of discovery in a statutory appraisal action (the “Appraisal Action”) concerning the July 27, 2005 arm’s-length all-cash merger (the “Merger”) between Shire Pharmaceuticals Group plc (“Shire”) and Transkaryotic Therapies, Inc. (“TKT” or the “Company”), a subset of the appraisal petitioners (“Plaintiffs”) filed a new action (the “Fiduciary Duty Action”) seeking rescissory damages for alleged breaches of fiduciary duty by four of TKT’s seven directors (Dr. Dennis Langer and Messrs. Jonathan Leff, Rodman Moorhead and Wayne Yetter, collectively referred to as the “Individual Defendants”), for alleged complicity in those breaches by Shire, and on the speculation that TKT’s stockholders may not have approved the Merger as required by 8 *Del. C.* § 251(c). Fact discovery in the Fiduciary Duty Action is complete, and Shire and TKT (jointly, the “Corporate Defendants”) now seek summary judgment in the Fiduciary Duty Action on the following four grounds:

First, Plaintiffs – a group of professional investment managers, hedge funds and merger arbitrageurs – lack standing, in whole or in part, to pursue fiduciary duty claims related to the Merger. Nine of the ten Plaintiffs were not TKT stockholders when TKT and Shire entered into and announced their merger agreement on April 21, 2005, and seven of the ten held no TKT shares on the June 10, 2005 record date for voting on the Merger (the “Record Date”). During the course of discovery, the Plaintiffs testified to a variety of motivations for their purchases on the eve of the Merger, including the hope of a higher bid by Shire or a third party and speculation that TKT’s shareholders would

reject the Merger and keep the Company independent. Plaintiffs, however, also knowingly accepted the risk that TKT's stockholders might approve the transaction and force Plaintiffs to choose between accepting the \$37 per share cash Merger consideration and pursuing a limited statutory remedy against TKT through the Appraisal Action. Plaintiffs now seek to expand their options by filing their baseless fiduciary claims, but Delaware law is clear that one who is not a stockholder when the board of directors approves a merger lacks standing to challenge that merger on fiduciary duty grounds. *See Brown v. Automated Mktg. Sys., Inc.*, 1982 WL 8782, at \*1-2 (Del. Ch. Mar. 22, 1982); *In re Beatrice Cos., Inc. Litig.*, 522 A.2d 865, 1987 WL 36708, at \*3 (Del. Feb. 20, 1987) (TABLE) ("In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged."). Consequently, seven of the ten Plaintiffs lack standing on Count I and nine of the ten Plaintiffs lack standing on Count II and, accordingly, all Defendants are entitled to summary judgment on those claims.

Second, there is no support in the record for any claim that Shire aided and abetted any alleged breaches of fiduciary duty by the Individual Defendants. As detailed in the briefs of Messrs. Leff, Moorhead and Yetter,<sup>1</sup> the Individual Defendants did not commit any underlying breaches of fiduciary duty. Even if they did, Shire did not knowingly

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<sup>1</sup> In addition, as set forth more fully below, the record is devoid of any facts that support the allegation that Dr. Langer breached any fiduciary duty owed to TKT's shareholders.

participate in any alleged misconduct by the Individual Defendants and certainly never agreed to give the Individual Defendants any “side deals” or other inducements to ignore their fiduciary responsibilities. Nor is there any evidence that concerted action by Shire and the Individual Defendants proximately caused any damage to the Plaintiffs by materially affecting the consideration payable to TKT shareholders in the Merger. For all of these reasons, Shire is entitled to summary judgment on the aiding and abetting claim alleged in Count IV.

Third, there is no genuine dispute that the TKT stockholders voted to approve the Merger as required by the relevant statute, and Plaintiffs’ half-hearted speculations to the contrary are baseless. The certificate of merger submitted herewith constitutes a complete and un rebutted *prima facie* showing that the Merger was legally consummated. *See 8 Del. C. § 105*. The inspector of election certified the count of the vote, and that certificate too is entitled to a presumption of correctness. *See Berlin v. Emerald Partners*, 552 A.2d 482, 491 (Del. 1988). Plaintiffs did not attend the TKT stockholders’ meeting, did not challenge the vote count at the meeting, did not bring an action under 8 *Del. C. § 225(b)* to challenge the vote count, and did not even pursue discovery on this claim. The record is hopelessly inadequate to sustain Plaintiffs’ claim, and the Defendants are entitled to summary judgment on Count III.

Fourth, even if any of Plaintiffs’ claims survive the Defendants’ summary judgment motions, there is no basis in the record for an award of rescissory damages against any of the Defendants. Rescissory damages are a rarely-awarded exception to the

normal out-of-pocket or compensatory measure of damages for an adjudicated breach of fiduciary duty. A rescissory damage award against a non-fiduciary acquirer such as Shire would be unprecedented. Moreover, there is no factual or legal basis for such an award against the participants in an arm's-length all-cash transaction, much less for such an award in favor of opportunistic investors who purchased most or all of their shares with knowledge of the terms of the Merger that they now challenge. Despite two years of fact discovery, Plaintiffs have failed to develop any record that could possibly support such an extraordinary remedy. The Court should determine that Plaintiffs will not be entitled to rescissory damages as a matter of law.

#### **NATURE AND STAGE OF PROCEEDINGS**

This is a consolidated action consisting of (i) the Appraisal Action, in which the holders of over eleven million shares of TKT common stock seek appraisal under 8 *Del. C.* § 262 (“Section 262”); and (ii) the Fiduciary Duty Action, in which a subset of the appraisal petitioners seek rescissory damages against the Individual Defendants, Shire, and TKT on the theories described above. The petitions underlying the Appraisal Action were filed between August and November 2005.

On March 8, 2007, after the close of discovery and just over a month before the scheduled trial in the Appraisal Action was set to commence, ten of the hedge fund petitioners in the Appraisal Action – High River LP (“High River”), Icahn Partners Master Fund (“Icahn Master”), Icahn Partners LP (“Icahn Partners,” collectively, the “Icahn Plaintiffs”), Viking Global Equities LP (“Viking”), VGE III Portfolio Ltd.

("VGE," collectively, the "Viking Plaintiffs"), CR Intrinsic Investments, LLC ("CR Intrinsic"), Atticus Capital LP ("Atticus"), Sigma Capital Associates, LLC ("Sigma"), Millenco LLC ("Millenco"), and Porter Orlin LLC ("Porter Orlin") – filed a Complaint in the Fiduciary Duty Action seeking an award of rescissory damages against: (i) the Individual Defendants for alleged breaches of fiduciary duty in connection with the Merger; (ii) Shire for allegedly aiding and abetting such breaches; and (iii) all the foregoing defendants on the theory that the stockholders of TKT allegedly did not vote in favor of the Merger as required by 8 *Del. C.* § 251(c). Trial in the consolidated action is scheduled for May 12-16, 2008.

On December 21, 2007, the Defendants moved for summary judgment in the Fiduciary Duty Action. This is the Corporate Defendants' opening brief in support of that motion.

## **STATEMENT OF FACTS**

### **I. The Merger.**

#### **A. Shire's Approach to TKT.**

TKT was a biopharmaceutical company primarily focused on researching, developing and commercializing treatments for rare diseases caused by protein deficiencies. (*See* McCauley Aff., Ex. 1).<sup>2</sup> In the fall of 2004, Shire, a more diversified pharmaceutical company, decided to preliminarily approach the TKT Board about a

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<sup>2</sup> All citations to "McCauley Aff." and exhibits thereto refer to the Affidavit of Charles A. McCauley, III, Esq., submitted in support hereof.

possible transaction. At the time, the TKT Board consisted of seven members: Michael Astrue, Wayne Yetter, Dr. Walter Gilbert, Dr. Lydia Villa-Komaroff, Dr. Dennis Langer, Jonathan Leff and Rodman Moorhead.<sup>3</sup>

In early October 2004, Matthew Emmens, Chief Executive Officer of Shire, made short telephone calls to Mr. Yetter, then the Chairman of TKT's Board,<sup>4</sup> and Mr. Astrue, then TKT's Chief Executive Officer, to set up an initial meeting between the two companies. (*See* McCauley Aff., Ex. 2). On October 13, 2004, Mr. Emmens and Barbara Deptula, Shire's Executive Vice President of Business Development, met with Mr. Astrue to discuss potential strategic transactions between the two companies, including transactions involving Dynepo, one of TKT's primary products. (*See* McCauley Aff., Ex. 3 at 11). Within the following month, Shire shifted its focus to consider an acquisition of TKT as a whole, rather than a transaction involving only one of TKT's products. Mr. Emmens placed a call to Mr. Yetter on November 15, 2004 to express that interest. *See id.*<sup>5</sup>

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<sup>3</sup> Messrs. Leff and Moorhead were affiliated with Warburg Pincus ("Warburg"), a private equity firm that had held a substantial equity stake in TKT for many years. (*See* McCauley Aff., Ex. 3 at 57).

<sup>4</sup> Messrs. Emmens and Yetter previously worked together at Merck Pharmaceuticals from 1982 to 1984 and at Astra Merck Pharmaceuticals from 1992 to 1997. (*See* Yetter Dep., Dec. 5, 2006 at 11:22-14:24).

<sup>5</sup> Though the record is unclear on the exact timing of Shire's approach regarding acquiring TKT as a whole as opposed to a potential strategic transaction involving Dynepo, *compare* Emmens Dep., Nov. 2, 2006, at 74:22-75:5 and Yetter Dep., Nov. 27, 2007, at 237:16- (...continued)

On December 6, 2004, Mr. Emmens sent Mr. Astrue a letter proposing an all-cash acquisition of TKT at a price in the range of \$29 to \$31 per share, subject to certain conditions. *Id.* In response to this letter, TKT's Board agreed to permit Shire to perform limited due diligence on specific legal and financial matters. *Id.* at 11-12.

**B. Shire's Increased Offer and TKT's Acceptance.**

After receiving Shire's initial offer, the TKT Board conducted a rigorous deliberative process, including arm's-length negotiations with Shire. (*See* McCauley Aff., Ex. 14); *see also* McCauley Aff., Ex. 3 at 12-13 (summarily describing arm's-length negotiations between TKT and Shire)). On February 23, 2005, Mr. Emmens sent a letter to TKT confirming Shire's interest in acquiring TKT in an all-cash transaction, and revising its proposed offer price to \$31 per share. (*See* McCauley Aff., Ex. 3 at 12). On February 26, 2005, after receiving a presentation by Mr. Emmens and advice from its legal and financial advisors, the TKT Board instructed one of its financial advisors, SG Cowen, to inform Shire's financial advisor (Goldman Sachs) that Shire's \$31 per share proposal was inadequate and that Shire would need to offer a significantly higher price for the TKT Board to continue to negotiate. *See id.* A month later and after further discussions, Shire increased its offer to a price of \$37 per share on March 31, 2005, subject to certain conditions and the completion of due diligence. *See id.*

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(continued...)

238:24 *with* Astrue Dep., Nov. 6, 2007, at 14:1-15:14, it is undisputed that by mid-November, Shire had made clear its interest in TKT as a whole.

On April 21, 2005 (the “Announcement Date”), the TKT Board formally accepted Shire’s offer to acquire TKT at a per-share price of \$37 by a vote of five directors to two. (See McCauley Aff., Ex. 19). As a result of TKT’s acceptance of the \$37 per share merger consideration, which represented a 44% premium over TKT’s average closing share price for the four weeks prior to the announcement, Shire and TKT entered into a formal agreement and plan of merger the same day. *See id.* There is no evidence in the record that Shire offered or agreed to give anything to any TKT director, including the five directors who voted to accept Shire’s offer, *i.e.*, Messrs. Yetter, Leff and Moorhead and Drs. Langer and Villa-Komaroff, except, as applicable, the consideration that all TKT shareholders received in connection with the Merger, *i.e.*, \$37 per share.

Throughout the negotiation process, Mr. Astrue was a vocal and active opponent of a potential merger transaction with Shire. Once the TKT directors determined that Shire’s \$37 per share offer constituted full and fair value for TKT’s shareholders and voted to accept it, Mr. Astrue stepped down from both his executive and director positions at the Company. (See McCauley Aff., Ex. 16). Dr. David Pendergast, TKT’s then-Chief Operating Officer, assumed the positions vacated by Mr. Astrue.

**C. Plaintiffs’ Post-Announcement Purchases of TKT Shares.**

**1. Plaintiffs’ TKT Holdings as of the April 21, 2005 Announcement Date.**

Only Porter Orlin held a long position in the Company as of the April 21, 2005 Announcement Date, claiming to have owned an aggregate of 3,157,059 shares as of this

date,

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2. **Plaintiffs' TKT Holdings as of the June 10, 2005 Record Date.**

The holders of record of TKT shares as of the close of business on the Record Date, June 10, 2005, were entitled to receive notice of and to vote at the special meeting on the Merger (the "Special Meeting"). Only three of the Plaintiffs held long positions in TKT as of the Record Date: Porter Orlin, Millenco, and Sigma.

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<sup>6</sup> A short sale occurs when a market participant such as Millenco sells a security that it does not own or that it has borrowed. *See In re Digex, Inc. S'holders Litig.*, 2002 WL 749184, at \*2 (Del. Ch. Apr. 16, 2002); *see also* 17 C.F.R. § 240.3b 3 (definition of term "short sale").

<sup>7</sup> This void in the record exists because Millenco, despite repeated requests, has declined to produce such information. (*See McCauley Aff.*, Exs. 13, 44).

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**D. The Stockholder Vote and Completion of the Merger.**

On June 27, 2005, TKT filed with the SEC its definitive proxy statement (the “Proxy Statement”), which, among other things, (i) provided notice that the Special Meeting would be held on July 27, 2005 (the “Merger Date”), and (ii) stated that the TKT Board of Directors recommended that the stockholders vote for the adoption of the merger agreement. (See McCauley Aff., Ex. 3). TKT’s transfer agent mailed the Proxy Statement to its stockholders as of the Record Date on June 27, 2005. (See McCauley Aff., Ex. 26).

TKT appointed Norris Richardson, a senior account manager of Computershare Limited, as inspector of election for the Special Meeting. (See Richardson Aff. ¶ 3, Ex.

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A).<sup>9</sup> Mr. Richardson has served as an inspector of election approximately 150 times over the past 15 years. (See Richardson Aff. ¶ 3). The inspector determined that the number of shares entitled to be voted at the Special Meeting was 35,624,361, the legally required majority of which was 17,812,181. (See 8 Del. C. § 251(c); Richardson Aff. ¶ 5, Exs. B, C).<sup>10</sup> At the Special Meeting, Dr. Pendergast submitted a proxy ballot casting 18,737,994 votes in favor of the Merger (the “Proxy Ballot”). (See McCauley Aff., Ex. 28). A stockholder who attended in person voted an additional 4000 shares in favor of the Merger. The inspector of election certified that, of the shares eligible to vote on the Merger, 18,741,994 shares were voted in favor, 9,890,989 shares were voted against, 47,416 shares abstained, and the remaining 6,943,962 shares were not voted. (See Richardson Aff. ¶ 5, Ex. C). Following the approval of the Merger by more than the legally required majority of TKT’s stockholders, a certificate of merger was filed with the Secretary of State and the Merger was completed on July 27, 2005.<sup>11</sup>

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<sup>9</sup> All citations to “Richardson Aff.” and exhibits thereto refer to the Affidavit of Norris Richardson, submitted in support hereof.

<sup>10</sup> As of the Record Date, TKT had 35,991,289 shares outstanding, of which 366,928 were held in a TKT treasury account and, hence, not entitled to be voted. (See McCauley Aff., Ex 27).

<sup>11</sup> Under the terms of the merger agreement, TKT was the surviving corporation in the Merger. Following the Merger, TKT filed a certificate of amendment under 8 Del. C. § 242(a)(1) with the Secretary of State of the State of Delaware, changing its legal name to Shire Human Genetic Therapies, Inc (“Shire HGT”).

Plaintiffs neither attended the Special Meeting nor requested a review-and-challenge session with respect to any issue that arose at the Special Meeting. (See Richardson Aff. ¶ 6; *see also* Bahn Dep., Oct. 17, 2007, at 148; Orlin Dep., Oct. 23, 2007, at 91-94;

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Moreover, Plaintiffs never brought an action under 8 Del. C. § 225(b) to determine the result of the vote at the Special Meeting.<sup>12</sup> Although Defendants produced materials related to the vote count during the Appraisal Action,<sup>13</sup> it was not until March 8, 2007 – more than 19 months after the Certificate of Merger was filed – that Plaintiffs for the first time asserted (in their complaint in the Fiduciary Duty Action) any challenge to the sufficiency of the stockholder vote in favor of the Merger. (See Compl. ¶¶ 95-99).

**E. Plaintiffs' Holdings as of the Merger Date.**

As noted above, nine of the ten Plaintiffs owned no shares on the Announcement Date and seven still owned none as of the Record Date. Most of the Plaintiffs acquired their shares in late June or July of 2005. Several of the Plaintiffs' representatives testified

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<sup>12</sup> Because no challenges were made, there was no need for the inspector of election to make or retain documentation related to a challenge. (See Richardson Aff. ¶6; 8 Del. C. § 231(b)(4)).

<sup>13</sup> The Corporate Defendants provided the following items in discovery, among others: (i) a TKT stock list as of the record date; (ii) the proxy ballot cast by David Pendergast on behalf of 28,676,399 shares; (iii) the report of the inspector of election; (iv) the certificate of the inspector of election; (v) written discovery; (vi) the depositions of TKT and Shire directors and officers; and (vii) hundreds of thousands of pages of other documents.

that they purchased large numbers of shares after the Announcement Date in an effort to turn a quick profit on a perceived “merger arbitrage opportunity.”

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To wit:

- The Icahn Plaintiffs purchased all 1,807,496 of their shares of TKT during the nine-day period beginning on July 12, 2005 and ending on July 21, 2005. (See McCauley Aff., Ex. 30 at 12-13; Exs. 31, 32 (trading history showing all purchases in July);

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Moreover, Millenco and Porter Orlin substantially increased their holdings in TKT in the period leading up to the Merger.

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## ARGUMENT

A Delaware court will grant a motion for summary judgment pursuant to Court of Chancery Rule 56(c) when there is “no genuine, material issue of fact and the moving party is entitled to judgment as a matter of law.” *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996) (internal citations omitted).

While a court must view the facts in the light most favorable to the nonmoving party when deciding a motion for summary judgment, “this does not mean that the nonmoving party can safely stand mute in the face of a summary judgment motion.” *Sierra Club v. Del. Dep’t of Natural Res. & Envtl. Control*, 919 A.2d 547, 554 (Del. Ch. 2006). Instead, “the nonmoving party must come forward with admissible evidence creating a triable issue of material fact or suffer an adverse judgment.” *Id.*; *see also Shuttleworth v. Abramo*, 1997 Del. Ch. LEXIS 99, at \*3 (Del. Ch. June 13, 1997) (holding that “unsupported allegations are insufficient to create a genuine dispute as to material facts”); *In re Tri-Star Pictures Litig.*, 1992 Del. Ch. LEXIS 30, at \*13 (Del. Ch. Feb. 21, 1992), *rev’d on other grounds*, 634 A.2d 319 (Del. 1993) (“[W]here the opponent of summary judgment has the burden of proof at trial, he must show specific facts demonstrating a plausible ground for his claim, and cannot rely merely upon allegations in the pleadings or conclusory assertions in affidavits.”).

**I. THE VAST MAJORITY OF PLAINTIFFS LACK STANDING TO PURSUE THE CLAIMS ASSERTED IN COUNT I (BREACH OF THE DUTY OF DISCLOSURE) AND COUNT II (BREACH OF THE DUTY OF LOYALTY).**

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The evidence in the record makes clear that virtually none of the Plaintiff hedge funds were long-term TKT shareholders but instead purchased the vast majority of their TKT shares after the Merger was announced, and in some cases after the Record Date, as an arbitrage “play” on the potential Merger. Now, Plaintiffs are attempting to extract value from their last minute investment in TKT through litigation.

But Delaware law is unequivocal on this threshold issue: a plaintiff only has standing to bring a claim for breach of the duty of disclosure (Count I) or breach of the duty of loyalty (Count II) if it holds shares of the relevant entity at the time of the alleged breach. As demonstrated below, there is no dispute that the majority of Plaintiffs held no shares of TKT on the dates of the alleged breaches described in Counts I and II of the Complaint. Accordingly, all Defendants are entitled to judgment as a matter of law with respect to at least seven of the ten Plaintiffs’ claims under Count I and nine of the ten Plaintiffs’ claims under Count II.

**A. The Seven Plaintiffs That Did Not Own Any Shares of TKT on the June 10, 2005 Record Date Lack Standing to Challenge TKT’s Merger-Related Disclosures (Count I).**

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Plaintiffs allege in Count I that the Individual Defendants breached their fiduciary duty by failing to disclose all material facts regarding the Merger and that, had all material facts been disclosed, the majority of TKT shareholders would have voted against

the Merger and TKT would have remained an independent company. (Compl. ¶¶ 86-87). Even if the merger-related disclosures had been inadequate, which they were not, the seven Plaintiffs that did not hold *any* shares of TKT on the Record Date and did not subsequently obtain the right to vote could not possibly have been harmed by any alleged inadequacies in the disclosures because these Plaintiffs were not deprived of their right to cast an informed vote on the Merger.<sup>19</sup> Logic therefore dictates, and Delaware authority confirms, that these seven Plaintiffs lack standing to bring the disclosure-related claim asserted in Count I.<sup>20</sup>

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<sup>19</sup> As described *supra* at 10-11, it is uncontroverted that the following seven Plaintiffs did not own a single share of TKT as of the Record Date: (1) High River, (2) Icahn Master, (3) Icahn Partners, (4) Viking, (5) VGE, (6) CR Intrinsic, and (7) Atticus. Furthermore, the record is devoid of any evidence that any post-Record Date purchasers ever acquired the right to vote their shares for or against the Merger, a fact acknowledged by the Plaintiffs' counsel during oral argument on TKT's Motion for Partial Summary Judgment in the Appraisal Action. *See, e.g.*, Transaction ID 14136309, at 33-36.

<sup>20</sup> In addition to the issue of standing, the Defendants will prove at trial that the three remaining Plaintiffs' claims under Count I must also fail because the alleged disclosure violations did not cause any cognizable harm separate and apart from the purported harm allegedly caused by the alleged underlying wrongdoing, *i.e.*, completion of an all-cash Merger. *See In re Tyson Foods, Inc. Consol. S'holders Litig.*, 919 A.2d 563, 597 (Del. Ch. 2007) ("For a disclosure claim to be viable, it must demonstrate damages that flow from the failure to adequately *disclose* information, not that the information disclosed concerned matters for which damages are appropriate.") (emphasis in original); *see also In re J.P. Morgan Chase & Co. S'holders Litig.*, 906 A.2d 766, 773 (Del. 2006) (holding that a plaintiff may only obtain compensatory damages for a breach of the duty of disclosure if those damages are "logically and reasonably related to the harm or injury for which compensation is being awarded"). The relief Plaintiffs seek for the alleged disclosure violations (under Count I) is duplicative of the relief they seek for the allegedly unfair merger process and price (under Count II). Consequently, the disclosure claims asserted in Count I should ultimately be dismissed against all Defendants. *See Brown v. Perrette*, 1999 WL 342340, at \*5-8 (Del. Ch. May 14, 1999) (stating that "a claim for relief for a breach of disclosure is subject to dismissal if the remedy sought is duplicative of the remedy sought for the underlying undisclosed wrongdoing"). Alternatively, because of the (...continued)

It is well-settled under Delaware law that “plaintiffs who purchase stock after disclosures have been made cannot pursue claims for breaches of the duty of disclosure.” *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1170 (Del. Ch. 2002). Delaware courts apply this same bar to plaintiffs who purchase stock *prior* to disclosures being made but *after* the deadline for acquiring the right to vote on the matter upon which the disclosures bear. In *Noerr v. Greenwood*, this Court held that “[a] claim for breach of the fiduciary duty of disclosure can only be maintained by stockholders to whom the duty was owed, in this case, the stockholders on the record date who were entitled, and were being asked, to vote.” 2002 WL 31720734, at \*4 (Del. Ch. Nov. 22, 2002). Put another way, when directors ask stockholders to approve a proposed merger, the directors owe a fiduciary duty of disclosure only to those stockholders of whom they make the request, *i.e.*, those who are entitled to vote. The directors owe no such duty to a stockholder who is not entitled to vote, including one who acquires all its shares after the record date without obtaining the right to direct the vote of those shares. In the context of a merger, a duty of disclosure under Delaware law is owed only to those stockholders who held shares as of the record date and, as such, were entitled to vote on the merger.

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overlapping nature of the claims in Counts I and II, the disclosure claims at least should be dismissed for lack of standing as to the nine Plaintiffs who held no TKT shares on April 21, 2005. All nine of these Plaintiffs lack standing to challenge the fairness of the Merger – regardless of whether they frame their claim as a direct challenge to the Merger or a challenge to the disclosures related thereto.

Here, the undisputed record evidence establishes that seven of the ten Plaintiffs did not own a single share of TKT as of the June 10, 2005 Record Date and, therefore, were not owed a duty of disclosure.<sup>21</sup> (See *McCauley Aff.*, Ex. 12). Thus, Defendants are entitled to judgment as a matter of law on Count I (and that portion of Count IV asserting that Shire aided and abetted the alleged misconduct identified in Count I)<sup>22</sup> against such Plaintiffs.<sup>23</sup> Accordingly, Count I must be dismissed with respect to all Plaintiffs except Porter Orlin, Millenco and Sigma.<sup>24</sup>

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<sup>21</sup> As noted *supra* at note 19, to the extent the stockholders as of the Record Date sold their shares to the Plaintiffs after the Record Date, the Record Date stockholders nevertheless retained the right to direct the vote of their shares. See 8 *Del. C.* § 213(a). The Plaintiffs here have not claimed that they obtained proxies to vote those shares from the Record Date holders of the shares that they subsequently acquired, or that they otherwise stand in the shoes of the Record Date holders for purposes of asserting a disclosure claim. Cf. *Noerr*, 2002 WL 31720734, at \*4 (certifying class consisting of record date stockholders and “successors in interest[] who by operation of law would be entitled to assert disclosure claims on behalf of those record date stockholders . . . [such as] a person having a power of attorney to act on behalf of a record date stockholder, a personal guardian for a record date stockholder, and an executor of a record date stockholder’s estate”).

<sup>22</sup> It is axiomatic that, to the extent Plaintiffs lack standing to assert claims for a breach of a duty of disclosure under Count I, they also lack standing to claim that Shire aided and abetted that purported breach. See *McGowan v. Ferro*, 859 A.2d 1012, 1041 (Del. Ch. 2004), *aff’d*, 873 A.2d 1099 (Del. 2005) (TABLE) (holding that because the underlying claims alleging a breach of duty of loyalty “fail as a matter of law . . . the aiding and abetting claims likewise fail”).

<sup>23</sup> Even if the relevant date for standing were not June 10, 2005 but instead the date on which the Proxy Statement was issued, June 27, 2005, the result would be the same because the seven Plaintiffs who did not hold any shares on the Announcement Date also did not hold any shares on the proxy date. See *McCauley Aff.*, Ex. 30 at 12-13; Exs. 31-34, 37.

<sup>24</sup> The Count I claims that survive the standing challenge, *i.e.*, claims by Porter Orlin, Millenco and Sigma, should be similarly limited to the shares that those Plaintiffs acquired before the Record Date and held continuously through the completion of the Merger. Neither Porter Orlin, Millenco nor Sigma were entitled to vote any shares that they acquired after the Record Date, and hence, they could not have been deprived of their right to cast an informed  
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**B. The Nine Plaintiffs That Did Not Own Or Have Any Economic Interest in Shares of TKT as of the April 21, 2005 Announcement Date Lack Standing to Challenge the Fairness of the Merger (Count II).**

Plaintiffs allege in Count II that the Individual Defendants breached their fiduciary duty of loyalty to TKT and its shareholders “[b]y pushing for and approving the merger because of personal reasons rather than because it was in the best interests of the Company.” (Compl. ¶ 92). Nine of the ten Plaintiffs lack standing to bring this claim, however, because they were not stockholders of TKT at the time the Board approved the Merger on April 21, 2005. It is undisputed that eight of the ten Plaintiffs did not hold a single share of TKT on the date of the alleged wrongdoing, *i.e.*, April 21, 2005 – the date that the TKT Board agreed to and announced the Merger.<sup>25</sup> Likewise, a ninth Plaintiff, Millenco, held a net short position in TKT on the Announcement Date,<sup>26</sup> and there is no evidence in the record that it beneficially owned any shares of TKT on that date.

Under Delaware law, these nine Plaintiffs lack standing to claim that the Merger resulted from alleged breaches of fiduciary duty by the Individual Defendants (or that

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vote as to those shares. Consequently, they cannot obtain a damage remedy on their disclosure-related claims set forth in Count I except as to those shares that they owned as of the Record Date and held continuously through the date of the Merger.

<sup>25</sup> In fact, it is undisputed that seven of these eight Plaintiffs (High River, Icahn Master, Icahn Partners, Viking, VGE, CR Intrinsic, and Atticus) did not own any TKT shares prior to July 1, 2005 – more than two months after the Announcement Date.

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Shire aided and abetted such alleged breaches). Accordingly, Defendants are entitled to judgment as a matter of law against these nine Plaintiffs.

**1. The Eight Plaintiffs That Did Not Own Any Shares of TKT On the April 21, 2005 Announcement Date Lack Standing to Challenge the Fairness of the Merger.**

Both the Delaware Supreme Court and this Court have made clear that a person who does not own stock on the date that a board of directors approves a merger agreement does not have standing to challenge the fairness of that merger agreement – and cannot acquire standing by purchasing stock thereafter. *See Brown v. Automated Mktg. Sys., Inc.*, 1982 WL 8782, at \*1-2 (Del. Ch. Mar. 22, 1982); *In re Beatrice Cos. Litig.*, 522 A.2d 865, 1987 WL 36708, at \*3 (Del. Feb. 20, 1987) (TABLE) (“In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged.”); *Omnicare*, 809 A.2d at 1169 n.11 (“A stockholder-plaintiff is barred from bringing claims when she purchases stock after the board of directors has approved a transaction and the transaction has been publicly disclosed.”); *In re Banyan Mortg. Inv. Fund S'holders Litig.*, 1997 WL 428584, at \*4 n.19 (Del. Ch. July 23, 1997) (holding that stockholder who began to purchase stock after merger agreement was approved, “lack[ed] standing to directly challenge the merger because . . . it was not a shareholder when the initial merger terms were approved”).

That is so both because the directors owe no fiduciary duty to one who is not a

stockholder when they take action and because Delaware enforces a strong public policy against the evil of purchasing lawsuits. *See Omnicare*, 809 A.2d at 1169-70; *see also La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1184 (Del. Ch. 2007).<sup>27</sup> It is axiomatic that one to whom no fiduciary is owed cannot recover for breach of that duty. *See Telstra Corp., Ltd. v. Dynegy, Inc.*, 2003 WL 1016984, at \*8 (Del. Ch. Mar. 4, 2003) (“In order to claim a breach of fiduciary duties, one must be a person to whom fiduciary duties are owed.”).

Here, the undisputed record evidence establishes that eight of the ten plaintiffs did not own a single share of TKT as of the April 21, 2005 Announcement Date. (*See* McCauley Aff., Exs. 11 (Atticus “admits that it did not own or control a beneficial interest in any shares of TKT stock” as of the Announcement Date), 12 (the Icahn Plaintiffs, the Viking Plaintiffs, CR Intrinsic and Sigma “admit that they were not the beneficial owners of TKT stock” as of the Announcement Date)). Under Delaware law, the Individual Defendants did not owe any fiduciary duty to those Plaintiffs at the time

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<sup>27</sup> Indeed, the General Corporation Law explicitly bars derivative suits brought by plaintiffs who owned no stock at the time of the alleged wrongdoing, *see* 8 *Del. C.* § 327, and this Court has long recognized that the same equitable bar applies to direct claims, including claims challenging the fairness of mergers. *See Omnicare*, 809 A.2d at 1169-70; *Banyan*, 1997 WL 428584, at \*4 n.19; *cf. Polygon Global Opportunities Master Fund v. West Corp.*, 2006 WL 2947486, at \*5 (Del. Ch. Oct. 12, 2006) (holding that hedge fund that acquired all its shares after announcement of a going-private merger “would not have standing to pursue a derivative action based on any potential breaches” of fiduciary duty by directors in approving merger and “could not pursue a direct claim or class action based on entire fairness” and concluding that hedge fund’s purpose of investigating potential breaches of fiduciary duty by directors was not proper under 8 *Del. C.* § 220).

they approved the Merger Agreement, and those Plaintiffs therefore lack standing as a matter of law to pursue the cause of action levied in Count II. Accordingly, Count II (and that portion of Count IV asserting that Shire aided and abetted the alleged misconduct identified in Count II) must be dismissed with respect to the Icahn Plaintiffs, the Viking Plaintiffs, Sigma, Atticus and CR Intrinsic.<sup>28</sup>

**2. Millenco Lacks Standing to Challenge the Fairness of the Merger Because It Has Not Shown That It Held Any TKT Shares On the April 21, 2005 Announcement Date.**

Like the eight Plaintiffs discussed above, Millenco lacks standing to challenge the fairness of the Merger because there is no evidence in the record that Millenco was a TKT shareholder on the Announcement Date.

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<sup>28</sup> To the extent Plaintiffs lack standing to assert claims for a breach of a duty of loyalty under Count II, they also lack standing to claim that Shire aided and abetted that purported breach in Count IV. *See supra* at note 22.

<sup>29</sup> By selling short a share of stock, the short seller creates a situation in which two persons are deemed “beneficial owners” of the same share – the person from whom the share was borrowed, and the person to whom the share is sold. *See Digex*, 2002 WL 749184, at \*2. The short seller, however, is not a holder of the share. If some benefit – such as a right to receive a dividend – accrues to all stockholders as of a specific date, the short seller must indemnify the lending owner for the benefit. *See id.* The same logic applies if the benefit accrued is an interest in an inchoate right of action. *See id.* at \*3. An investor with a short position at the time a cause of action arises incurs not a right to maintain suit but rather an obligation to indemnify the lending owner for the value of the cause of action as to the shares borrowed and sold short.

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(See, e.g., McCauley Aff., Exs. 23, 44). This is because Millenco has refused to identify any of its sales as long or short, or to identify any of its trades by trading portfolio, claiming such information to be irrelevant.<sup>30</sup> (See McCauley Aff., Ex. 13).

Millenco's failure to proffer evidence showing that it held any TKT shares on April 21, 2005 forecloses Millenco's ability to assert that it was a stockholder on that date under *Deephaven Risk ARB Trading Ltd. v. UnitedGlobalCom, Inc.*, 2005 WL 1713067 (Del. Ch. July 13, 2005). In *UnitedGlobalCom*, the plaintiff demonstrated that it held a long position in one account at all relevant times, but simultaneously held a larger short position in another account. 2005 WL 1713067, at \*1-2. The Court held that the plaintiff had standing to seek the company's books and records under 8 *Del. C.* § 220, notwithstanding the fact that the plaintiff's overall net position was short, because plaintiff maintained a long position in certain trading accounts. *Id.* at \*6. The rationale underlying the *UnitedGlobalCom* Court's holding does not assist Millenco here, however, because there is nothing in the record to demonstrate that Millenco, or any of its trading portfolios, held a long position in TKT as of the Announcement Date.

In light of the fact that Millenco has not produced evidence that could support a rational inference that it held TKT shares as of April 21, 2005, and admits that its net position was short on that date, the only inference that can be reasonably drawn from the record is that Millenco was not a TKT shareholder as of the Announcement Date. See

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*Sierra Club*, 919 A.2d at 554 (“[W]here the moving party supports its motion with admissible evidence and points to the absence of proof bolstering the nonmoving party’s claims, the nonmoving party must come forward with admissible evidence creating a triable issue of material fact or suffer an adverse judgment.”).

Accordingly, Millenco lacks standing to maintain Count II (and that portion of Count IV alleging Shire’s complicity in the conduct alleged in Count II), and the Defendants are entitled to judgment as a matter of law against Millenco on that count.<sup>31</sup>

**II. SHIRE IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM THAT IT AIDED AND ABETTED THE INDIVIDUAL DEFENDANTS’ ALLEGED BREACHES OF THE DUTY OF DISCLOSURE AND LOYALTY (COUNT IV).**

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Assuming *arguendo* that the Plaintiffs have standing to pursue either their Count I duty of disclosure claims or their Count II duty of loyalty claims, and also assuming *arguendo* that the Individual Defendants are not entitled to judgment as a matter of law

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<sup>31</sup> To the extent that Millenco (or Porter Orlin for that matter) have standing to bring a breach of fiduciary duty claim, Defendants will ask the Court to limit any potential remedy to one that is proportional to the number of shares each entity held continuously from April 21 through July 27, 2005. Plaintiffs cannot obtain damages as to shares they acquired after April 21, 2005 for the same reasons articulated above: the right to pursue an equitable and/or monetary remedy as to those shares acquired after April 21, 2005 accrued to the Announcement-Date stockholders, and the right to pursue such a remedy was not transferred through open-market sales of the stock. *See, e.g., In re Beatrice Cos.*, 1987 WL 36708, at \*3; *In re Banyan Mortg. Inv. Fund S’holders Litig.*, 1997 WL 428584, at \*4 n.19. Parity of reasoning compels the conclusion that a post-announcement open-market purchaser does not, solely through such a post-announcement open-market purchase, obtain the right to pursue an equitable damage remedy as to more shares than the purchaser owned on the date of the announcement. Indeed, that conclusion is a necessary corollary of the public policy against the evil of purchasing lawsuits, *see, e.g., Omnicare*, 809 A.2d at 1169-70, and any contrary rule would both undermine the policy against purchasing lawsuits and promote arbitrage litigation.

on those claims,<sup>32</sup> Shire nevertheless is entitled to summary judgment on Count IV, in which Plaintiffs allege that Shire aided and abetted the Individual Defendants in their alleged breaches of fiduciary duties. Plaintiffs have not and cannot come forward with material facts in dispute that, if proven, would satisfy the elements of their aiding and abetting claim. Shire therefore is entitled to judgment as a matter of law on Count IV.

In order to successfully bring a claim of aiding and abetting a breach of fiduciary duty, Plaintiffs must demonstrate “(i) the existence of a fiduciary relationship; (ii) a breach of that relationship; (iii) knowing participation in the breach by a defendant who is not a fiduciary; and (iv) damages proximately caused by the breach.” *McGowan v. Ferro*, 859 A.2d 1012, 1041 (Del. Ch. 2004), *aff’d*, 873 A.2d 1099 (Del. 2005) (TABLE); *see also Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001); *In re Lukens, Inc. S’holders Litig.*, 757 A.2d 720, 734 (Del. Ch. 1999).

Assuming solely for purposes of argument that Plaintiffs’ allegations against the Individual Defendants are sufficient to survive summary judgment, the Court nevertheless should enter summary judgment in favor of Shire on Count IV because there is no genuine issue of material fact with respect to the third and fourth elements of Plaintiffs’ Count IV claim. Indeed, the undisputed record evidence establishes that (a) Shire did not knowingly participate in any breach of fiduciary duty, and (b) no damage

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<sup>32</sup> Shire and TKT join the briefs filed by Messrs Leff, Moorhead and Yetter, and hereby incorporate the arguments contained therein. As noted above, to the extent the Court concludes that the Individual Defendants did not breach their fiduciary obligations, Shire cannot be liable for aiding and abetting such a breach.

was proximately caused by any such breach (assuming one occurred). Accordingly, Shire is entitled to judgment as a matter of law on Count IV.

**A. It Is Undisputed That Shire Did Not Knowingly Participate In Any Breach of Fiduciary Duty By Any of the Individual Defendants.**

Plaintiffs allege in Count IV that Shire “knowingly assisted” the Individual Defendants in breaching both their duty of loyalty (by inducing the Individual Defendants to improperly vote in favor of the Merger) and their duty of disclosure (by encouraging the TKT Board to disseminate a materially misleading Proxy Statement in the hope of getting the Merger approved). (Compl. ¶¶ 101-05). The record, however, which is now fully developed, lacks any evidence to support these claims.

The “knowing participation” standard is stringent. *See Saito v. McCall*, 2004 WL 3029876, at \*9 (Del. Ch. Dec. 20, 2004). “Knowing participation in a board’s fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach.” *Malpiede*, 780 A.2d at 1097-98; *see also Nebenzahl v. Miller*, 1996 WL 494913, at \*7 (Del. Ch. Aug. 26, 1996) (“A court can infer a non-fiduciary’s knowing participation only if a fiduciary breaches its duty in an inherently wrongful manner, and the plaintiff alleges specific facts from which that court could reasonably infer knowledge of the breach.”). Further, a mere conclusory assertion that the non-fiduciary acquirer knew of the fiduciary’s alleged breaches does not suffice to establish knowing participation. *See In re Santa Fe Pac. Corp. S’holders Litig.*, 669 A.2d 59, 72 (Del. 1995).

Plaintiffs cannot establish Shire's liability as an aider and abetter without showing that Shire and one or more of the Individual Defendants reached some understanding with respect to their complicity in a breach of fiduciary duty. *See Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1995 WL 694397, at \*15 n.11 (Del. Ch. Nov. 21, 1995). After a full opportunity to develop a factual record, Plaintiffs have utterly failed to adduce any competent evidence – let alone the substantial evidence required to defeat summary judgment, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) – that Shire knowingly participated in any breach of the duty of loyalty or duty of disclosure by one or more of the Individual Defendants.

**1. Duty of Loyalty.**

Plaintiffs' theory of knowing participation on the duty of loyalty claim turns on the unsupported assertion that Shire offered certain "side deals" or "inducements" to the Individual Defendants to entice them to disregard their fiduciary obligations. A claim that a non-fiduciary aided and abetted a breach of the duty of loyalty by offering a fiduciary a side deal can survive summary judgment only if the record supports a rational inference that the non-fiduciary offered the side deal in order to induce the fiduciary to breach or ignore his duty. *See, e.g., McGowan v. Ferro*, 2002 WL 77712, at \*3-\*4 (Del. Ch. Jan. 11, 2002); *see also In re General Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at \*26 (Del. Ch. May 4, 2005); *In re Telecommunications, Inc.*, 2003 WL 21543427, at \*2 (Del. Ch. July 7, 2003). To establish a genuine issue of material fact on this count, Plaintiffs must point to "specific details about the payments made incident to

negotiating the terms of the agreement” under challenge. *Jackson Nat’l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999) (internal citations omitted). Plaintiffs do not, and cannot, make such a showing.

The record, which is now fully developed after nearly two years of fact discovery, contains no evidence at all that Shire entered into any side deal, much less a side deal designed to induce a breach of fiduciary duty. There is simply no evidence that Shire made side payments to anyone affiliated with TKT, including the Individual Defendants, or that any such purported payments (which did not occur) were “made incident to negotiating the terms” of the Merger. The fact that Shire, a non-fiduciary acquirer, approved of the Merger and urged the TKT fiduciaries across the table to do the same is insufficient, in and of itself, to establish a knowing participation in a breach. *See Lukens*, 757 A.2d at 735.<sup>33</sup> Thus, Plaintiffs cannot meet their burden of establishing the “specific details” that are required by law to maintain such a cause of action.

With respect to Plaintiffs’ allegations against the former TKT Directors employed by Warburg, Plaintiffs do not and cannot contend that Shire ever offered Mr. Leff or Mr. Moorhead anything, or that those directors or Warburg received anything, in connection with the Merger other than the same consideration payable to all TKT stockholders *pro*

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<sup>33</sup> To the contrary, the Delaware Supreme Court and this Court have recognized repeatedly that a non-fiduciary acquirer is legally entitled to “attempt to obtain the lowest possible price . . . through arms’-length negotiations.” *See Lukens*, 757 A.2d at 735; *see also Malpiede*, 780 A.2d at 1097 (maintaining that “a bidder’s attempts to reduce the sale price through arm’s-length negotiations cannot give rise to liability for aiding and abetting”); *McGowan*, 2002 WL 77712, at \*4.

*rata*. That indisputable fact is alone dispositive with respect to any claim that Shire knowingly participated in a breach of duty by Messrs. Leff and Moorhead.

Plaintiffs' allegations of Shire's purported attempt to induce Wayne Yetter to vote in favor of the Merger similarly fail. Plaintiffs allege that Shire's CEO, Matt Emmens, had extensive undisclosed ties to Mr. Yetter and that he offered Mr. Yetter "an undisclosed Shire board seat or other consideration." (Compl. ¶ 104). In support of their theory, Plaintiffs point to notes written down early on in the negotiation process, which appear to suggest that Shire considered offering Mr. Yetter a Shire directorship.<sup>34</sup> The undisputed factual record in the case – from both Messrs. Emmens' and Yetter's testimony – however, establishes that Shire never made any such offer and that Mr. Yetter never accepted one. (*See* Emmens Dep., Nov. 2, 2006, at 80:22-81:1, 83:20-84:9; Yetter Dep., Dec. 5, 2006, at 43:10-21).<sup>35</sup> Nor did Shire ever engage Mr. Yetter as a consultant in any capacity. (*See* Emmens Dep., Nov. 2, 2006, at 71:7-8). Thus, like the allegations against Messrs. Leff and Moorhead, the Yetter-related allegations are inconsistent with the record and otherwise insufficient as a matter of law.

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<sup>34</sup> It is worth noting that there is evidence in the record to suggest that, at one time, Shire considered offering Mr. Astrue a Shire directorship. (*See* McCauley Aff., Ex. 20). As in the case of Mr. Yetter, however, there is absolutely nothing in the record to suggest that Shire ever conveyed that possibility to Mr. Astrue.

<sup>35</sup> While an early draft set of "discussion points" prepared by Goldman Sachs makes reference to a possible "board seat at SHIRE" for Wayne Yetter, *see* McCauley Aff., Ex. 20 at 3, this language is in fact crossed out on Mr. Emmens' copy of the document, and the possibility of assuming a role on Shire's Board of Directors was never discussed with Mr. Yetter. (*See* Emmens Dep., Nov. 2, 2006, at 80:22-81:1, 83:20-84:9; Yetter Dep., Dec. 5, 2006, at 43:10-21).

Finally, Plaintiffs allege that Dr. Langer was induced to vote in favor of the Shire acquisition in exchange for a deal that would afford him the opportunity to control some unused TKT proteins (generally referred to as the “Zuma proteins”).<sup>36</sup> (Compl. ¶¶ 47-63). Although Shire had not opposed TKT’s efforts to outlicense the Zuma proteins during the due diligence phase of the potential merger,<sup>37</sup> TKT never finalized any potential agreement related to the Zuma compounds before Shire’s all-cash offer was agreed to and announced. Once the Merger was announced, the record is abundantly clear that Shire did not enter into an agreement with Dr. Langer for anything. In fact, Plaintiffs’ own Complaint cites to an e-mail, *see* Compl. ¶ 62, that states that after reviewing “detailed information regarding the projects being considered for outlicense” and gaining an “understanding of how retaining these products might impact [] shareholder value in the future,” Shire concluded that it was “not in [its] best interest to proceed” with the Zuma transaction. (*See* McCauley Aff., Ex. 25). Thus, the record is literally devoid of anything that proves that Shire entered into any agreement with Dr. Langer (or any entity affiliated with him) regarding the Zuma compounds either before or after the Merger.

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<sup>36</sup> For a more fulsome discussion of the facts underlying the potential Zuma transaction, the Corporate Defendants refer the Court to the Opening Brief of Messrs. Leff and Moorhead.

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Absent any evidence of an untoward agreement between Shire and Dr. Langer, of which there is none, Plaintiffs cannot, as a matter of law, establish that Shire knowingly participated in any purported breach of Dr. Langer's fiduciary duty, and their claim should be dismissed accordingly.

**2. Duty of Disclosure.**

With respect to Plaintiffs' claim that Shire aided and abetted a breach of duty of disclosure by encouraging the TKT Board to disseminate a materially misleading Proxy Statement, the record is simply barren.

Although Plaintiffs had a full opportunity for discovery in the Appraisal Action before filing the instant claim, the Complaint in the Fiduciary Duty Action is utterly devoid of any detail on the changes Shire supposedly insisted TKT make to its disclosures. Nor have Plaintiffs done anything to further develop this claim through discovery in the Fiduciary Duty Action. Plaintiffs do not and cannot allege that Shire requested any specific change that rendered TKT's disclosures materially misleading or incomplete. To the contrary, there is no contention, much less substantial evidence, that Shire had any control over what TKT included in or omitted from its disclosures.<sup>38</sup>

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<sup>38</sup> The Court has previously noted that it would make little sense for an arm's-length acquirer to become liable as an aider and abettor of a breach of a target board's duty of loyalty due to a defective *joint* proxy statement or consent solicitation. *See Hughes*, 2005 WL 1089021, (...continued)

Because there is no genuine issue of material fact as to whether Shire knowingly participated in any alleged breach of fiduciary duty by the Individual Defendants, Shire is entitled to summary judgment on Count IV.

**B. The Undisputed Record Evidence Establishes That Any Alleged Concerted Action by Shire and the Individual Defendants Did Not Proximately Cause Any Damages to the Plaintiff Shareholders.**

Finally, even assuming *arguendo* that Plaintiffs were able to establish a genuine issue of material fact as to whether Shire entered into a side deal with any of the Individual Defendants or knowingly participated in a breach of the duty of disclosure, which they cannot, there is no evidence whatsoever that any such purported breach caused damages by affecting the Merger consideration in any way, much less in a material respect. Thus, the aiding-and-abetting claim against Shire should be dismissed on the independently sufficient ground that Plaintiffs cannot show that the concerted action of Shire and the Individual Defendants proximately caused any damages to the Plaintiffs.

In order to successfully bring a claim of aiding and abetting, a plaintiff must establish that the purported breach caused damages by being of such magnitude as to materially affect the Merger consideration received by shareholders. *See Crescent / Mach I P'ship, L.P. v. Turner*, 2005 WL 3618279, at \*1 (Del. Ch. Dec. 23, 2005). If a

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(continued...)

at \*27 n.247. Under that rationale, *a fortiori* it makes even less sense to hold Shire liable for the contents of disclosures made only by TKT's fiduciaries.

plaintiff cannot claim, consistent with the record, that the alleged collateral agreements were “so grossly excessive as to be inherently wrongful,” see *McGowan v. Ferro*, 2002 WL 77712, at \*3, then summary judgment is appropriate as to the aiding and abetting claim. In *Crescent*, the Court granted summary judgment against an aiding and abetting claim based on forgiveness by the merged company’s board of a \$400,000 loan that had been made by the target to one of its directors before the merger. 2005 WL 3618279, at \*2. The Court explained that, “although the board’s action was substantially contemporaneous with the merger, the Plaintiffs have not shown that it had any impact on the merger consideration [and w]ithout a showing by the Plaintiffs that the loan forgiveness impacted the merger consideration, there is no direct claim here for the Plaintiffs to assert.” *Id.*

Here, unlike in *Crescent*, the undisputed record evidence establishes that there was *no* side deal at all between Shire and any of the Individual Defendants. Even if the Court were to infer that, contrary to the record as a whole, there had been a side deal, Plaintiffs have made absolutely no showing that any such hypothetical deal was “grossly excessive” or “inherently wrongful” or that but for the purported side deals the Merger consideration would have been materially higher. The purported side deals Plaintiffs have alleged – such as an offer of a board seat

**REDACTED**

**REDACTED**

<sup>39</sup> – do not approach

the magnitude of the agreements found by courts to support an aiding and abetting claim. *Cf., In re USACafes, L.P. Litig.*, 600 A.2d 43, 56 (Del. Ch. 1991) (denying motion to dismiss based on a “grossly excessive” agreement in which the individual defendants received an additional \$15 million in benefits for themselves at the expense of monies that would otherwise have been available to be paid to unitholders). Consequently, there is no showing that the Plaintiffs suffered any harm as a result of any hypothetical concerted action between Shire and one or more of the Individual Defendants. As such, Shire is entitled to judgment as a matter of law on Count IV of Plaintiffs’ Complaint.

\* \* \*

In sum, there is absolutely no evidence that Shire unlawfully induced or attempted to induce any of the Individual Defendants to approve the merger agreement, nor that Shire strong-armed TKT into omitting material facts from its proxy materials. To the contrary, the record establishes that Shire did nothing wrong and caused no harm to the Plaintiffs. Thus, the aiding and abetting claim against Shire contained in Count IV must be dismissed as a matter of law.

**REDACTED**

**III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT III BECAUSE THE UNDISPUTED EVIDENCE DEMONSTRATES THAT THE TKT STOCKHOLDERS APPROVED THE MERGER.**

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The Court should grant summary judgment in Defendants' favor on Count III of Plaintiffs' Complaint, which alleges, in conclusory fashion, that the stockholders of TKT may not have approved the Merger at the Special Meeting.<sup>40</sup> Both because the record is replete with evidence that supports the propriety of the Merger, and because the Plaintiffs have done nothing during the course of discovery to test, much less to undermine, this uncontroverted evidence, Plaintiffs' claim must fail. Each piece of unrefuted evidence independently proves the propriety of the vote count, and when considered collectively, the record evidence leaves no doubt that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law.

First, TKT has filed a certificate of merger with the Secretary of State and, as a matter of law under 8 *Del. C.* § 105 ("Section 105"), that certificate constitutes *prima facie* evidence that the TKT stockholders voted to approve the Merger. There is no evidence in the record to rebut this *prima facie* showing. Second, both the certified

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<sup>40</sup> Plaintiffs misstate the legal standard governing the vote. Section 251(c) requires that a merger be approved by "a majority of the outstanding stock of the corporation entitled to vote thereon" – not, as Plaintiffs would have it, "a majority of TKT's record shareholders," *see* Compl. ¶ 96, or "a majority of the stock," *see* Compl. ¶ 97. As of the June 10, 2005 Record Date, TKT had 35,991,289 shares outstanding, of which 366,928 were held in a TKT treasury account and hence not entitled to be voted. *See* 8 *Del. C.* § 160(c). Accordingly, the number of shares outstanding and entitled to vote was 35,624,361, the legally required majority of which was 17,812,181. The inspector of election certified that 18,741,994 shares – or 929,813 more than the required majority – were voted in favor of the Merger. (*See* McCauley Aff., Ex. 28)..

report of the inspector of election, who was duly appointed as required by 8 *Del. C.* § 231, and other corporate records produced in the Appraisal Action (long before the Fiduciary Duty Action was ever filed), prove that TKT's stockholders approved the Merger at the Special Meeting.

**A. The Certificate of Merger Constitutes Sufficient Proof as a Matter of Law that the Merger Was Lawfully Completed.**

The certificate of merger on file with the Delaware Secretary of State constitutes *prima facie* evidence that the vote required by 8 *Del. C.* § 251(c) was obtained. To date, that *prima facie* showing remains unrefuted, a fact that independently provides the Court with more than an ample basis to grant the Defendants' summary judgment motion on Count III.

Under Section 105, a duly certified copy of "any . . . certificate which has been filed in the office of the Secretary of State as required by any provision of" the General Corporation Law "shall . . . be received in all courts . . . as *prima facie* evidence of . . . observance and performance of all acts and conditions necessary to have been observed and performed precedent to the instrument becoming effective; and . . . any other facts required or permitted by law to be stated in the instrument." 8 *Del. C.* § 105. A duly certified copy of the certificate of merger, filed with the office of the Delaware Secretary of State, is submitted herewith. *See* McCauley Aff., Ex. 29. By operation of law, the certificate of merger constitutes a *prima facie* showing that a majority of shares

outstanding and entitled to vote were in fact voted in favor of the Merger and that the Merger was completed in accordance with the law.<sup>41</sup>

Plaintiffs have not rebutted and cannot rebut the showing, created by the certificate of merger, that the Merger was lawfully completed. Indeed, Plaintiffs do not even explicitly allege that the TKT stockholders did not approve the Merger, but rather, Plaintiffs make only a perfunctory attempt – alleging a “material likelihood” of mistake or fraud in connection with the vote without evidentiary support – to overcome the *prima facie* showing that the Merger was approved. Plaintiffs’ half-hearted allegation is insufficient to rebut the presumption associated with the certificate as a matter of law. *See Shuttleworth v. Abramo*, 1997 Del. Ch. LEXIS 99, at \*3 (Del. Ch. June 13, 1997) (“Although all facts are to be viewed in favor of the non-moving party on a motion for summary judgment, unsupported allegations are insufficient to create a genuine dispute as to material facts.”)<sup>42</sup> In light of the fact that Plaintiffs have simply failed to offer any

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<sup>41</sup> Section 105 unambiguously provides that a certificate of merger, which is required to be filed pursuant to Section 251(c), constitutes *prima facie* evidence that stockholders (in this case, TKT stockholders) have approved a merger. Here, TKT stockholders’ approval of the Merger was an act or condition “necessary to have been observed and performed precedent to the instrument becoming effective” and that the vote was a “fact[] required or permitted by law to be stated in the instrument.” *See* 8 *Del. C.* § 251(c)(2) and 8 *Del. C.* § 105; *see also Coates v. Netro Corp.*, 2002 WL 31112340, at \*2 (Del. Ch. Sept. 11, 2002) (dismissing under Rule 12(b)(6) as conclusory a claim that stockholders’ approval of a merger “likely” had depended on invalid proxies and/or erroneous tabulation, where plaintiff failed to challenge vote count or seek relief under applicable statute).

<sup>42</sup> Not only do Plaintiffs’ conclusory and wholly unsupported claims fail to rebut TKT’s *prima facie* showing that the necessary vote was obtained, but such claims fail to even satisfy Delaware Court of Chancery Rule 9(b)’s requirement that claims of fraud be pled with (...continued)

evidentiary support for their claim and cannot overcome TKT's *prima facie* showing that the necessary vote was obtained, Defendants are entitled to judgment as a matter of law on Count III.

**B. Other Unrefuted Evidence in the Record Demonstrates that the TKT Stockholders Approved the Merger.**

Even assuming *arguendo* that the Court determines that the certificate of merger, in and of itself, does not constitute sufficient proof of stockholder approval, the additional, undisputed evidence in the record clearly establishes that the TKT stockholders approved the Merger. Long before Plaintiffs filed the Fiduciary Duty Action, they had received copies of (1) the certified report of the inspector of election, and (2) the written ballot, signed by Dr. Pendergast as proxy, casting more than a sufficient number of votes to approve the Merger.<sup>43</sup> These documents, which also remain unchallenged, are more than sufficient to establish that the vote required by Section 251(c) was obtained at the Special Meeting.<sup>44</sup>

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(continued...)

particularity. *See Siple v. Corbett*, 447 A.2d 1184, 1186 (Del. 1982) (granting summary judgment to a defendant where the plaintiff failed to comply with Rule 9(b)'s requirement).

<sup>43</sup> In response to Defendants' requests for admission, Plaintiffs claimed to lack any way of knowing whether the inspector's report was genuine. It is genuine, as demonstrated by the attached affidavit. *See Richardson Aff.* ¶4.

<sup>44</sup> To the extent that Count III may be read as a claim that the voting process cannot be reconstructed in its entirety due to alleged "spoliation of voting records," the Corporate Defendants note that Delaware law does not recognize an independent tort of spoliation of evidence. *See Lucas v. Christiana Skating Ctr., Ltd.*, 722 A.2d 1247, 1248-51 (Del. Super. 1998).

It is undisputed that TKT appointed an inspector of election in conformity with 8 *Del. C.* § 231, that the inspector signed the required oath to execute his duties with strict impartiality and to the best of his ability (Richardson Aff. ¶ 4), and that the inspector certified that the stockholders of TKT had approved the Merger by the majority required by law. “Although the report of the inspectors of election is ministerial, it is presumed to be correct.” *Berlin v. Emerald Partners*, 552 A.2d 482, 491 (Del. 1988) *see also Atterbury v. Consolidated Coppermines Corp.*, 20 A.2d 743, 749 (Del. Ch. 1941) (noting “presumptive correctness” of report of inspector of election). The Plaintiffs have not raised any particularized challenge to the correctness of the inspector’s certified report, much less any challenge that would affect the correctness of the ultimate conclusion that TKT’s stockholders approved the Merger by more than the necessary margin. Accordingly, the certified report of the inspector of elections provides additional, independent and unrefuted evidence that the TKT shareholders approved the Merger.

Similarly, the proxy ballot, *see* McCauley Aff., Ex. 28, is independently conclusive evidence that the vote required by Section 251(c) was obtained. The actual ballot cast at the Special Meeting eliminates any doubt that the requisite majority of TKT’s shares were voted in favor of the Merger. That is all that is necessary to comply with Section 251(c), and Count III fails on this ground alone. Plaintiffs’ real theory is that there may have been mistakes in the process of translating the instructions signed by thousands of stockholders and their banks, brokers and other agents and intermediaries, into the single written ballot cast by Dr. Pendergast as proxy for all those stockholders.

*Cf. North Fork Bancorp, Inc. v. Toal*, 825 A.2d 860, 862 n.1 (Del. Ch. 2000) (noting that proxy cards in fact create an agency relationship between the stockholder and the named proxy who actually attends the stockholder meeting and votes on the stockholder's behalf). Neither the Complaint nor the record evidence, however, lends any support to Plaintiffs' theory. Even assuming that mistakes were made in the tabulation process, there is absolutely no evidence that those mistakes were the result of fraud or deliberate misconduct, or that the correction of those mistakes would have altered the outcome of the vote on the Merger.

Thus, in addition to the certificate of merger, which constitutes as a matter of law a complete *prima facie* showing that the TKT stockholders approved the Merger as required by Section 251(c), the inspector's report and the written ballot provide additional, unrebutted evidence of the propriety of the vote count, further establishing Defendants' entitlement to judgment as a matter of law on Count III.

#### **IV. PLAINTIFFS CANNOT OBTAIN RESCISSORY DAMAGES IN THIS ACTION.**

Finally, Shire and TKT respectfully request that the Court determine that Plaintiffs are not entitled to an award of rescissory damages in this action as a matter of law. Even assuming *arguendo* that the Court were to determine that there is a triable issue of fact with respect to the alleged breaches of disclosure and loyalty by the Individual Defendants (and with respect to Shire's liability for aiding and abetting such alleged

breaches), rescissory damages are nevertheless inappropriate as a matter of law in this case.<sup>45</sup>

Courts do not award rescissory damages for every adjudicated breach of a director's duty of loyalty. *See Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000) (“Rescissory damages is an exception to the normal out-of-pocket measure.”).<sup>46</sup> Instead, the traditional award of damages in a breach of loyalty case, if any, is compensatory

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<sup>45</sup> At a minimum, Plaintiffs’ delay in challenging the vote count should foreclose rescissory damages as a viable remedy under Count III. *Gaffin v. Teledyne, Inc.*, 1990 WL 195914, at \*18 (Del. Ch. Dec. 4, 1990). For over nineteen months after the Special Meeting, which they did not bother to attend, Plaintiffs’ conduct manifested acceptance of the fact that the TKT stockholders had voted to approve the Merger. Plaintiffs manifested their acceptance of the legality of the Merger by pursuing the Appraisal Action – a remedy which they have no basis to seek without lawful consummation of the Merger in the first place – and by failing to raise any contention that the necessary vote had not been obtained (under 8 *Del. C.* § 225(b)) for an inordinate amount of time. Moreover, the facts underlying Plaintiffs’ challenge to the propriety of the vote count were available to them at the time of the Special Meeting and, yet, they inexplicably elected to wait a full nineteen months to bring the current cause of action. *Cf. Nevins v. Bryan*, 885 A.2d 233, 246-47 (Del. Ch. 2005) (finding one year delay in challenging stockholder vote to remove director unreasonable). Under these circumstances, Plaintiffs are not entitled to the extraordinary remedy of rescissory damages and the Defendants respectfully request that this Court bar any such relief under Count III as a matter of law.

<sup>46</sup> Historically, the Court has been reluctant to award rescissory damages against individual directors, in part because of the potentially devastating financial effect such an award would have on even wealthy individuals and the consequent deterrent effect on Delaware corporations’ efforts to recruit and retain qualified directors. *See Strassburger*, 752 A.2d at 580. Where the challenged transaction is an all-cash merger with an unaffiliated acquirer valued at more than a billion dollars, and the target corporation’s directors have not received any personal benefit, it is inherently inequitable and disproportionate to require the directors to pay rescissory damages calculated on the basis of the corporation’s post-Merger increase in value. Much, if not all, of the increase will be attributable, not to the Individual Defendants’ alleged misconduct, but to synergies created by the Merger and to Shire’s legitimate and unchallenged post-Merger business activities, which are unrelated to the alleged misconduct at issue in this litigation. There is no conceivable justification to punish the individual directors merely because Shire has operated TKT’s business successfully since the Merger.

damages, which are measured by the plaintiff's actual loss that is attributable to the defendant's wrongful conduct. *Id.* Thus, in the case of a merger found to have been effected at an unfair price, plaintiff shareholders are normally entitled to compensatory damages equal to the fair value of their stock at the time of the merger, less any merger consideration that they actually received. *Id.*

Indeed, to the best of the Corporate Defendants' knowledge, neither the Delaware Supreme Court nor this Court has *ever* countenanced an award of rescissory damages, as opposed to compensatory damages, against a non-fiduciary acquirer. *Cf. Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 503 (Del. 1981) (granting rescissory damages in the context of a tender offer made by a majority shareholder); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (awarding rescissory damages after a merger effected by the controlling stockholder); *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 698-99 (Del. Ch. 1996) (considering rescissory damages for a merger effected by the controlling shareholder but denying them on the grounds of plaintiffs' delay), *aff'd*, 693 A.2d 1082 (Del. 1997) (TABLE); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1183-85 & n.9 (Del. Ch. 1999) (awarding rescissory damages after a corporation was improperly sold to its own CEO and director), *aff'd*, 766 A.2d 437 (Del. 2000); *Strassburger*, 752 A.2d at 581-82 (rescissory damages awarded against both the CEO who became controlling stockholder as a result of his repurchases of stock for entrenchment purposes as well as the two directors appointed by entity from which stock was repurchased); *In re Fuqua Industries, Inc. S'holders Litig.*, 2005 WL 1138744, at \*6 (Del. Ch. May 6, 2005)

(denying motion for summary judgment precluding rescissory damage award where complaint alleged scheme to entrench directors).

Plaintiffs here have had a full opportunity to take fact discovery, and the record they have developed offers no basis, either in law or in fact, for a damage award that exceeds this Court's normal compensatory measure of damages. Assuming such a remedy is even available in a case such as this, *i.e.*, one involving a non-fiduciary acquirer, then surely the plaintiff seeking it must show that the acquirer committed misconduct qualitatively more egregious than the "knowing participation in a breach of fiduciary duty" required to support a compensatory damage award for aiding and abetting. Here, Shire's conduct plainly did not rise to such a level as to warrant the draconian remedy that Plaintiffs now seek.<sup>47</sup>

Accordingly, at a minimum, the Court therefore should enter summary judgment against Plaintiffs as to their request for rescissory damages.

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<sup>47</sup> Easy availability of the rescissory damage remedy against arm's-length acquirers would both deter arm's-length acquisitions and diminish acquirers' incentives to increase the value of the businesses they acquire. The compensatory and rescissory damage rules create opposite incentives for acquirers. A compensatory damage rule encourages the acquirer to increase the value of the acquired asset after a transaction, because the acquirer will be allowed to retain any gains above the adjudicated fair value as of the transaction date. A rescissory damage rule discourages such efforts and may even create a perverse incentive for the acquirer to diminish the asset's value before judgment. Because a plaintiff will naturally prefer out-of-pocket damages if the asset declines in value, but rescissory damages if the asset increases, the Court discourages plaintiffs from waiting to see how the asset's value changes during the lawsuit and opportunistically seeking rescissory damages only if the asset's value has increased. *See, e.g., Ryan*, 709 A.2d at 699.

## CONCLUSION

For the foregoing reasons, Defendants TKT and Shire are entitled to judgment as a matter of law on Counts I, II, III and IV.

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