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IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

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| | | D.C. |

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

**FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER OF THE COURT ENTERED IN MASTER DOCKET NO. 07MD1**

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# PRELIMINARY STATEMENT

Under Tennessee law, Defendants are entitled to summary judgment unless Plaintiffs can prove that Dollar General's Board of Directors acted disloyally or in bad faith by accepting KKR's $22 per share cash offer. Here's how Plaintiffs' own corporate governance expert addressed the issue:

> **Q: Is it your opinion that it was unreasonable for the board to have approved the – KKR's $22 per share offer and related terms on March 10th or 11th?**
>
> **A: No.**
>
> -- October 3, 2008 Deposition Testimony of Prof. Bernard Black.

Prof. Black is not alone in this opinion. One of the nation's most prominent independent institutional shareholder advisory firms agreed: "The [Dollar General] board conducted a thorough sale process which involved multiple interested parties. In our opinion, such a sale process, all things being equal, yields the highest possible valuation for a Company... We recommend that shareholders vote FOR this proposal."

KKR's all cash offer was a terrific deal for Dollar General's shareholders. It represented a 31% premium over the company's trading price the day before the deal was announced and a 43% premium over the average stock price for the preceding year. When the Dollar General shareholders had the chance to vote on it, ninety-nine percent of the voting shares said yes. Cal Turner and the Turner family, company founders and holders of the largest block of Dollar General stock, voted for the merger. Indeed, the deal was so good, even Lead Plaintiff City of Miami voted for it. Moreover, there was no competing offer. The three other active bidders were not willing to consider a bid, and, even though any other competing bidder could have come forward and offered to top $22, none ever did

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This outstanding offer for Dollar General shareholders was generated by the excellent process run by the Dollar General Board of Directors.

- Dollar General's Board consisted of eleven directors, none of whom had any relationship with KKR and nine of whom were also independent of management.
- The Board informed itself in depth about the Company's business plans by reviewing a series of major restructuring initiatives called Project Alpha, which the Board adopted in November 2006.
- When it received expressions of interest from buyout firms, the Board created a Strategic Planning Committee composed entirely of outside directors and led by long-term Dollar General director and senior banking executive Dennis Bottorff.
- The Board and the Committee retained independent and highly qualified legal and financial advisors for the strategic review process.
- The Committee ran a multi-month process that included four of the country's leading private equity firms as potential bidders.
- The Board and the Committee structured a process that allowed Dollar General to implement Project Alpha and simultaneously test whether private equity bidders would offer a risk-free, cash price – giving shareholders the best of both worlds.
- In March 2007, their advisors told the Board and the Committee that KKR's $22 per share cash offer <u>exceeded the highest potential value</u> of Dollar General as a public company, even with Project Alpha; that it represented a 31% premium over the market price of the stock ($16.78); and that it was fair to shareholders. The Board unanimously approved KKR's offer and agreed to recommend the transaction to the shareholder vote.
- In May 2007, Dollar General gave its shareholders a Proxy Statement accurately describing the proposed acquisition of Dollar General by an affiliate at KKR (the "Merger") in detail.
- In July 2007, 99% of voting shares – including those held by the Turners and the City of Miami – voted in favor of the Merger.

These facts are undisputed and they entirely preclude Plaintiffs from proving that the Directors acted in bad faith or disloyally. On this record, under well-settled Tennessee law, there is simply no material issue for trial.

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In June 2007, this Court rejected Plaintiffs' attempt to enjoin the shareholder vote. Plaintiffs argued that the Proxy Statement was incomplete or misleading. This Court found Plaintiffs failed to show a likelihood of success on the merits on any of their claims. As this Court is well aware, the business and affairs of corporations are run by boards of directors. Just as in Chancellor Lyle's decision in *Thomas Nelson*, the Court's inquiry here is defined by the business judgment rule, which protects directors from having their good faith business judgments second guessed by disaffected shareholders. Because there is no evidence that the Merger resulted from anything but careful and diligent work by disinterested directors, the business judgment rule protects the Directors' decisions here.

In addition, the relief Plaintiffs seek – money – is not available. The Tennessee Business Corporation Act authorizes companies to immunize directors from personal liability for money damages arising from breaches of fiduciary duty. Dollar General's charter adopted an exculpatory provision that protects the Directors to the fullest extent permitted by Tennessee law. Therefore, any monetary recovery is foreclosed.

Lastly, the shareholder vote bars fiduciary duty claims against the Directors as a matter of law. When shareholders ratify a transaction, a plaintiff must have evidence that material information was misstated or withheld from the shareholders. There is no such evidence.

Plaintiffs want to second guess the Board's decision As a matter of law they cannot Nevertheless, Plaintiffs can be expected to make a slew of arguments to distract attention from the only conclusion that can be drawn from the undisputed facts. None of those arguments raises a bona fide dispute about a material fact.

Allowing this case to proceed to trial would send a chilling message to the directors of all Tennessee corporations – like the upstanding, reputable Directors of Dollar General – even if

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you are careful and act in the best interests of the company, you can be second guessed and subject to substantial personal liability based on nothing more than the speculation by a shareholder who wants even more money than he already accepted. That would be an unfortunate, unwarranted and legally unsupportable result.

**UNDISPUTED FACTS**

Dollar General is a discount retailer that sells an assortment of basic merchandise, including health and beauty aids, packaged food, home cleaning supplies, housewares, and basic clothing Defs.' R. 56.03 Stmt. of Undisputed Facts ("SUF") ¶ 1. Dollar General's Board consisted of eleven individuals. SUF ¶ 4. Nine members of the Board were non-management directors and independent under the rules of the New York Stock Exchange: Dennis Bottorff, Barbara Bowles, Reginald Dickson, Dr. E. Gordon Gee, Barbara Knuckles, J. Neal Purcell, James Robbins, Richard Thornburgh, and David Wilds (the "Outside Directors") SUF ¶ 5. David Wilds was the lead Outside Director. SUF ¶ 17. Dennis Bottorff was head of the Board's Nominating and Governance Committee ("Governance Committee"). SUF ¶ 5. Plaintiffs do not and cannot allege that any Outside Director had any interest in the Merger different from any public shareholder or had any financial or social relationship with KKR or its representatives. SUF ¶¶ 5-7.

The remaining two members of the Board, David Perdue and David Beré, were part of Dollar General management at the time the Merger was announced SUF ¶¶ 8, 9 Mr Perdue served as Dollar General's Chief Executive Officer and Chairman from April 2003 until the completion of the Merger. SUF ¶ 8. He has no ongoing role with Dollar General. SUF ¶ 8. Mr. Beré was a Board member from 2002 through the completion of the Merger. SUF ¶ 9. Mr. Beré

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was named Dollar General's President and Chief Operating Officer in November 2006 and held that position until completion of the Merger. SUF ¶ 9.

### A. The Board Begins Consideration of Project Alpha

Prior to the Merger, the Company had several years of rapid growth, expanding from 5,540 stores in 2002 to 8,229 stores at the end of 2006. But "in many ways [Dollar General] had outgrown its infrastructure to support its level of growth." SUF ¶¶ 11, 12. By early 2006, the Company had failed to execute its annual plan for two straight years and its stock price was falling. SUF ¶ 13.

In the Spring of 2006, the Board began considering how to "rebuild [the] foundation" of the Company's operations. SUF ¶ 14 From July 24 to July 26, 2006, the Board held its annual strategic planning meeting and discussed initiatives to improve the performance of the Company's business. SUF ¶ 15. These initiatives came to be known internally as "Project Alpha." SUF ¶ 15. Management and the Board's analysis of these initiatives continued through the Summer and Fall of 2006. SUF ¶¶ 16, 29-34 [1]

### B. KKR's Expression of Interest

On October 5, 2006, representatives of KKR met with Mr. Perdue, Mr Wilds and Cal Turner, the former CEO of Dollar General and controller of the largest block of Dollar General stock. SUF ¶ 17. KKR had no non-public information about Dollar General at that time, SUF ¶ 18, and requested permission to conduct due diligence on Dollar General subject to a confidentiality agreement. SUF ¶ 17.

---

[1] During the Summer of 2006, Perdue had general discussions with several investment banks and private equity firms "regarding the Company's position in light of its stock price and the active mergers and acquisitions market." Bottorff Ex 6 at DG149939. These firms included TPG Capital, Goldman Sachs Principal Investment Area (PIA), Credit Suisse, Lehman Brothers and KKR Riley Ex 31 Mr. Perdue told the Board about these general contacts on August 29, 2006 Bottorff Ex. 6 at DG149939.

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The next day, Messrs Perdue and Wilds told Mr. Bottorff about the KKR meeting. Messrs. Bottorff and Wilds agreed to bring the matter to the whole Board so it could determine the Company's response. SUF ¶ 19. The Board met two days later on October 8, 2006. SUF ¶ 20. Mr. Bottorff described the meeting with KKR and noted KKR's "request[] . . . to conduct due diligence of [Dollar General's] current financials and financial projections with a view to making an offer." SUF ¶ 20. The Board decided to defer responding to KKR until the Governance Committee had a chance to recommend an appropriate process. SUF ¶ 20.

**C. The Board Creates the Strategic Planning Committee**

The Governance Committee met on October 10, 2006 and recommended that the Board form a Strategic Planning Committee ("SPC") comprised of Outside Directors. SUF ¶ 21. The Board established the SPC on October 19, 2006. SUF ¶ 21. The Board created the SPC to "assist the Board . in evaluating strategic plans and choices and in responding to changes in market conditions, external business risks in the financial markets and significant opportunities which may require the Board's attention" SUF ¶ 22 As Mr Bottorff explained: "we decided that basically the board should take control of this process and that we needed to ensure that we had a good independent method for responding and processing" Dollar General's various options. SUF ¶ 24. The SPC consisted of Outside Directors Bottorff, Thornburgh, and Bowles. SUF ¶ 23. Outside Director Beré was initially named to the SPC but left the SPC on November 28, 2006 when he was became COO of Dollar General. SUF ¶ 23.

The Outside Directors who served on the SPC are all accomplished, respected business people with experience on the boards of companies, educational institutions and other organizations. Mr. Bottorff served in the banking industry for over 30 years and was the CEO of Commerce Union and First American banks. SUF ¶ 23. He has been the chairman of numerous

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boards including the United Way, the Tennessee Titans Advisory Committee and the Tennessee Education Lottery Corporation. SUF ¶ 23. He is currently Vice Chairman of the Board of Trustees of Vanderbilt University and a director of the Tennessee Valley Authority. SUF ¶ 23. Ms Bowles is the former CEO of The Kenwood Group, Inc., and former Vice Chairman of Profit Investment Management, both registered investment advisory firms. SUF ¶ 23. She serves as a director and audit committee member on the boards of Black & Decker Corporation and Wisconsin Energy Corporation SUF ¶ 23 Mr Thornburgh has more than 30 years of experience as an investment banker, and served as CFO and Vice Chairman of Credit Suisse First Boston as well as the Chairman of the Securities Industry Association. SUF ¶ 23. He is currently the Vice Chairman of Corsair Capital, a private equity investment company, and a member of multiple boards of directors. SUF ¶ 23.

**D. The SPC Takes Control**

The SPC immediately acted to ensure that the Board's consideration of its strategic alternatives was independent and well-advised. From its formation until the approval of the Merger on March 10, 2007, the management directors (Mr. Perdue and, after November 2006, Mr. Beré) were excluded from the SPC's deliberations. SUF ¶ 25. The SPC retained the law firm of Wachtell, Lipton, Rosen, & Katz to act as its independent, outside legal counsel. SUF ¶ 26. At the SPC's first meeting on November 1, 2006, Edward Herlihy, a partner in the Wachtell firm, explained the Board's obligations in connection with potential strategic transactions. SUF ¶ 27. Mr Perdue presented a summary of Dollar General's short- and long-term financial projections, with and without adopting Project Alpha. SUF ¶ 27. The SPC then voted to recommend to the full Board that it retain an independent investment banking firm to evaluate

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Project Alpha and other strategic alternatives. SUF ¶ 27. The Board subsequently retained Lazard Freres & Co LLC. SUF ¶ 28.

The Board continued its evaluation of Project Alpha on November 3, 2006. Following this meeting, the Board sought additional information and advice from Lazard, the Board's independent financial adviser, and Lehman Brothers, the Company's financial advisor, so that it could further analyze the potential risks and benefits of pursuing Project Alpha. SUF ¶ 29.

Approximately two weeks later, Lehman and Lazard made presentations to the SPC and the full Board. SUF ¶ 30. Lazard opined "that some variation of Project Alpha [was] the right strategy for the Company if executed properly " SUF ¶ 32 The financial advisors noted that a major restructuring like Project Alpha carried execution risk. SUF ¶ 31. They also noted that its execution could cause the Company's stock price to fall. SUF ¶ 31. In discussing the Company's other strategic alternatives, Lazard also reviewed a list of potential strategic partners in the retail industry and advised that it was "unlikely" any of them would be interested in Dollar General. SUF ¶ 31. On November 20, 2006, following the SPC's recommendation, the Board "table[d]" discussions of "other strategic alternatives" (including any response to KKR's expression of interest) until it had made a decision about Project Alpha. SUF ¶ 33

### E. The Board Adopts Project Alpha Despite the Risk

After months of discussion and analysis, beginning with the consideration of Project Alpha in July, the Board approved Project Alpha on November 28, 2006, concluding that it reflected the best strategy to improve the Company's financial performance as an independent entity. SUF ¶ 34. As adopted, Project Alpha had a number of components including (1) closing 400 stores, (2) reducing new store openings in the near-term, (3) upgrading existing stores, and (4) eliminating the Company's "packaway" inventory model. SUF ¶ 34.

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In a November 29, 2006 press release, the Company announced that it expected the short term reduction in store growth would "lead[] to a more strategic portfolio of high-potential stores and allow[] [Dollar General's] operations team to better focus and deploy resources where near-term opportunities are greatest." SUF ¶ 35 The Company announced that Project Alpha would also allow it to return to opening new stores in the future and specifically noted it planned to open 700 new stores per year beginning in 2009 and that longer term it had the "potential to grow square footage by as much as 10 percent per year." SUF ¶ 36.

The market's response to the announcement of Project Alpha was mixed. SUF ¶ 40 (Affidavit of Steven A. Riley ("Riley Aff") Ex. 4 (November 29, 2006 Goldman Sachs Report) ("[W]e remain skeptical - prior strategic shifts that were applauded by the Street in 2003 didn't turn out so well."); Riley Ex. 5 (November 30, 2006 Deutsche Bank Report) ("We like the idea of opening fewer stores and moving away from the inventory packaway strategy, so yesterday's announcements were incrementally positive if not entirely unexpected. But, execution against the strategies, and therefore a return to past profitability levels, is uncertain."). Following the announcement, Dollar General stock never traded above $17.92 per share. SUF ¶ 41.

**F. The Board Solicits Preliminary Indications of Interest**

While the Board believed Project Alpha was an attractive strategy for the Company, it recognized there were substantial risks involved in the implementation of a new inventory model and real estate strategy on the scale of 8,000 retail stores:

> Among others, these risks included a relatively new management team with a recent track record of missed annual projections, a newly-hired and untested real estate development team with no proven track record of successful store growth management; downward pressure on the stock price; and the real risk that the Company did not have the knowledge or buyers to execute the fundamental change in its inventory model from "packaway" to "markdown." Indeed, Lazard and Lehman informed the Board that

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> Dollar General's stock could easily trade below its previous 52-week low of $12.10 per share during the first year of reported financial results under Project Alpha, which would be negatively impacted by, among other things, the high costs of closing poor performing stores.

SUF ¶ 37. Accordingly, the Board determined it was in the shareholders' best interest to explore how much could be obtained for shareholders in a sale of the Company. SUF ¶ 39.

In early December 2006, the Board decided to seek indications of interest from two private equity firms, KKR and Bain Capital, both of which had significant experience buying and running retail businesses SUF ¶ 42 The Board authorized Lazard to provide KKR and Bain Capital with confidential information to elicit preliminary indications of interest. SUF ¶ 42.

On December 8, 2006, KKR and Bain Capital made separate presentations to the SPC. SUF ¶ 43 On December 19, 2006, KKR and Bain Capital submitted preliminary indications of interest Bain Capital indicated a range of $20 to $21 per share; KKR a range of $19 to $20 per share. SUF ¶ 44. At the time, Dollar General's stock was trading at $15.61 per share, so these preliminary indications reflected a substantial premium. SUF ¶ 45. Two days later, the SPC met with Lazard and Wachtell to review the indications of interest and decided to update the Board. SUF ¶ 46.

### G. The Board Allows KKR and Bain Capital to Diligence the Company

The Board met on January 5, 2007. SUF ¶ 47. Mr. Bottorff described the steps taken since KKR had expressed interest in the Company in early October. SUF ¶ 47. He explained that the Board had to decide whether to allow KKR and Bain Capital access to additional information and to the Company's management and, if so, whether to broaden the process to include other firms. SUF ¶ 47.

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Lazard made a presentation to the Board discussing, among other things (1) a summary and comparison of the indications of interest from KKR and Bain Capital; (2) the mixed market reaction to Project Alpha, including the questions raised by several analysts whether Project Alpha would be sufficient and could be implemented effectively; (3) its view that a potential strategic combination with Family Dollar, one of Dollar General's competitors, was unlikely because Family Dollar was under investigation by the SEC and could not file its audited financial statements; and (4) a valuation of Dollar General that ranged from a low of $13 per share to high of $21 per share. SUF ¶ 48.

After listening to Lazard's presentation, the Outside Directors asked Messrs. Perdue and Beré to leave the meeting. SUF ¶¶ 49, 50. The nine Outside Directors decided that because KKR and Bain Capital both provided indications of interest at the high end of Lazard's valuation, it was in the shareholders' best interest to allow the firms to conduct additional diligence. SUF ¶ 50. Wachtell attended the January 5, 2007 meeting and was present during the Board's discussions. SUF ¶ 49.

The Outside Directors also debated whether to broaden the process to include other firms. SUF ¶ 51. With the advice of Lazard, the Outside Directors discussed several factors including that: (1) both KKR and Bain Capital were leading private equity firms, with significant retail experience and financial resources; (2) keeping the process confidential would become more difficult if additional firms were included, which increased the risk that the Company would put itself "into play" and thereby undermine its ongoing efforts to implement Project Alpha; (3) broadening the process would be an additional distraction for management at a time that it was already fully engaged in implementing Project Alpha; and (4) it was unlikely that Dollar General could enter into a transaction with a strategic acquirer such as Family Dollar. SUF ¶ 51 The

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Outside Directors decided at that time not to invite additional firms to conduct diligence. SUF ¶ 52.

Neither Mr. Perdue nor Mr. Beré had any role in the deliberations or decisions of the Board on January 5, 2007, having been excused from the meeting SUF ¶ 50.

In mid-January 2007, upon the recommendation of the SPC and its advisors, the Board allowed KKR and Bain Capital to partner with another private equity firm in connection with their potential bids. SUF ¶ 53. KKR partnered with TPG and Bain Capital partnered with Blackstone Group. SUF ¶ 53 TPG and Blackstone also are among the leading private equity firms in the world. SUF ¶ 54. As part of the diligence process, all four bidders had access to a "data room" that contained business, financial, legal, human resources, operational, tax and other information about the Company SUF ¶ 56. The SPC instructed Lazard to ensure that "each bidder be treated equally in terms of access to due diligence information and in the process overall." SUF ¶ 57.

On February 5, 2007, the SPC asked the potential bidders to submit their best and final bids. SUF ¶ 58.

### H. Bain Capital, Blackstone and TPG Withdraw From the Process But KKR Makes an Offer of $22 Per Share

As the bid deadline approached, Bain Capital and Blackstone told Lazard that they would not submit an offer. SUF ¶ 59. They explained that based on the information they studied they could not reach even Bain Capital's preliminary indication of $20 to $21 per share. SUF ¶ 59. KKR alone submitted a bid at $22 per share early on the morning of March 9, 2007. SUF ¶ 60 TPG, KKR's partner, withdrew from the bidding after concluding that "the $22 per share price overvalued Dollar General." SUF ¶ 61.

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On March 9, 2007, the SPC met with Lazard and Wachtell SUF ¶ 62. The SPC unanimously decided that KKR's offer was attractive and should be brought to the full Board. SUF ¶ 62 The SPC also requested a fairness opinion from Lazard. SUF ¶ 63.

### I. The Board Considers and Accepts KKR's Offer

On March 10, 2007, the full Board met with its advisors. SUF ¶ 64. Mr. Bottorff told the Board that KKR's partner, TPG, was not willing to move forward at $22 per share, that Bain Capital and Blackstone had not submitted an offer, but that Bain Capital had indicated that any bid it could submit would be below $20 per share. SUF ¶ 64. Mr. Bottorff further explained that KKR had indicated this was its best and final offer and that the offer would be withdrawn if it was disclosed to another bidder. SUF ¶ 64.

Lazard made a detailed presentation to the Board. SUF ¶ 64. Lazard said that KKR's offer exceeded the value of Dollar General under every valuation methodology it utilized. SUF ¶ 64 Lazard also discussed other potential strategic and financial acquirers and expressed its view that none was likely to offer more than $22 per share. SUF ¶ 64. Lazard further advised the Board that it believed KKR would significantly reduce or withdraw its offer if the Board insisted on the ability to solicit other proposals. SUF ¶ 64.

Lazard provided the Board with a fairness opinion (later confirmed in writing) that KKR's $22 per share offer was fair to Dollar General shareholders from a financial point of view SUF ¶ 64 Wachtell reviewed with the Board its legal obligations in considering KKR's proposal SUF ¶ 64. After its deliberations, the Board unanimously approved the proposed merger agreement and agreed to recommend KKR's offer to shareholders for approval. SUF ¶ 64.

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On March 11, 2007, KKR and Dollar General entered into a definitive agreement, subject to shareholder approval. SUF ¶ 65. Under the Merger Agreement, the Board was permitted to consider other unsolicited bids and accept a superior offer, that emerged subject to a termination fee of approximately 3% of the Merger price. SUF ¶ 65

The $22.00 per share Merger price represented a premium of approximately 31% over the market closing price of $16.78 on March 9, 2007, the last trading day prior to the announcement of the transaction and approximately 43% over the one year average stock price of $15.43. SUF ¶ 66.

At the time the Merger Agreement was signed, neither Mr. Perdue nor Mr. Beré had any agreements or understandings with respect to future employment or potential investments with the Company after the transaction. SUF ¶ 67. Mr. Perdue, in fact, was not retained by KKR after the Merger and currently has no financial interest in the Company. SUF ¶ 68. Mr. Beré did not expect to the stay with the Company post-Merger, but subsequently was not asked to stay on after the Board accepted KKR's offer. SUF ¶ 69.

The Merger Agreement was announced on March 12, 2007. SUF ¶ 70. The response from securities analysts was overwhelmingly favorable, with some stating that they did not anticipate a higher bid. SUF ¶ 70. They were right: no other bidder ever came forward . SUF ¶ 71.

**J. Shareholders Receive a Proxy Statement Concerning the Merger**

On or about May 21, 2007, Dollar General filed the Proxy Statement with the SEC and distributed it to shareholders SUF ¶ 72 The Proxy included.

- a summary term sheet describing the Merger Agreement and the Board's recommendation; Lazard's fairness opinion, the Directors' and management's potential interests in the merger; the financing for the merger, conditions of the Merger,

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restrictions on the ability of the company to solicit other offers, the termination fee, and a comparison of the offer to the market price of Dollar General's stock. SUF ¶ 72

- a description of the background of the Merger, describing in detail the process Dollar General useded to evaluate its strategic alternatives, including Project Alpha. SUF ¶ 72.

- a copy of Lazard's fairness opinion and a seven-page summary of Lazard's analysis of the Merger, including a discounted cash flow analysis, an analysis of the present value of the future stock price, a comparable company analysis, and a precedent transaction analysis. SUF ¶ 73.

- Dollar General financial information for two different sets of projected future cash flows, an "Alpha Case" and a more optimistic "Alternative Case" for the fiscal years 2007-2009; and Lazard's extrapolated projections for the Alpha and Alternative cases for the fiscal years 2010-2011. SUF ¶ 72

- disclosure of Lazard's fee in connection with its services, including the amount of $5 million due on the date Lazard rendered its fairness opinion and $10 million upon consummation of the Merger. SUF ¶ 72.

- disclosure of the interests of the Directors and management in the Merger, including a description of equity awards and the possibility that, prior to the closing, some or all of the Company's executives may discuss or enter into employment arrangements with the surviving corporation. SUF ¶ 72.

- a description of the litigation related to the Merger, enumerating the alleged claims and explicitly referencing this action. SUF ¶ 72.

- a description details of the "no shop" provision prohibiting Dollar General from soliciting alternative bids, and the "fiduciary out" provision that allowed the Board to consider any unsolicited, superior offer. SUF ¶ 72.

- a description of the $225 million termination fee payable to KKR if Dollar General terminated the Merger. SUF ¶ 72.

- the 49-page Merger Agreement itself. SUF ¶ 72.

The Proxy also set forth the material factors the Board considered in adopting the Merger Agreement, including, among other factors, that the price of $22 cash per share represented an approximately 31% premium over the last closing price; the rights inherent in Dollar General's operating model; current trends in the markets and retail sectors, financial analyses provided to

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the Board; Lazard's fairness opinion; and the reputation and experience of KKR, particularly with respect to its ability to obtain the financing required to fund the Merger. SUF ¶ 73.

The most prominent institutional shareholder advisory firms, ISS and Glass Lewis & Co., both recommended that shareholders vote in favor of the Merger. Glass Lewis announced.

> We believe the positive aspects of the proposed transaction outweigh any concerns. **The board conducted a thorough sale process which involved multiple interested parties. In our opinion, such a sale process, all things being equal, yields the highest possible valuation for a Company.** As such, and in the absence of substantial conflicts, we believe this proposal warrants shareholder approval. Accordingly, **we recommend that shareholders vote FOR this proposal.**

SUF ¶ 75 (emphasis added). ISS wrote:

> Based on our review of the terms of the transaction and the factors described above, including the reasonable premium and the strategic review process, **we believe that the merger agreement warrants stockholder support.**

SUF ¶ 74 (emphasis added).

**K. Shareholders Overwhelmingly Approve the Merger**

On June 21, 2007, shareholders approved the Merger with 99% of the voting shares voting in favor of the Merger. SUF ¶ 76. Cal Turner, who controlled the largest block of Dollar General stock, voted in favor of the Merger. SUF ¶ 77. Plaintiff City of Miami also voted in favor of the Merger. SUF ¶ 78.

## ARGUMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the

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adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. A genuine issue for trial is one "that must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd v Hall*, 847 S.W.2d 208, 211 (Tenn. 1993).

## I. PLAINTIFFS MUST SHOW BAD FAITH OR DISLOYAL CONDUCT TO SURVIVE SUMMARY JUDGMENT

Plaintiffs allege that the Directors violated their fiduciary duty of care in connection with the sale of Dollar General and the preparation of the Proxy Statement These claims are barred as a matter of law by the exculpatory provision in Dollar General's charter and because they were extinguished by the shareholder vote approving the Merger. The shareholder vote would also restore business judgment rule protections against duty of loyalty claims in the event Plaintiffs were able to show a director had a conflict of interest.

### A. The Exculpatory Provision in Dollar General's Charter Bars Plaintiffs' Claims

Tennessee law authorizes a corporation to immunize its corporate directors from personal liability for money damages arising from a breach of fiduciary duty. Tenn. Code Ann. § 48-12-102(b)(3) . Accordingly, Article 10 of Dollar General's Amended and Restated Charter provides:

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

Riley Ex 32.

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The amended complaint seeks only money damages Am Compl. at 51. Accordingly, the Directors are entitled to summary judgment dismissing all of Plaintiffs' claims based on alleged violations of the duty of care. *See, e.g*, *In re Transkaryotic Therapies, Inc*, 954 A 2d 346, 363 (Del. Ch. 2008); *Globis Partners, L P v Plumtree Software, Inc*, 2007 WL 4292024, at *14-15 (Del. Ch. Nov. 30, 2007); *In re Lukens, Inc S'holders Litig.*, 757 A.2d 720, 734 (Del. Ch. 1999).[2]

**B. Ratification by the Shareholders Extinguishes All Duty of Care Claims and Restores Business Judgment Rule Protection Against Any Duty of Loyalty Claims**

Plaintiffs' duty of care claims are also precluded because the Company's shareholders ratified the transaction *See City of Pontiac Gen. Employees' Ret. Sys. v Thomas Nelson*, No. 06-501-I(III), slip op. at 21 (Tenn. Ch May 4, 2007) ("The duty of care, however, is extinguished by informed shareholder ratification."); *accord Indiana State Dist Council of Laborers & HOD Carriers Pension Fund v Brukardt*, No. 05-1392-II, slip op. at 29 (Tenn. Ch. Aug. 27, 2007); *In re Wheelabrator Techs , Inc S'holders Litig*, 663 A.2d 1194, 1200 (Del. Ch 1995).

The shareholders' ratification also restores the presumption of the business judgment rule against duty of loyalty claims, to the extent any director was conflicted, and shifts the burden to Plaintiffs to prove that the transaction was irrational or amounted to waste. *Solomon v Armstrong*, 747 A.2d 1098, 1117 (Del. Ch. 1999); *Roster v New Valley Corp*, 2005 WL 1364624, at *4 (Del. Ch May 27, 2005); *see also Brukardt*, slip op. at 29 (where shareholders

[2] Tennessee courts often look to Delaware law when deciding issues relating to corporate fiduciary duties. *See, e g, Thomas Nelson*, slip op. at 2 n.1 ("Delaware law is as a useful reference point where Tennessee law is not fully developed"); *see also McCarthy v. Middle Tenn. Elec Membership Corp*, 466 F.3d 399, 409 (6th Cir 2006) ("'Courts of other states consider the decisions of Delaware courts on corporate matters to be instructive.'") (citation omitted)

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approved transaction, "with respect to Plaintiff's duty of loyalty claims, Defendants are entitled to the presumption of the business judgment rule").[3]

Ninety-nine percent of voting shares voted for the KKR deal – including Plaintiff City of Miami and Cal Turner. As discussed in Section IV *infra*, and as the Court found in denying Plaintiffs' motion for a temporary injunction, the undisputed record establishes that the shareholders were fully informed when they voted for the Merger. Plaintiffs cannot show any evidence that would justify a departure from the Court's initial decision. Therefore, the shareholder vote extinguished Plaintiffs' duty of care claims and Plaintiffs must overcome the protections of the business judgment rule to prevail on their duty of loyalty claims.

**C. Shareholders That Voted In Favor Of The Merger Cannot Challenge It**

Under the doctrine of acquiescence, shareholders who cast an informed vote in favor of a transaction are barred as a matter of law from challenging it. *See Bershad v Curtiss-Wright Corp* , 535 A 2d 840, 848 (Del. 1987); *In re PNB Holding Co Shareholders Litig.*, 2006 WL 2403999, at *21 (Del. Ch. Aug. 18, 2006) . As the Delaware Chancery Court held in *PNB*:

> If informed, uncoerced stockholders wish to challenge a transaction, the least that can be expected of them is that they not endorse it through a yes vote in the first instance. That is, if a stockholder says "yea" in the election, she cannot say "nay" in court if her vote was informed and uncoerced. The ballot box is the most important place to register opposition, not the courthouse Therefore, the PNB stockholders who cast yes votes are barred by the doctrine of acquiescence from challenging the Merger.

*Id*

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[3] The duty of loyalty imposes restrictions on directors who are interested in the transaction at issue, in the sense of self-dealing, or who are otherwise not independent, in the sense that they cannot base decisions solely on the corporate merits of the subject. *See Orman v Cullman*, 794 A 2d 5, 22-23 (Del. Ch. 2002) . The duty to act in good faith is an element of the broader duty of loyalty and is only breached when directors "consciously disregard" their fiduciary duties. *Stone v Ritter*, 911 A.2d 362, 370 (Del 2006)

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Plaintiff City of Miami voted in favor of the Merger after receiving all material information. SUF ¶ 78; *see also* Section IV *infra*. Accordingly, the Court should enter judgment against it on the grounds of acquiescence.

## II. THE COURT NEED ONLY CONSIDER THE BUSINESS JUDGMENT RULE

### A. The Business Judgment Rule Under Tennessee Law

As this Court has recognized, "the business judgment rule has been adopted in Tennessee and continues to be followed." Riley Ex. 33 (June 24, 2007 Prelim. Inj. Hr'g Tr. at 89-90). The business judgment rule "presume[s] that a corporation's directors, when making a business decision, acted on an informed basis, in good faith, and with honest belief that their decision was in the corporation's best interests." *Lewis v Boyd*, 838 S.W.2d 215, 220-21 (Tenn Ct App. 1992). Thus, Tennessee courts are "reluctant to interfere with the internal workings of corporations or intrude on the managerial responsibilities of directors." *Memphis Health Ctr., Inc. v Grant*, 2006 WL 2088407, at *8 (Tenn. Ct. App. July 28, 2006). The business judgment rule requires "judicial restraint in deference to management of a business organization, not by the courts, but by the directors who are best able to judge whether a transaction is expedient to the corporation." *Thomas Nelson*, slip op. at 8. Where the business judgment rule applies, a plaintiff must prove that a challenged transaction was "an irrational sale, waste, a gift or that a person of ordinary sound business judgment could not consider the purchase price fair." *Id* at 7.

### B. The Board Was Independent and Disinterested

To overcome the business judgment rule, Plaintiffs must present evidence that "demonstrate[s] that ***a majority*** of the board . . . was interested in the transaction." *Brukardt*, slip op. at 12 (emphasis added); *accord Thomas Nelson*, slip op. at 10 (citing *Orman v Cullman*, 794

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A.2d 5, 23 (Del. Ch. 2002)). Plaintiffs do not dispute that the nine Outside Directors – a supermajority of the eleven members of the Board – were fully independent and disinterested. SUF ¶¶5, 7. Each of the Outside Directors was a Dollar General shareholder and had every incentive to secure the highest and best value for shareholders *Thomas Nelson*, slip op at 11 ("Where the director receives for his stock what other shareholders are receiving . . the director's interest is aligned with the shareholders to obtain the highest value and is not adverse."); *see also Globis Partners*, 2007 WL 4292024, at *8. Each of the Outside Directors received the same $22 per share as the Company's public shareholders. Accordingly, Plaintiffs cannot establish that a majority of the Board was interested.

The record also demonstrates that neither Mr Perdue nor Mr. Beré had any interest in the transaction other than as Dollar General shareholders Because their interests were fully aligned with shareholders in obtaining the best price, there was no conflict of interest. *Thomas Nelson*, slip op. at 11, *Globis Partners*, 2007 WL 4292024, at *8. Neither Mr. Perdue nor Mr Beré had any financial relationship with KKR; nor did they have any agreements or understandings with KKR with respect to future employment or potential investments with the Company post-Merger. SUF ¶ 7. Mr. Beré did not expect to stay with the Company after the Merger, and he was not asked to stay on as interim CEO until some time after the Board approved the merger SUF ¶ 69.

Even in the event Plaintiffs were to argue that Mr. Perdue or Mr. Beré had a conflict of interest with respect to the Merger, the point would be irrelevent. Nine of the Directors were disinterested.[4] The record also establishes that the SPC was formed specifically to ensure that

[4] The Tennessee Business Corporation Act provides that if any director has a conflict of interest, the transaction may be validly approved by "the affirmative vote of a majority of the directors on the

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the Board – and not management – controlled the process And the management Directors were excluded from all the SPC's deliberations, as well as the Board's key meeting on January 5, 2007 SUF ¶ 50. Therefore, "the mere presence of a conflicted director or an act of disloyalty by a director does not deprive the Board of the business judgment rule's presumption of loyalty." *McMillan v Intercargo Corp* , 768 A 2d 492, 504 n.54 (Del. Ch. 2000), *accord Malpiede v Townson*, 780 A 2d 1075, 1084-84 (Del. 2000).

**C. Plaintiffs' Attempt to Conjure a Loyalty Claim Is Unsupportable**

Plaintiffs have tried to argue that Messrs. Perdue and Beré conspired to deceive the Board and the shareholders, and that their allegedly disloyal conduct invalidates the approval of the Merger by the other Directors More specifically, Plaintiffs allege that Dollar General management had a secret plan to increase the number of its stores from 8,000 to 16,000 or more and duped the Board into approving the Merger at an unfair price. Sept 9, 2008 Omnibus Mem in Opp. to Defs.' Mot. for J. on the Pleadings ("Plaintiffs' Omnibus Memorandum") at 22-23.

There is no evidence whatsoever of any secret plan. Indeed the Company's plans were publicly known. At the time the Board decided to accept KKR's offer, management's plan was Project Alpha, which sought to *reduce* the growth of new stores temporarily for two years before resuming new store growth. This plan was discussed in detail with the Board over several months and was fully disclosed to shareholders. SUF ¶ 34; *see infra at* Section IV. The November 29, 2006 press release announcing Project Alpha clearly stated that the Company expected to open approximately 700 new stores beginning in 2009. SUF ¶ 36. The press release added: "[l]ong term, we believe the model still provides the potential to grow square footage by

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board of directors . who have no direct or indirect interest in the transaction " Tenn. Code Ann. § 48-18-302(a)(1), (c)

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as much as 10 percent per year" SUF ¶ 36 The potential for increased growth of new stores in 2009 was repeated in the Proxy Statement, which included projections that the total number of stores would grow by 615 in 2009 (net of store closings). Bottorff Ex. 23 at 23

The record also makes clear the Board knew about the Company's potential growth prospects. Mr. Bottorff states in his affidavit that "the Board regularly discussed the Company's growth opportunities and examined the number of potential building sites for discount retailers in the United States" in evaluating the Company's strategies even before Project Alpha was adopted Bottorff Aff. ¶ 19. This sworn testimony is corroborated by, among other things, two management presentations to the Board in November 2003 and July 2004, which stated that there were more than 17,000 potential sites for Dollar General stores in the United States SUF ¶ 81 Mr. Bottorff further explains, however, that many of those potential sites were in locations that were not viable sites in the short-term. Bottorff Aff. ¶ 19.

Management and securities analysts regularly addressed growth prospects in public disclosures as well For example, during an investor call on June 28, 2006, Mr. Perdue stated "we have the ability to open a large number of new stores each year, it's a machine . . . . We believe we have a long run rate for adding new square footage." SUF ¶ 83(c) . During another call in the same month, he stated that "we are a long way from [store saturation] and in this model right now, there is so much opportunity on the profitability side." SUF ¶ 83(b) Similarly, in September 2006, Goldman Sachs issued a report on Dollar General stating that its "geographical analysis points to the potential for more than 18,000 units in the United States." SUF ¶ 82(a). After reviewing these and other documents, Plaintiffs' own expert Prof Black and damages expert Ms. O'Connor both conceded that information regarding Dollar General's long-term growth potential was in the public domain and available to shareholders. Bernard S Black

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Dep. Tr. ("Black Tr.") at 263:15-264:8; Mary A. O'Connor Dep. Tr. ("O'Connor Tr.") at 77:21-78:11, 93:8-16.[5]

## III. THE BOARD RAN AN EXEMPLARY PROCESS THAT NO JURY COULD FIND WAS DONE IN BAD FAITH

### A. The Business Judgment Rule Applies in the Change of Control Context and Plaintiffs Fail to Show Any Breach of the Duty of Good Faith or Loyalty

In *Thomas Nelson*, Chancellor Lyle pointedly "rejected" the argument that "the business judgment rule is inapplicable . . . because a change of control transaction is subject to enhanced judicial scrutiny." *Thomas Nelson*, slip op at 22. After a review of Delaware law, Chancellor Lyle found that so-called "enhanced judicial scrutiny" beyond the business judgment rule "has been applied mostly in hostile takeover cases to assess protection devices" to entrench management and it "does not appear to have majority application in the garden variety change of control transaction where there is no controlling shareholder on each side of the transaction." *Id* As in *Thomas Nelson*, the Merger here is a "garden variety change of control transaction " Accordingly, the business judgment rule applies. *Id*

"There are no special and distinct" duties that arise in the change of control context. *Lukens*, 757 A.2d at 731. Rather, directors must only act "in a manner consistent with [their] triad of fiduciary duties" – due care, good faith and loyalty. *Id.*[6] Significantly, directors are still

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[5] To support the allegation that management conspired to hide the Company's growth potential, Plaintiffs rely heavily on Outside Director Richard Thornburgh's testimony that he was not aware of a particular study in 2003 that calculated the total number of stored Dollar General could potentially open nationwide Richard Thornburgh Dep Tr ("Thornburgh Tr ") at 235:9-236:12 But Mr. Thornburgh joined the Board in the Summer of 2006. The fact that he could not recall a specific study commissioned three years before he joined the Board is meaningless

[6] In *Revlon, Inc v Forbes Holdings, Inc* , 506 A.2d 173 (Del 1986), the Court held that when the Directors decide to sell a company they must seek the highest value reasonably available to shareholders. *See also Paramount Comm. Inc v QVC Networks, Inc.*, 37 A 2d 34 (Del 1994). Challenges to the sale process adopted by a board are sometimes referred to as *Revlon* claims. However, no Tennessee court has adopted *Revlon* as Tennessee law In any event, the Directors

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entitled to the presumption that they satisfied their fiduciary duties pursuant to the business judgment rule. *See In re Compucom Sys., Inc. Stockholders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005) (even when a corporation is "up for sale," "[t]he court begins its analysis with the presumption of the business judgment rule"); *McMichael v. U.S. Filter Corp.*, 2001 WL 418981, at *14 (C.D. Cal. Feb. 22, 2001) (directors in change of control context are still entitled to "the presumption that [they] exercised the requisite due care in approving the transaction and adequately informed themselves of the value of the company").

Further, in order to avoid the protections of the exculpatory provision in Dollar General's charter, Plaintiffs must show that the Directors' efforts to review strategic options and ultimately sell the Company were in bad faith or disloyal. Specifically, any challenge to the sale process is barred as a matter of law unless plaintiffs can show **"the directors consciously acted in a manner contrary to the interests of [the Company] and its stockholders."** *See, e.g., In re Lear Corp. S'holder Litig.*, 2008 WL 4053221, at *1, 10 (Del. Ch. Sept. 2, 2008) (emphasis added); *see also, e.g., McMillan*, 768 A.2d at 502; *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *21 (Del. Ch. 1999).

In *Lear*, the Delaware Chancery Court specifically rejected the argument that independent directors' alleged failure to discharge their fiduciary duties in selling a company could constitute bad faith:

> [When a case] simply involves the question of whether a board took enough time to market test a third-party, premium generating deal and there is no allegation of a self-interested bias against other bidders, a plaintiff seeking damages after the deal was closed cannot . . . rest on quibbles about due care. And in that sort of scenario, the absence of an illicit directorial motive and the presence of a strong rationale for the decision taken (to secure the

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plainly satisfied the *Revlon* standard and acted reasonably to (and did in fact)obtain the highest price reasonably available.

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> premium for stockholders) makes it difficult for a plaintiff to state a loyalty claim.

*Id* at *11 n. 62.

Plaintiffs do not, and cannot, cite any evidence (or even plausible theory) that the Outside Directors had any motive other than maximizing shareholder value. Instead, Plaintiffs raise boilerplate claims that the Board did not exercise sufficient care because it should have invited additional potential bidders to conduct due diligence and because it agreed to standard deal protection terms in the Merger Agreement. Courts uniformly reject these allegations as within the Board's business judgment. Plaintiffs also complain about a few early conversations between Mr Perdue and Mr. Calbert of KKR But these discussions ended before the Board decided how to respond to KKR's initial request to conduct due diligence, and certainly before the Board started any process leading to the sale of the Company. They did not have (and could not have had) any impact on the Merger or Merger price. Plaintiffs' challenges to the sale process do not come close to showing bad faith and are all insufficient as a matter of a law.

**B. The Board's Actions Were Exemplary and Plainly in Good Faith**

The Delaware Supreme Court has emphasized that "there are many business and financial considerations implicated in investigating and selecting the best value reasonably available," which are within the discretion of the board of directors. *Paramount Commc'ns Inc v. QVC Network Inc*, 637 A.2d 34, 45 (Del. 1994) (courts must defer to board decision unless it falls outside of the "range of reasonableness"). "[T]here is no single blueprint that a board must follow" in the sale of a company in order to fulfill its fiduciary duties. *Barkan v Amsted Indus., Inc*, 567 A.2d 1279, 1286 (Del. 1989). Accordingly, where a plaintiff challenges the process followed by the board, courts do not "second-guess reasonable, but debatable, tactical choices that directors have made in good faith" *In re Toys "R" Us, Inc S'holder Litig*, 877 A.2d 975,

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1000 (Del. Ch. 2005); *see also In re MONY Group Inc S'holder Litig* , 852 A 2d 9, 19-20 (Del Ch 2004).

Plaintiffs cannot point to any evidence showing that the Directors acted in bad faith. *To the contrary, Plaintiffs' own corporate governance expert, Prof Bernard Black, testified that the Board acted reasonably and appropriately at every stage in the sale process* For example:

- Prof. Black agreed that Mr. Perdue and Mr. Wilds acted appropriately in informing the Board about their October 5, 2006 meeting with KKR. Black Tr. at 101:16-102:2.
- Prof. Black agreed that it was "customary" and "good practice" for "the board to form a special committee of outside directors to control the process"; and that both "the creation of the [special] committee" and "the membership of the [special] committee" were "appropriate " *Id* at 102:21-104 4; 110.13-18.
- Prof Black agreed that as of October 8, 2006, management was not "unilaterally deciding how to respond" to KKR. *Id* at 111·11-15.
- Prof Black agreed that it was appropriate for the SPC to retain its own legal advisors *Id* at 126:11-19.
- Prof. Black agreed that it was consistent with "good corporate governance" for the SPC to retain an investment bank, like Lazard, that was independent from management. *Id* at 132:12-134:8.
- Prof Black agreed that it was reasonable for the Board in structuring a strategic review process to consider that increasing the number of participants could risk the confidentiality of the process *Id* at 206·14-207:6
- Prof Black agreed that it was reasonable for the Board in constructing a strategic review process to consider the risk of disruption to the Company's business *Id* at 208:5-9.
- Prof. Black thought "it was a reasonable decision" to permit KKR and Bain Capital to conduct additional due diligence given the advice the Board received that a $21 per share LBO price was higher than Lazard's valuation of the Company under Project Alpha. *Id* at 185:1-186:5.
- Prof Black agreed it was reasonable for the Board to rely on Lazard's fairness opinion. *Id* at 212.17-19.
- *Finally, Prof Black agreed that it was reasonable for the Board to approve KKR's $22 per share offer and related deal terms Id at 215·13-17*

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These admissions are fatal to Plaintiffs' claims.

### *1. The Board Had No Duty to Seek Out More Bidders*

Delaware courts have repeatedly held that a Board is not required to maximize the number of potential acquirers in the sale process. *See, e.g., In re MONY*, 852 A.2d at 19 (finding sale process involving a single bidder was reasonable); *Toys*, 877 A.2d at 1008 (holding that board's decision to limit process to a small number of bidders rather than canvass the entire market was reasonable); *In re Pennaco Energy, Inc.*, 787 A.2d 691, 707 (Del. Ch. 2001) (denying injunction where board did not canvass the market); *In re KDI Corp S'holders Litig.*, 1990 WL 201385, at *3 (Del. Ch. Dec. 13, 1990) ("There is *no* requirement that there be a bidding contest or even an active market survey.") (emphasis in original). Chancellor McCoy reached the same result in *Brukardt*, dismissing a case in which the board negotiated with only one bidder. *Brukardt*, slip op. at 19-23.

The Board determined it was in the best interest of the Company and the shareholders to run the auction process with a limited number of private equity firms. With the assistance and advice of Lazard, the Board considered a number of factors, including: both KKR and Bain Capital were major private equity players with significant retail experience and the ability to complete a transaction; the Board was concerned about maintaining confidentiality of the process if too many potential bidders were involved; the Board was worried that management would be unable, as a practical matter; to both execute Project Alpha and respond to due diligence requests from many different firms at the same time; and the Board already had a good understanding of the value of the business based on its review of the Project Alpha proposal. SUF ¶ 51.

As both the Delaware courts and Prof. Black recognize, these are all indisputably reasonable factors for the Board to consider in deciding how to structure a review of strategic

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alternatives and potential sale process. *See* Black Tr. at 206.14-22, 207:1-6, 208.5-9 (Prof. Black conceding that disruption to the Company's business and confidentiality risks were reasonable considerations); *In re MONY*, 852 A.2d at 21 (confidentiality was a legitimate reason for limiting the participants in the sale process). Courts do not second guess these types of reasonable decisions by boards. *See, e g., Toys*, 877 A.2d at 1001.

Delaware courts and Prof. Black also recognize that it is not necessary for directors to canvass the market for potential acquirers when the directors already "possess a body of reliable evidence with which to evaluate the fairness of a transaction." *Barkan*, 567 A 2d at 1287 (reasonable for directors not to canvass the market after receipt of a *single* offer). Here, the Board had already spent several months analyzing the operations, strategies and profitability of the Company in connection with Project Alpha before even considering a potential transaction. SUF ¶¶ 14-16, 27-34, 48, 51. The Board and its advisors were therefore uniquely positioned to assess the value of the Company and "evaluate the fairness of a transaction " *Barkan*, 567 A.2d at 1287.

Nevertheless, the Board also did canvass the market by consulting with Lazard about potential interest from financial and strategic buyers and then inviting four prominent private equity firms to conduct due diligence and submit bids. Bottorff Aff. ¶¶ 31, 51, 64.[7] There is nothing to support a claim that additional bidders were required. As Prof. Coffee put it, "Once one has encouraged two major battleships to compete, there is little to be gained from also attracting a flotilla of smaller ships to participate." Coffee Aff , Exhibit A ¶ 26 Finally, the

[7] Lazard advised the Board that there was limited interest on the part of potential strategic partners. SUF ¶ 31. Lazard also advised the Board that because of the favorable credit market at the time, private equity partners could be able to pay more to acquire the company than strategic partners SUF ¶ 64(f)

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Merger was publicly announced on March 12, 2007, notifying all other potential bidders of the opportunity to buy Dollar General. The Delaware Supreme Court has recognized that the fact that no higher bid emerged between the public announcement of the Merger on March 12, 2007 and the shareholder vote on June 21, 2007 "is supportive of the Board's decision to proceed." *Barkan*, 567 A 2d at 1287; *McMillan*, 768 A.2d at 506; *Goodwin*, 1999 WL 64265, at *22.

### 2. *The Deal Protections Were Reasonable*

Courts in Tennessee and Delaware recognize that an acquiring company has "a legitimate interest in protecting the time and resources it had devoted to the merger " *Brukardt*, slip op. at 21. Therefore, it is reasonable, particularly where an offer includes a substantial premium, for a board to approve a merger agreement containing terms intended to protect the bidder's interests, commonly referred to as "deal protection" provisions *Id*; *see also Toys*, 877 A 2d at 1017. Here, the Merger Agreement contained standard provisions – a termination fee of approximately 3% if the Board accepted another offer and a no solicitation clause that permitted the Board to accept an unsolicited superior offer.

Courts routinely find that termination fees in the range of 3% are reasonable and would not meaningfully deter rival bidders. *See McMillan*, 768 A.2d at 505 (dismissing claims where merger agreement contained a termination fee of 3.5% and a "no-shop clause" and noting "it is difficult to see how a 3.5% fee would have deterred a rival bidder who wished to pay materially more "); *Toys*, 877 A 2d at 1018 (3 75% termination fee reasonable); *Goodwin*, 1999 WL 64265, at *20 (3.125% termination fee reasonable). Courts also routinely approve "no shop" provisions when coupled, as here, with a "fiduciary out" provision that allowed the Board to terminate the deal upon receipt of a superior proposal *In re IXC Commc'ns v Cincinnati Bell, Inc* , 1999 WL 1009174, at *6 (Del. Ch. Oct. 27, 1999) (allegations that the directors agreed to a "no shop"

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provision are insufficient as a matter of law where the provision is subject to a fiduciary out).[8] Similarly, Plaintiffs' expert Prof. Black conceded that it was not improper for the Board to accept the "level of deal protections" in the Merger Agreement. Black Tr. at 293: 12-17.

### 3. *There Is No Evidence That the Early Perdue/KKR Contacts, Which Occurred Before the Sale Process Even Started, Undermined the Process in Any Way*

Plaintiffs likely will argue that a handful of emails from Michael Calbert of KKR referencing discussions with Mr. Perdue between August 17 and November 9, 2006 somehow undermined the Board's process. Those discussions, however, ended in early November 2006. And the emails themselves refute any suggestion that Mr. Perdue's conversations had an impact on the process subsequently initiated by the Board and the SPC in December 2006. The emails reflect that in the only communication between Mr. Perdue and KKR reflected in these emails after the creation of the SPC on October 19, 2006, Mr. Perdue communicated the message that the Board was not interested in pursuing a transaction at that time. Calbert Ex 1. It is undisputed that no transaction was even being considered by the Board until sometime after November 20, 2006. Black Tr. 149:11-149:15.

In addition, it is undisputed that the Board established the SPC to "take control of [the] process and . . ensure that [the Board] had a good independent method for responding and processing" potential strategic options. Bottorff Tr. at 54.20-22. After that point in time, Mr.

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[8] The Merger Agreement also provided KKR with the right to match a superior offer, if one emerged. Bottorff Ex. 23 at Annex A Delaware courts have repeatedly found comparable "matching rights" provisions to be reasonable *See In re Lear Corp S'holder Litig.*, 926 A 2d 94, 120 (Del. Ch. 2007) ("match rights are hardly novel and have been upheld by this court when coupled with termination fees despite the additional obstacle they present"), *accord Toys*, 877 A.2d at 980

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Perdue had no role or influence in the Board's deliberations or structuring of its strategic review process.

- Mr. Perdue did not participate in any SPC deliberations nor was Mr. Perdue informed about any of the SPC deliberations, SUF ¶ 25;
- the SPC directed all communications with potential acquirers through the SPC's independent advisors at Lazard and Wachtell. Bottorff Aff. ¶ 14;
- KKR did not receive any non-public financial information from the Company until such disclosures were authorized by the Board and SPC Calbert Aff ¶ 6;
- Mr. Perdue was excluded from the Board's deliberations during the January 5, 2007 meeting in which the Board decided to permit KKR and Bain Capital to conduct due diligence and to limit the number of potential bidders, SUF ¶ 50; and
- the KKR/TPG and Bain Capital/Blackstone consortiums had equal access to the information in the data room and to Dollar General management, SUF ¶¶ 56-57

Any issue concerning Mr. Perdue's early communications with Mr. Calbert is a red herring. Accordingly, Prof. Coffee appropriately observes

> Thus, even if we deem Perdue to have made improper disclosures to Calbert, the essence of what he is disclosing is that the Dollar General board remains committed to Project Alpha and will consider an alternative project only if and when it decides that Project Alpha cannot maximize value for its shareholders. Such a disclosure is essentially harmless. Indeed, no auction was anywhere near being in view by the end of these emails and thus could not be tainted by them.

Coffee Aff. ¶ 15. Even Prof. Black could not identify any particular harm resulting from these contacts, merely observing that the effect of such contacts on the subsequent sale process is "uncertain." Black Tr , Ex. 2, ¶2(a) To rebut the business judgment rule and show bad faith conduct by the Board, Plaintiffs need evidence, not an undefined uncertainty.

#### 4. *Plaintiffs' "Tip" Allegation Is A Fiction*

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Plaintiffs allege that the Board's outside counsel, Wachtell Lipton, "tipped" KKR at some unknown time that Bain Capital would withdraw from the bidding process. *See, e g*. Black Tr., Ex. 1. This is simply a fiction.

The contemporaneous record demonstrates that at the time KKR submitted its bid, KKR assumed that Bain Capital would bid aggressively for Dollar General:

- On February 22 and March 5, 2007, the KKR deal team reported to the KKR Investment Committee that Bain Capital would likely be aggressive in pursuit of Dollar General and would submit a competing bid. Affidavit of Michael M. Calbert ("Calbert Aff.") Ex. 6 at KKRE0215688; *Id* Ex. 7 at KKRE0045142

- At 2:55 in the morning on March 9, 2007 – a few hours before KKR submitted its $22 bid – Michael Calbert of KKR was asked by his boss, KKR co-founder George Roberts, whether he thought Bain Capital was bidding. Calbert Aff. Ex. 11. Mr Calbert answered, "Yes." *Id*

- Then at 12:30 pm on the same day – hours *after* KKR submitted its bid – Mr Calbert informed the KKR Investment Committee that he did not know "how the other consortium bid." Calbert Aff. Ex. 12.

When shown these documents at his deposition, Prof. Black conceded "you've provided additional evidence that suggests that – that is consistent with Mike Calbert not knowing whether or how Bain was going to bid." Black Tr at 316.22-317:4.[9]

Both Mr. Calbert and Edward Herlihy, lead partner at Wachtell, unequivocally deny that there was any so-called "tip." Calbert Aff ¶ 14 ("KKR never received any information from any source concerning the status of Bain as a bidder prior to submitting its bid on the morning of

[9] Plaintiffs base this allegation on a misreading of a March 8, 2007 email in which Mr Calbert expresses concern to Mr. Roberts about the process potentially being "compromised " *See* Plaintiffs' Omnibus Memorandum at 19-20 (citing KKRE0215729) As explained by Mr Calbert, KKR had some concerns about the possibility that other bidders might have access to information about KKR's bid. When Mr. Calbert wrote in the email that he thought the "process is compromised," he was expressing concern that the process had been compromised to the *disadvantage* of KKR. Calbert Aff. ¶ 13. **Notably, Plaintiffs chose not to ask Mr. Calbert about this email at his deposition.**

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March 9."); Herlihy Aff. ¶ 5 ("Nor did I or (to the best of my knowledge) any attorney at my firm inform KKR that Bain Capital was not expected to make a bid ")

**C. The Board Had Every Reason to Believe KKR's Offer Was Attractive**

To prevail in this case, Plaintiffs must prove that the Board "consciously acted in a manner contrary to the interests of [the Company] and its stockholders" when it accepted KKR's offer and then put that offer to a shareholder vote. *Lear*, 2008 WL 4053221, at *10. No reasonable jury could reach that conclusion. Indeed, Plaintiffs' expert Prof Black has conceded that the Board's decision to accept KKR's offer and related merger terms was reasonable. Black Tr. at 215:13-17.

In addition, it is undisputed that KKR's $22 per share offer was all cash and a 31% premium over Dollar General's most recent stock price ($16.78 per share) and a 43% premium over its one-year average stock price ($15.43). Bottorff ¶ 23; *Id* Ex 8, 61 No higher bids were ever received. Quite the contrary, after a multi-month diligence process involving four of the largest private equity firms in the world, KKR offered $22 per share, which was $2 above its preliminary indication of interest The bid was so high that KKR's potential partner, TPG, dropped out because it concluded that "$22 per share overvalued Dollar General." Wheeler Aff. ¶ 4. And the other potential bidders, Bain Capital and Blackstone, were unwilling to bid even $20 per share SUF ¶ 59 These facts preclude a finding of bad faith. *See* Coffee Aff ¶ 4 (describing this "fact pattern" as having "all the characteristics of the "Winner's Curse" in which "the winner has overpaid"); *see also Goodwin*, 1999 WL 64265, at *22; *McMillan*, 768 A.2d at 506-07, *Lukens*, 757 A.2d at 734.

Any suggestion that the Board acted in bad faith also is foreclosed by the Board's reasonable reliance on its financial advisors. Tennessee law specifically provides that in

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discharging their duties, directors are entitled to rely on "opinions, reports, or statements, including financial statements and other financial data" presented by "persons as to matters the director reasonably believes are within the person's professional or expert competence..." Tenn. Code Ann. § 48-18-301(b)(2). Lazard, a well-known and sophisticated financial advisor, provided the Board with its opinion that KKR's $22 per share price was fair to Dollar General shareholders from a financial point of view. SUF ¶ 64(c),(d). There is no basis to question the Board's good faith reliance on Lazard's fairness opinion. Black Tr. at 212:17-19, *see also McMillan*, 768 A.2d at 505, n.55 (reliance upon an investment banker is a "factor weighing against the plaintiffs' ability to state an actionable claim"), *In re Vitalink Comm Corp S'holders Litig.*, 1991 WL 238816, at *12 (Del. Ch. Nov. 8, 1991) (board satisfied its duty of care by relying on investment bank's fairness opinion)

In rendering its fairness opinion, Lazard told the Board that KKR's offer exceeded the value of Dollar General under *every* valuation methodology it utilized and that it believed other potential strategic and financial acquirers were unlikely to offer more than $22 per share. SUF ¶ 64(d) Moreover, Lazard informed the Board that at the time of the Merger financial buyers (such as KKR) had access to "extraordinary" credit terms that allowed them to pay more for companies like Dollar General than would otherwise be possible. SUF ¶ 64(f); *see also* Paul A. Gompers Deposition, Ex. 1 ¶ 32 ("Gompers Report") ("The amount of leverage allowed KKR to offer a higher purchase price per share in the Dollar [General] Acquisition that KKR would have been able to offer otherwise."). In other words, Lazard was telling the Board that March 2007 was an extremely attractive time to sell a retailer like Dollar General to a financial buyer like KKR. SUF ¶ 64(f); *see also* Gompers Report ¶ 33 ("From about 2004 to July 2007, due in part to the availability of credit on favorable terms, private equity deals and their values were

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increasing "). And the Board considered this advice from Lazard in deciding whether to accept KKR's offer. Thornburgh Tr. at 229:11-21("[T]here was a pretty explicit statement made by Lazard that the private equity firms were able to get financing at terms that corporate industrial companies could not get in terms of the financing, which would facilitate their ability to pay what they paid.")

The Board also had compelling reasons – and certainly a good faith basis – to prefer KKR's all cash $22 per share offer to the risks of executing Project Alpha as a public company. First, Lazard advised the Board that even assuming Project Alpha was successfully implemented and executed the Company was worth, at most, $21.25 per share. Bottorff Ex. 22 at LAZ0057625. Second, the market indicated that Project Alpha was unlikely to yield a price anywhere close to $22 per share. After Project Alpha was announced, Dollar General's stock price never traded higher than $17.92 per share (approximately 20% less than KKR's offer). *See* Kenneth Lehn Dep. Tr., Ex. 1 ¶¶ 10(b), 44 ("Lehn Report"). Moreover, market analysts questioned whether Project Alpha was aggressive enough and whether it could be implemented and executed successfully. *Id.* ¶ 45. Given the many risks and uncertainties inherent in Project Alpha, the Board decided to give shareholders the opportunity to accept KKR's all cash, risk-free 31% premium offer. *See* SUF ¶ 66 .

The events after the announcement of the Merger Agreement up through the shareholder vote all reinforced the reasonableness of the Board's decision on March 10. Securities analysts overwhelmingly praised the offer price. For example, Bear Stearns found that the offer price "is a full valuation" and "seems expensive to us." Riley Ex 18. It advised investors to "take your money and run." *Id* The independent shareholder advisory services concurred. Glass Lewis told its institutional investor clients that "the board conducted a thorough sale process which

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involved multiple interested parties. In our opinion, such a sale process, all things being equal, yields the highest possible valuation for a Company. . . . Accordingly, we recommend that shareholders vote FOR this proposal " Ex 20. Other market participants also did not expect a higher bid, as the share price never traded above the offer price of $22. SUF ¶ 41. And no higher bidder ever emerged. Plaintiffs' apparent theory that a higher price was "reasonably available" is bald speculation. They do not and cannot point to any potential buyers who would have paid more than $22 per share. Finally, Turner and his family, who founded the company and controlled the largest block of Dollar General, all voted in favor of the Merger and accepted the same $22 per share price received by the shareholders. If they had believed the price was unfair, they plainly had the knowledge and incentive to vote against the offer and seek a higher price. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1177 (Del 1995) . And Lead Plaintiff City of Miami has already voted with its wallet as well.

**D. *Ryan* Is Irrelevant**

The only authority Plaintiffs have ever cited to support their claims that the Board acted in bad faith is *Ryan v Lyondell Chemical Co* , 2008 Del. Ch. LEXIS 105 (Del. Ch. July 29, 2008) . In *Ryan*, Vice Chancellor Noble held, on an undeveloped record, that the Board's apparent failure to take *any action* to discharge its duties in a sale of corporate control *could* constitute bad faith and a breach of the duty of loyalty. *Id.* at *48.

As an initial matter, *Ryan* appears to be an outlier decision that this Court should not follow. As Prof. Coffee notes, "[t]he status of the *Ryan* decision, even in Delaware, is controversial" and commentators have interpreted Vice Chancellor Strine's analysis in *Lear* (quoted above) as an implicit criticism of *Ryan*. Coffee Aff. ¶ 27. Indeed, the Delaware Supreme Court has accepted an interlocutory appeal of the decision, which strongly suggests that

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its precedential value is limited and likely to be short-lived *See Lyondell Chem Co v Ryan*, 2008 Del. LEXIS 431, at *1-2 (Del. Sept. 15, 2008).

Moreover, *Ryan* is entirely inapposite. Unlike this case, *Ryan* involved a single bidder sale process that lasted only seven days, in which the board did not retain an investment banker and did not play any role in negotiating the merger agreement. The board delegated its responsibilities almost entirely to the CEO and was effectively a "passive conduit to shareholders." *Ryan*, 2008 Del. Ch. LEXIS 105, *47.

## IV. THE PLAINTIFFS' DISCLOSURE CLAIMS SHOULD BE DISMISSED

Plaintiffs' disclosure claims should be rejected because they cannot prove that material information was withheld from investors. For a fact to be material, the plaintiff must show a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Thomas Nelson*, slip op at 13; *see also Ramage v Logan's Roadhouse, Inc et al.*, No. 99-90-III, slip op. at 5 (Tenn. Ch. Davidson County Feb. 2, 1999). The "total mix" of information available includes "information already in the public domain and facts known or reasonably available to shareholders." *Rodman v Grant Foundation*, 608 F.2d 64, 70 (2d Cir 1979). Under the exculpatory provision discussed in Section II above, only disclosure claims based on disloyalty or bad faith could be viable. Thus, to survive summary judgment, Plaintiffs must show that the Directors acted in bad faith – that they **"intentionally omitted material information or knowingly disseminated false information."** *Goodwin*, 1999 WL 64265, at *7 (emphasis added), *see also Arnold v Society for Sav Bancorp, Inc*, 650 A.2d 1270, 1287-88 (Del. 1994); *McMillan*, 768 A.2d at 597. Plaintiffs cannot satisfy this burden.

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Plaintiffs' entire disclosure theory hinges on one sentence in the Proxy Statement describing an assumption Lazard made in its discounted cash flow analysis: "The perpetuity growth rates were applied to the projected free cash flow for 2011, as adjusted to reflect no additional store openings in perpetuity, resulting in a lower sales growth and lower capital expenditures."[10] Plaintiffs argue that this sentence, which accurately describes Lazard's assumption, was part of a scheme by management to hide Dollar General's growth prospects from shareholders and thereby dupe them into approving the Merger. As Prof. Coffee aptly states in his affidavit, this is a "slender thread." Coffee Aff. ¶ 41.

First, Dollar General repeatedly and publicly disclosed the Company's growth prospects, and the Company's potential ability to open thousands of new stores before reaching a "saturation point" was well known in the public markets.[11] Second, the description of Lazard's growth rate assumption in the Proxy Statement is accurate and therefore as a matter of law does not give rise to a disclosure claim. Third, there is no evidence that the allegedly omitted information would have altered the shareholder vote or caused any injury.

### A. Dollar General's Future Growth Prospects Were Well Known to the Market

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[10] *See* Pl's Omnibus Br. at 43-46, Black Tr. at 224:2–225:19. *See* Memorandum of Law In Support of Defendants Dollar General and the Directors' Motion For Judgment on the Pleadings filed July 2, 2008 at 15-23 for a discussion of certain additional disclosure allegations made in the Consolidated Complaint but apparently abandoned in Plaintiffs' Omnibus Brief.

[11] Of course, there also is no evidence in the record that Dollar General had a ***plan*** to open thousands of new stores up to its potential geographic saturation point across the country, because, simply, no such plan existed. *See* Bottorff Aff. ¶ 19 (a substantial number of the potential building sites identified by management based on certain studies were in locations with no established company operations). The Directors cannot possibly be held liable for intentionally failing to disclose a nonexistent plan. *See In re Anderson, Clayton S'holders Litig.*, 519 A.2d 680, 693 (Del. Ch. 1986) ("Obviously, defendants may not be faulted for not disclosing an opinion of which they were unaware, even if one assumes its materiality.").

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Plaintiffs have claimed that Dollar General management hid from shareholders (and, indeed, the Board) that Dollar General had the long term potential to open thousands of additional stores, including a 2003 study by a consulting firm known as Claritas stating that Dollar General's theoretical "saturation point" was in excess of 18,000 stores. This is nonsense. Plaintiff City of Miami's own investment adviser, James Norris, testified – under questioning by Plaintiffs' own counsel – that he valued the Company at the time of the Merger with full knowledge of the Company's long term growth prospects:

> Q. Okay. And did you have a view as to Dollar General's growth prospects over the long term in terms of the number of stores?
>
> A Yes We -- we felt like they could grow that share base considerably, and we based that largely upon the fact that they were not in all geographies currently, and there were some areas of the country where they did not have any stores at all. There were other areas of the country where they were understored. And so if you took the states where they were full -- where they were fully stored and you applied that kind of a penetration rate to other states, you could easily justify 14, 15, 16,000 stores.
>
> Q. Okay. So I want to wrap this back Under questioning from Mr. Stern, you testified that you thought it was important that Dollar General stop growing stores and start focusing more on some of their problems; is that correct?
>
> A. Temporarily, yes.
>
> Q. Okay. And -- and was it your view that once they got those problems under control that they could then start opening stores again?
>
> A. Absolutely, yes.
>
> Q And you thought they might be able to go as high as 14 or 15,000 stores?
>
> A. Yes, that's correct.
>
> Q. Okay. Which -- which for a company who had 8,000 stores that would imply a substantial growth for a period of time?
>
> A. That's correct, yes.

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James Norris Dep Tr ("Norris Tr") at 167:1–168:9 And Mr. Norris voted the City of Miami's shares in favor of the Merger. SUF ¶ 78.

The Norris admission standing alone defeats any claim that Dollar General's store growth potential was not adequately disclosed. But there's much more The record also demonstrates that management repeatedly discussed the Company's potential store growth and theoretical saturation point during securities analyst conference calls and in public SEC filings.

- During an investor call on June 28, 2006, Perdue stated: "We have the ability to open a large number of new stores each year, it's a machine . . . . We believe we have a long run rate for adding new square footage." Perdue then discussed the Claritas study, saying: "We had a study done a few years ago by an outside group that does – actually does a lot of work with the government that gave us comfort that frankly there – this is in 2003, there were more opportunities to open our stores in our core states." SUF ¶ 83(c).

- On another investor call in June 2006, Perdue said. "I think at some point, there will come a time when saturation gets to be an issue and we have to worry about well, what does the model have to have in terms of real growth to maintain itself. But frankly we are a long way away from that and in this model right now, there is so much opportunity on the profitability side" SUF ¶ 83(b).

- On a March 21, 2006 investor call, Perdue stated: "[W]e firmly believe there are opportunities out there in the marketplace that customers are not getting their needs met. And we believe we need to be there. That's one reason why we opened up the geography from the 24 core states that we had a, few years ago to now trying to move judiciously into these outlying states that are contiguous with our core states." SUF ¶ 83(a).

- Specifically with respect to Project Alpha, the Company publicly disclosed in its SEC Form 10-Q for the third quarter of 2006 that it planned to reduce new store openings in 2007 and 2008 but "[w]e expect to return to a higher rate of store openings thereafter, beginning in fiscal 2009, when we plan to open approximately 700 new stores and relocate or remodel 450 stores." SUF ¶ 83(d)

- In announcing Project Alpha, Dollar General issued a press release stating that "[a]s part of its new store strategy, the Company currently expects to open . . . approximately 300 and 400 new stores in fiscal 2007 and 2008, respectively . . . The Company plans to return to a higher rate of store openings thereafter beginning in Fiscal 2009. . . . [and,] in the long-term to grow square footage by as much as 10 percent per year." SUF ¶ 83(e).

- The Proxy Statement included management's projections that the Company's total number of stores would increase by 615 in 2009 (net of store closings), which was consistent with the announcement of Project Alpha. Bottorff Ex 23 at 23.

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And securities analysts published numerous reports discussing Dollar General management's growth expectations and saturation analysis. For example:

- In September 2006, Goldman Sachs analyzed Dollar General's potential growth and in its published report stated that "***geographical analysis points to the potential for more than 18,000 units in the United States.***" SUF ¶ 82(a) (emphasis added).
- In May 2006, Merrill Lynch published a report projecting a five year store growth rate of 9.4%. SUF ¶ 82(b).
- In October 2006, Lehman Brothers noted that "Dollar General currently operates in only 32 states, primarily in the eastern two-thirds of the country, and a more westward expansion that began in FY04 will likely continue in coming years . . . we see no risk that the company has ***saturated*** the country at this point, even with 8,208 stores at September 29, 2006" SUF ¶ 82(e) (emphasis added).
- On March 12, 2007 – immediately following the announcement of the Merger – Baird stock analysts published a report stating that "***DG expects store growth to accelerate in 2009 (700 new stores), with long-term potential for 10% unit growth.***" SUF ¶ 82(f) (emphasis added).

After reviewing these documents at their depositions, both Plaintiffs' corporate governance expert (Prof. Black) and damages expert (Ms. O'Connor) conceded that information about Dollar General's potential long term store growth was in the public domain and available to shareholders. *See* Black Tr. at 263:15-264:8; O'Connor Tr. at 77:21-78:11, 93:8-16

There is no genuine issue of fact requiring a trial on this disclosure claim. Information regarding Dollar General's future growth potential was indisputably available to shareholders when they voted to approve the Merger And there is no requirement that the proxy statement specifically repeat this information. Courts have long held that "**proxy statements need not disclose 'facts known or reasonably available to the stockholders.'**" *MONY*, 853 A.2d at 683 (quoting *Seibert v Harper & Row, Publishers, Inc* , 1984 WL 21874, at *6 (Del. Ch. 1984)) (emphasis added) The Directors "may not be faulted for failure to repeat material information which has been publicly proclaimed in various ways on other occasions The adequacy of

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disclosure of material information must be evaluated by a consideration of the 'total mix' of all information conveyed or available to investors." *Spielman v General Host Corp* , 402 F. Supp. 190, 195 (S.D N.Y. 1975), *aff'd per curiam*, 538 F.2d 39 (2d Cir. 1976), *see also Heliotrope General, Inc v. Ford Motor Co* , 189 F 3d 971, 976 (9th Cir. 1999) (affirming summary judgment where analyst reports and news articles discussing a corporate strategy were "part of the total mix of market information prior to" a merger). Importantly, since the information was publicly available, there would be no possible basis to find that the Directors acted in bad faith and intentionally withheld it from shareholders *Goodwin*, 1999 WL 64265, at *7.

**B. Plaintiffs Cannot Manufacture A Disclosure Claim Out of The Proxy Statement's Accurate Description Of An Assumption Made By Lazard**

Plaintiffs also argue that Lazard's use of a terminal growth rate assumption in its discounted cash flow analysis, which assumed "no additional store openings" after 2011, was misleading because management believed the Company had the potential for long term store growth Plaintiffs' Omnibus Brief at 43-48; Black Tr. at 224.2–225.19. But Plaintiffs concede that they are merely challenging the reasonableness of Lazard's assumptions, not the accuracy of the disclosure itself. Black Tr. at 228:1-9 ("I'm not quibbling with how [Lazard] disclosed it or how they did their calculations, given their assumptions. I'm quibbling with the reasonableness of the assumption of . . . terminal growth . . against the backdrop of what management thought the long-term growth opportunities were."). And courts have repeatedly held that "[t]his kind of quibble with the substance of a banker's opinion does not constitute a disclosure claim." *In re JCC Holding Co S'holders Litig* , 843 A.2d 713, 721 (Del. Ch. 2003) .

Chancellor Lyle's decision in *Thomas Nelson* is instructive. The plaintiffs in *Thomas Nelson* alleged the financial advisor improperly "used a conservative terminal multiple growth rate of 2-4% and high discount rates" in preparing the fairness opinion *Thomas Nelson*, slip op.

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at 13-14. Chancellor Lyle dismissed the disclosure claims, in part, because the proxy "included a fair summary of the work" performed by the financial advisor and "provided additional context for the investor to be able to accurately assess the weight to place on the [fairness] opinion." *Id* at 15-16.[12]

Similarly, in *JCC Holding Co* , minority shareholders alleged various flaws in methodology used by the financial advisor (Houlihan) in rendering an opinion that a cash-out merger was fair. Specifically, the plaintiffs claimed that the "comparable-companies analysis used companies that the plaintiffs believe were not comparable to JCC." *In re JCC Holding Co* , 843 A.2d at 721. The Court dismissed the disclosure claims because the proxy statement fairly described the financial advisor's analysis:

> The proxy statement obviously provided the plaintiffs with the material they needed to determine various ways in which they disagreed with Houlihan. This does not suggest the absence of fair disclosure; indeed, it inclines the mind in the opposite direction, because the proxy statement was written in a manner that allowed a reasonably sophisticated investor to see the key judgments that Houlihan made and to make her own independent determination of whether those judgments struck her as proper.

*Id* The *JCC Holding* court also recognized that permitting shareholders to assert disclosure claims based on accurately described financial analyses would give corporations the "perverse incentive" to provide less disclosure, which would be "injurious to stockholders." *Id* ; *see In re MONY*, 852 A.2d at 28 n.52 ("a complaint about the accuracy or methodology of a financial advisor's report is not a disclosure claim"); *PNB*, 2006 WL 2403999, at *20 ("So long as the valuation work is accurately described and appropriately qualified, that is sufficient."); *Nebel v*

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[12] Notably, Chancellor Lyle held that the omission of management projections showing a growth rate of 24% from the proxy was immaterial because the plaintiffs failed to articulate how the omission resulted in injury to shareholders.' *Thomas Nelson*, slip op at 13-14. Plaintiffs here also have not articulated how any of the alleged omissions injured the shareholders. *See, infra,* at Section IV.C.

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*Southwest Bancorp, Inc* , 1995 WL 405750, at *4 (Del. Ch. July 5, 1995) (dismissing disclosure claim where the financial advisor employed a valuation methodology that "was legally improper" but the methodology employed had been accurately and "plainly disclosed").

Further, there is no support in the record for Plaintiffs' assertion that "management told Lazard that 'no growth' was reasonable, while at the same time trumpeting the Company's huge growth prospects to KKR and others " Omnibus Brief at 43-48. The Proxy Statement clearly states that Lazard's DCF analysis was based on management's projections for 2007-2009 and Lazard's extrapolation from those projections for 2010-2011, which management "deemed reasonable " Bottorff Ex. 23 at 22 Nothing in the Proxy Statement suggests that management reviewed or offered any opinion with respect to Lazard's ***post-2011*** assumptions underlying its terminal value analysis. Even Plaintiffs' expert Prof. Black agreed that the Proxy Statement contains no "explicit statement" by management affirming Lazard's assumptions "beyond 2011." Black Tr. at 223:15–224:1. And Michael Wilkerson of Lazard testified that management had no input into Lazard's perpetuity growth assumption; this was based solely on Lazard's professional judgment October 10, 2008 Wilkerson Tr. at 108:8-15. Given the extensive disclosures and public discussion of Dollar General's growth prospects and the fact that Lazard was the Board's ***independent*** financial advisor (*i e.*, independent of management), no reasonable shareholder could have construed Lazard's terminal value analysis as a representation by management about future store growth

Finally, Plaintiffs' nondisclosure claims fail because as in *Brukardt*, shareholders knew of Plaintiffs' allegations. *Brukardt*, slip op. at 11. The Proxy Statement summarized the lawsuits, directed shareholders to the Court in which they were pending, and even cited the case name and document number. SUF ¶ 72. With public disclosure of this information,

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shareholders had notice of "substantially all of the alleged improprieties identified by Plaintiff[s]." *See Brukardt*, slip op. at 11.

**C. The Allegedly Withheld Information Was Immaterial As A Matter Of Law**

Even if the challenged information had been withheld from investors (and it was not), Plaintiffs' disclosure claims would still fail because Plaintiffs cannot show that any omission or misstatement caused a compensable economic injury. *Thomas Nelson*, slip op. at 13. An omitted fact cannot cause *injury* unless shareholders would likely have rejected the transaction had the omitted facts been disclosed and, further, that shareholders would have been better off had the transaction not gone forward *Brukardt*, slip op. at 24. The Delaware Supreme Court has held that "there is no per se rule that would allow damages for all director breaches of the fiduciary duty of disclosure " *Loudon v Archer-Daniels Midland Co.*, 700 A.2d 135, 146-47 (Del. 1997). Compensatory damages may only be awarded where plaintiffs can show the damages are "logically and reasonably related to the harm or injury for which compensation is being awarded." *In re J P Morgan Chase & Co. S'holder Litig* , 906 A.2d 766, 773 (Del. 2006) ; *see also In re Tyson Foods, Inc.*, 919 A.2d 563, 601-02 (Del. Ch. 2007) (plaintiffs must show that the claimed damages "arise logically and directly from the lack of disclosure"); *Brukardt*, slip op. at 24 (citing *Loudon* and *J P. Morgan* and holding that the "nondisclosure itself ... must cause injury"). For example, in *J P Morgan*, the Delaware Supreme Court dismissed a disclosure claim holding that "plaintiffs have pled no facts from which ... any quantifiable amount [of damages] can be inferred from the claimed infringement of their right to be told the material facts relating to the merger on which they were asked to vote." *Id.*[13]

[13] Moreover, not even nominal damages may be automatically awarded *In re J P Morgan*, 906 A.2d at 775-76 Rather, to obtain even a nominal award, Plaintiffs must show that the merger directly impaired their economic or voting rights as holders of common stock *Id* at 774-75; *Zoren*, 836 A 2d

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Similarly, the Delaware Chancery Court recently rejected a disclosure claim seeking money damages after the transaction closed as too speculative to be "adequately quantified or monetized." *Transkaryotic*, 954 A.2d at 361

> Delaware case law recognizes that an after-the-fact damages case is not a precise or efficient method by which to remedy disclosure deficiencies. A post-hoc evaluation will necessarily require the court to speculate about the effect that certain deficiencies may have had on a stockholder vote and to award less-than scientifically quantified amount of money damages to rectify any perceived harm.

*Id.* at 360 (quoting *In re Staples, Inc. S'holders Litig.*, 792 A 2d 934, 960 (Del. Ch. 2001)); *see also Zoren v Genesis Energy, L P.*, 836 A.2d 521, 531 (Del. Ch. 2003) ("There is no possibility that the court would award actual damages to Zoren or the class because they suffered no economic injury as a result of the vote to approve" the restructuring ) Courts have also found that plaintiffs cannot show the essential element of causation where "there is no evidence of causation; plaintiffs have pointed to nothing in the record indicating that the vote would have been different but for the allegedly bad disclosure. Plaintiffs merely speculate." *Transkaryotic*, 954 A.2d at 362 n. 55. So too here.

There is absolutely nothing in the record to suggest that the shareholder vote would have been different if any additional information had been disclosed. *Brukardt*, slip op at 29; *In re Transkaryotic*, 954 A.2d at 360-2. As Prof. Coffee notes, this "is a particularly high and frankly insurmountable hurdle here where there was a 99% shareholder vote in favor of the transaction." Coffee Aff. ¶ 29 Nor is there any evidence to suggest that Plaintiffs suffered any independent

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at 530-31 Here, the merger did not change Plaintiffs rights as shareholders of Dollar General at all: the transaction merely transferred ownership of the company. *See id*

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economic loss caused directly by the alleged failure to disclose information *In re J P Morgan Chase* , 906 A.2d at 773; *Brukardt*, slip op at 24.

Perhaps the clearest indication of why the alleged store growth potential was immaterial is that the three other private equity firms conducting diligence – TPG, Bain Capital and Blackstone – all had access to the same information that was available in the Company's data room SUF ¶ 80; Black Tr at 245·12-246·9 The fact that none of these other firms was willing to submit a bid at or higher than $22 per share defeats any possible inference that the information on store growth opportunities would have had a meaningful impact on the views of the public shareholders As Prof Coffee notes, sophisticated investors like these three private equity firms do not easily forgo the opportunity to invest in companies that have supposedly massive, but secret, opportunities for growth. Coffee Aff ¶ 36

* * *

Plaintiffs' disclosure claims should be dismissed for a total failure of proof. Plaintiffs' financial adviser and expert witnesses all testified that the allegedly withheld information about store growth opportunities was actually in the public domain. Information cannot be hidden when it is in plain sight And directors certainly cannot be found to have acted in bad faith for not disclosing information that was already well known in the markets In any event, the information at issue here was not material to investors and would not have had any impact whatsoever on the shareholder vote.

## V. PLAINTIFFS' AIDING AND ABETTING CLAIMS AGAINST KKR AND DOLLAR GENERAL FAIL

In order to sustain an aiding and abetting claim, a plaintiff must offer evidence of a breach of duty by a fiduciary, and a party's knowing participation in that breach *See Journal Commc'ns, Inc v Sabo*, 2008 WL 821524, at *7 (M.D. Tenn. Mar 26, 2008). The party

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alleged to have aided and abetted must have given "substantial assistance or encouragement" to the breaching party *Allen v McPhee*, 240 S.W.3d 803, 818 (Tenn. 2007) (quoting *Cecil v Hardin*, 575 S W 2d 268, 272 (Tenn 1978)). Plaintiffs cannot prove either element of their claims against KKR and Dollar General.

**A. There was No Breach of Duty that KKR or Dollar General Could Have "Aided or Abetted"**

As discussed above, there is no evidence from which a reasonable juror could find that the Board acted in bad faith or disloyally in connection with Merger Because Plaintiffs cannot prove any underlying fiduciary breach, the first element of aiding and abetting cannot be satisfied and the claims against both KKR and Dollar General must be dismissed. *Midland Grange No 27 Patrons of Husbandry v Walls*, 2008 WL 616239, at *12 (Del. Ch. Feb. 28, 2008) (granting judgment "as a matter of law" to defendants on aiding and abetting breach of fiduciary duty claims because no underlying breach of fiduciary duty had occurred), *accord Globis*, 2007 WL 4292024, at *15.

**B. The Record Does Not Support a Finding that KKR "Knowingly Participated" In or Substantially Assisted Any Purported Breach**

"Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted [by the third party] constitutes such a breach." *Malpiede*, 780 A.2d at 1096-97. To survive summary judgment, a plaintiff must put forth evidence demonstrating actual knowledge of the breach or that the transaction was so "inherently wrongful" or "per se illegal" that the alleged aider and abettor is deemed to be "on notice" of a fiduciary's breach. *See, e.g , In re GM (Hughes) S'holder Litig.*, 2005 WL 1089021, at *24 (Del Ch May 4, 2005).

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There is no evidence that KKR had actual knowledge of any purported breach by the Board. Nor is there anything "inherently wrongful" or "per se illegal" about a process run by a special committee of outside directors that results in a merger price reflecting a 31% premium. *See In re Telecommc'ns, Inc S'holders Litig*, 2003 WL 21543427, at *2 (Del. Ch. July 7, 2003) (dismissing aiding and abetting claims for failure to plead knowing participation where merger terms were not "egregious" or "outrageous"), *Lukens*, 757 A.2d at 735 (finding that even procedures that led to a "grossly underpriced" transaction could not support the element of knowing participation); *Carlton Investment, Inc. v TLC Beatrice Int'l Holdings, Inc*, 1995 WL 694397, at *15 n.11 (Del. Ch. Nov. 21, 1995) (an aiding and abetting claim requires an understanding between the parties "with respect to their complicity in any scheme to defraud or in any breach of fiduciary duties").

Further, Plaintiffs cannot show that KKR "actively participated" in an alleged breach. There is no evidence that KKR "participated in the board's [or the SPC's] decisions, conspired with the board, or otherwise caused the board to make the decision at issue" *Malpiede*, 780 A.2d at 1098; *see also Lukens*, 757 A.2d at 734-35 (failure to plead facts that the acquirer conspired with the board supports dismissal of aiding and abetting claims). To the contrary, the evidence show that negotiations were conducted at arms-length, which "precludes a showing that the defendants knowingly participated in the breach by the fiduciaries" *In re GM (Hughes)*, 2005 WL 1089021, at *26.

Plaintiffs ask the Court to infer knowing participation from the fact that certain members of management invested in post-closing Dollar General. Pls.' Omnibus Br at 67-68 It is, however, a common feature of going private transactions that in lieu of receiving cash for some of their shares, management often is asked to make an equity investment as a performance

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incentive. Gompers Report ¶ 18. Moreover, KKR did not have any discussions with management about what role or financial interest management might have in the post-merger company until after the Board approved the Merger. Calbert Aff. ¶ 16; Calbert Tr. at 196:10-23; 52:20–53:2), Beré Tr. at 54:15-19; 57:18–58:16. The fact that certain members of management (and notably only one Director out of eleven) have a post-closing interest in Dollar General cannot possibly raise an inference that KKR knowingly participated in a fiduciary breach.

Similarly, Plaintiffs ask the Court to infer knowing participation based on certain communications between Mr. Perdue and KKR. However, as discussed in Section IV, above, Mr. Perdue's communications with KKR occurred before there was even a transaction under consideration and there is no evidence that these communications had any impact on the process implemented by the Board and the SPC. *See* Black Tr. at 149:11-149:15; Black Tr. Ex. 2 ¶ 2(a). Furthermore, it is undisputed that Mr. Perdue was *not* retained by KKR after the Merger.

Finally, Plaintiffs ask the Court to infer knowing participation based on the demonstrably false allegation that KKR was "tipped" that Bain Capital was not bidding for Dollar General. The undisputed record evidence demonstrates that KKR received no information about Bain Capital's bid before it submitted its bid on March 9, 2007.

### C. Dollar General Cannot Aid and Abet Its Own Directors' Purported Breaches of Duty

Dollar General cannot be held liable for "aiding and abetting" alleged breaches of duties by its own officers and directors. A "corporation owes no fiduciary duties to shareholders independently from its agents, and the corporation itself is not liable for a breach of fiduciary duties by its directors." *Emerald Partners v. Berlin*, 1995 WL 600881, at *8 (Del. Ch. Sept. 22, 1995)(citing cases), *rev'd on other grounds,* 726 A.2d 1215 (Del. 1999); *see also Gaffin v. Teledyne, Inc.*, 1987 Del. Ch. LEXIS 496 (Del. Ch. Oct. 9, 1987) (liability for breach of a

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director's fiduciary obligation cannot run against the corporation itself). Plaintiffs argue that Dollar General can be held liable because it is chargeable with the knowledge of its agents acting within the scope of their authority But this proves too much. Under Plaintiffs' theory, a corporation would ***always*** be aiding and abetting a breach of duty committed by its agent because the corporation is always chargeable with the knowledge of the agent. Plaintiffs have not offered any authority to support this novel – and circular – theory.

## CONCLUSION

For the reasons set forth above, Defendants respectfully request that their Motion for Summary Judgment be granted.

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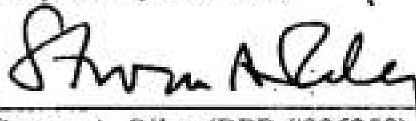
Respectfully submitted,



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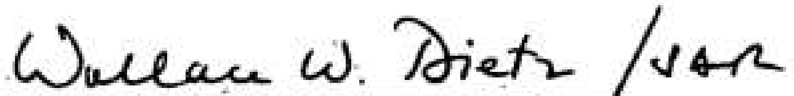

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