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

IN RE DOLLAR GENERAL CORPORATION SHAREHOLDER LITIGATION	)	Master Docket No. 07MD1 (Consolidated Action)
	)	**CLASS ACTION**
	)	Judge Brothers

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER 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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TABLE OF CONTENTS

			Page
PRELIMINARY STATEMENT			1
ARGUMENT			3
I.	There Is No Dispute as to the Applicable Standards		3
	A.	The Business Judgment Rule	4
	B.	The Duty of Loyalty	5
	C.	The Duty of Good Faith	6
	D.	The Duty of Disclosure	7
II	The "Secret" Store Growth Plan Is a Desperate Fiction		7
III.	Plaintiffs Cannot Show the Board Acted in Bad Faith in Structuring the Process or Approving the Merger		19
	A.	The Early Contacts Between Perdue and KKR Are Irrelevant	20
	B.	Plaintiffs' Other Process Complaints Are Meritless	24
	C	The Deal Protections Were Reasonable	26
	D	The Board Relied on Lazard's Fairness Opinion in Good Faith	27
	E	Plaintiffs' Quibbles About the Process Fall Well Short of Bad Faith as a Matter of Law	30
IV.	Plaintiffs Have No Disclosure Claims		33
	A.	There Was No Secret Store Growth Plan to Disclose	33
	B.	The Proxy Statement Did Not Make Any Representation as to What Store Growth Would Be After 2011	34
	C.	Plaintiffs' Other Disclosure Claims Fail	37
	D.	Plaintiffs Cannot Show That the Alleged Misstatements Caused Any Compensable Economic Injury	39
V.	Shareholder Ratification and Acquiescence		40
VI	The Aiding and Abetting Claims Against KKR and Dollar General Fail		41
CONCLUSION			43

COPY

TABLE OF AUTHORITIES

Cases

Ash v McCall, 2000 Del. Ch. LEXIS 144 (Del Ch Sept. 15, 2000) 29

Barkan v Amsted Indus Inc , 567 A.2d 1279 (Del. 1989)...25, 32

Bershad v Curtiss-Wright Corp., 535 A 2d 840 (Del 1987) 41

Brody v Zaucha, 697 A.2d 749 (Del. 1997) 38

Byrd v Hall, 847 S.W.2d 208 (Tenn. 1993).. 4

Cinerama, Inc v Technicolor, Inc , 663 A.2d 1134 (Del. Ch. 1994)..................... 27

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

Delaware Open MRI Radiology Assocs v Kessler, 898 A.2d 290 (Del. Ch. 2006).. . . .. .33

Globis Partners, L P v Plumtree Software, Inc , 2007 WL 4292024 (Del Ch
Nov. 30, 2007)..4, 34

Goodwin v Live Entm't, Inc , 1999 WL 64265 (Del Ch Jan 25, 1999) 4, 7, 33

Guiseppone v Hilton Hotels Corp , BC-373765 (Cal. Super. Ct Jan. 28, 2008). 12, 15

Hannan v Alltel Publ'g, 2008 Tenn. LEXIS 792 (Tenn. Oct. 31, 2008)...................... 3

Head v Wachovia Bank of Ga , N A , 88 S.W 3d 180 (Tenn Ct. App. 2002)... 4

In Re Emerging Commc'ns, Inc S'holders Litig . 2004 WL 1305745 (Del Ch
June 4, 2004).. 33

In re GM (Hughes) S'holder Litig., 2005 WL 1089021 (Del. Ch. May 4, 2005) 42

In re Hechinger Inv Co of Del , 278 Fed. Appx 125 (3d Cir. 2008) 42

In re J P Morgan Chase & Co S'holder Litig , 906 A.2d 766 (Del 2006). 40

In re Lear Corp S'holder Litig , 2008 WL 4053221 (Del. Ch. Sept. 2, 2008)... .. . . .. 4, 7, 30, 31

In re MONY Group Inc S'holder Litig , 852 A.2d 9 (Del Ch 2004) 36

In re PNB Holding Co S'holders Litig , 2006 WL 2403999 (Del. Ch Aug 18,
2006)......... .... .36, 41

COPY

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

In re Transkaryotic Therapies, Inc , 954 A 2d 346 (Del Ch. 2008). . .. .passim

In re Tyson Foods, Inc , 919 A.2d 563 (Del. Ch. 2007) 40

In re Vitalink Commc'ns Corp. S'holders Litig , 1991 WL 238816 (Del. Ch. Nov. 8, 1991) .. .. .27

In re Walt Disney Co. Derivative Litig , 906 A 2d 27 (Del 2006) 7

Indiana State Dist Council of Laborers and HOD Carriers Pension Fund. v. Brukardt, No 05-1392-II (Tenn. Ch. Aug 27, 2007). .. .. .passim

JCC Holding Co , Inc S'holders Litig , 843 A 2d 713 (Del Ch 2003) . . . 33, 36

Lewis ex rel. Citizens Sav Bank & Trust Co v Boyd, 838 S.W.2d 215 (Tenn. App 1992) 5

Loudon v Archer-Daniels Midland Co , 700 A.2d 135 (Del. 1997).. ....7, 40

M P M Enters , Inc v Gilbert, 731 A.2d 790 (Del. 1999)..32

McMillan v Intercargo Corp , 768 A.2d 492 (Del Ch 2000) . .. .24, 27

McPadden v Sidhu, 2008 Del. Ch. LEXIS 123 (Del. Ch. Aug. 29, 2008) .. .. passim

McRedmond v Estate of Marianelli, 46 S.W.3d 730 (Tenn. Ct. App 2000) 6

Mechs Laundry Serv v Auto Glass Co of Memphis, 98 S W.3d 151 (Tenn. Ct. App. 2002)... 26

Nebel v. Southwest Bancorp, Inc., 1995 WL 405750 (Del. Ch. July 5, 1995) 36

ONTI, Inc v Integra Bank, 751 A.2d 904 (Del. Ch. 1999) .. .. .33

Rosser v New Valley Corp , 2005 WL 1364624 (Del Ch. May 27, 2005) . 41

Ryan v Lyondell Chemical Co , 2008 Del Ch LEXIS 105 (Del Ch. July 29. 2008) .. .. .30

Skeen v Jo-Ann Stores, Inc , 750 A.2d 1170 (Del. 2000)................................ 38

Solomon v Armstrong, 747 A 2d 1098 (Del. Ch. 1999) 41

Stroud v Grace, 606 A.2d 75 (Del. 1992) 38

COPY

Union Planters Bank of Middle State v Choate, 2000 Tenn. App. LEXIS 593 (Tenn. Ct. App. Aug. 31, 2000) 4

Wayne County Employees Ret. Sys v. Corti, 954 A.2d 319 (Del. Ch. 2008) 12, 15

Zirn v. VLI Corp., 1995 WL 362616 (Del. Ch. June 12, 1995) 12

Rules

17 CFR § 229.1015(a), (b) 39

Item 1015(b) of Reg M-A 39

Tenn. Code Ann. § 48-18-301(c) 30

Tenn. R. Civ. P. 56.06 3

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PRELIMINARY STATEMENT

Despite its length, Plaintiffs' opposition memorandum does not raise any genuine issue of material fact After sponsoring and abandoning a variety of allegations, Plaintiffs now try to sustain primarily two (1) that Defendants had a secret plan to add at least 7,000 new stores and (2) that pre-sale communications by Perdue "corrupted" the process. There is no genuine issue of material fact as to either

- **Secret Plan to Double the Number of Stores** – There is not and never was such a plan. Dollar General did have a geographic and demographic analysis that stated it was theoretically possible to open 7,000 or more additional stores and that opportunity was widely known – by the Board, by analysts, by Plaintiff City of Miami But there was never a plan to open anything remotely approaching that number of stores There is not a single document or witness that supports Plaintiffs' claim. Confusing the **opportunity to grow** with a **plan to grow** does not raise a genuine issue of material fact. Even Plaintiffs' own expert concedes that "of course" there is a difference between "an opportunity to open a store and a plan to open a store." And, the Court can take notice of the true fact that since the KKR transaction closed the number of Dollar General stores has increased far **below** even the plans that did exist So much for the "secret plan."

- **Corrupted Process** – Even assuming that Perdue told KKR non-public information about Dollar General's amenability to a going private transaction and promised KKR exclusivity, that information became worthless once Dollar General actually started a **non**-exclusive strategic review process with KKR and Bain and others In addition to being factually irrelevant, whatever Perdue said also became legally irrelevant once the Board and Strategic Planning Committee took control of the process and excluded Perdue from it. Here again, even Plaintiffs' own governance expert admits the Board acted reasonably and appropriately at every stage of the process, including with respect to the ultimate decision to approve the Merger at $22/share. So much for the "corrupted" process.

Plaintiffs do argue that the "secret plan" and "corrupt process" should have been publicly disclosed, but there is no duty to disclose the non-existent or the immaterial.

The parties, with no important exceptions, agree on the legal standards that govern this motion. The record must demonstrate a **genuine** issue of **material** fact that a **majority** of the directors were **disloyal** or acted in **bad faith** Plaintiffs must do so by citing to specific **facts** in

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the record that would be admissible at trial. Plaintiffs cannot make this showing without demonstrating that the Directors **intended** to breach their fiduciary duties Plaintiffs must also show that KKR **knowingly participated** in such intentional breach. These are serious charges and Plaintiffs cannot back them up

In fact, Plaintiffs make an extraordinary number of concessions, explicit and implicit, that absolutely preclude them from proving essential elements of their case. Accordingly, the business judgment rule protects the Board's decisions and this case must be dismissed. For example, Plaintiffs do not dispute that 9 of 11 Directors were unconflicted and had no motive other than to do what was best for shareholders. (In fact, they now offer to **dismiss** 8 directors from the case) Plaintiffs do not dispute that the three members of the SPC were eminently qualified. Plaintiffs do not dispute that there was no controlling shareholder at the Company and do not argue that Perdue or anyone else dominated the Board. Plaintiffs do not dispute that the offer of $22/share was a 31% cash premium offer and that securities analysts and shareholder advisory firms lauded the price Plaintiffs do not dispute that Perdue was excluded from the SPC's deliberations about the transaction, was not informed of those deliberations, and did not tell KKR about those deliberations Plaintiffs do not contest the fact that their own governance expert admitted under oath that the Board ran a reasonable process and that its ultimate decision to vote in favor of the transaction was reasonable. They do not attempt to address the Herlihy Affidavit and have abandoned the irresponsible claim that KKR was "tipped." They do not attempt to address the TPG Affidavit, which makes it clear that TPG dropped out of the bidding process because it could not justify joining KKR's bid at $22/share.

The arguments that Plaintiffs do attempt to make are predicated on speculation, mischaracterizations, inadmissible evidence and selective and even manipulated quotations

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Needless to say, unsupported arguments of this nature cannot raise genuine issues of material fact.

This litigation was commenced in March 2007, 20 months ago. Since then, the parties have conducted extensive discovery, including 25 fact and expert depositions, at great expense. Plaintiffs have now filed an 85-page opposition memorandum over the names of a dozen lawyers that does not raise one genuine issue of material fact for trial The time has come to dismiss the baseless allegations in this case

ARGUMENT

I. There Is No Dispute as to the Applicable Standards

Plaintiffs agree that "[s]ummary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law " *Hannan v Alltel Publ'g Co* , 2008 Tenn. LEXIS 792, at *7 (Tenn Oct 31, 2008) (citing Tenn. R. Civ. P. 56.04); Plts.' Opp Br ("Opp.") at 44 Although the moving party has the ultimate burden of persuading the court that "there are no disputed, material facts creating a genuine issue for trial … and that he is entitled to judgment as a matter of law," the moving party "may shift the burden of production to the nonmoving party by showing that the nonmoving party cannot establish an essential element of the claim at trial " *Hannan,* 2008 Tenn. LEXIS 792, at *8, 13 (internal citations omitted). Plaintiffs then "may not rest upon the *mere allegations* or denials of the 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 (emphasis added).

"[S]ummary judgment is not a disfavored procedural shortcut but rather an important vehicle for concluding cases that can and should be resolved on legal issues alone " *Byrd v*

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Hall, 847 S.W.2d 208, 210 (Tenn. 1993) Tennessee courts can and do grant summary judgment in cases involving breach of fiduciary duty claims. *See Head v. Wachovia Bank of Ga , N A* , 88 S W 3d 180 (Tenn Ct App. 2002) (affirming summary judgment on breach of fiduciary duty claims against bank acting as trustee); *Union Planters Bank of Middle State v Choate*, 2000 Tenn. App LEXIS 593 (Tenn. Ct. App. Aug. 31, 2000) (affirming summary judgment on claims including breach of fiduciary duty)

Plaintiffs also agree that the exculpatory provision in the Dollar General charter shields the Directors from money damages for breaches of the duty of care. Opp. at 75-76.[1] Therefore, in order to prevail, it is undisputed that Plaintiffs must show that the Merger resulted from disloyal or bad faith conduct by the Board, *see 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), or that the Board "intentionally omitted material information or knowingly disseminated false information" to shareholders. *Goodwin v Live Entm't, Inc* , 1999 WL 64265, at *7 (Del. Ch. Jan. 25, 1999); *see also City of Pontiac Gen Employees' Ret. Sys v. Thomas Nelson*, No. 06-501-I(III), slip op. at 13 (Tenn. Ch. May 4, 2007). In all events, Plaintiffs must demonstrate intentional misconduct.

A. The Business Judgment Rule

It is undisputed that 9 of the 11 directors are Outside Directors who were not part of management and are independent under the rules of the New York Stock Exchange. Plts.' Resp.

[1] Plaintiffs are wrong, however, that application of the exculpatory provision "cannot result in dismissal of the action as a whole " Opp at 76 Courts frequently dismiss actions against directors for alleged breaches of fiduciary duty on the basis of exculpatory provisions *See, e g , In re Lear Corp S'holder Litig* , 2008 WL 4053221 (Del Ch Sept 2, 2008), *McPadden v Sidhu*, 2008 Del Ch. LEXIS 123 (Del Ch. Aug. 29, 2008).

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to Defs ' R 56 03 Stmt. of Undisputed Facts ("SUF") ¶ 5.[2] Accordingly, the Board's decisions are presumptively entitled to protection under the business judgment rule, which presumes that the Board "acted on an informed basis, in good faith, and with the honest belief that their decision was in the corporation's best interests." *Lewis ex rel Citizens Sav Bank & Trust Co v Boyd*, 838 S.W.2d 215, 220-21 (Tenn.Ct.App. 1992) (Tennessee jurisprudence "squarely align[s] Tennessee with the jurisdictions recognizing and following the 'business judgment rule'" such as Delaware). In *Thomas Nelson*, Chancellor Lyle, applying Tennessee law, held that in order to overcome the business judgment rule, Plaintiffs must present evidence "that a majority of the Board was interested or lacked independence" with respect to the transaction at issue. *Thomas Nelson*, slip op. at 10.

Having already conceded that 9 directors are disinterested, Plaintiffs try to circumvent the time-honored protections of the business judgment rule with three arguments: (1) they allege that Perdue and Beré deliberately tricked the Outside Directors by concealing a "secret plan" to open 7,000-plus new stores, Opp at 22-31; (2) they allege the Board acted in bad faith by participating in a corrupt process, Opp. at 37-41; and (3) they argue the Board intentionally failed to disclose the secret store growth plan and corrupted process in the Proxy Statement Opp. at 31-33.

B. The Duty of Loyalty

To rebut the business judgment rule on a duty of loyalty claim, Plaintiffs must show either that a **majority** of the board had a disabling interest or lack of independence or that one or more interested directors "dominate[d]" the whole board. *Transkaryotic*, 954 A 2d at 363 But

[2] Indeed, it is not even clear that Plaintiffs still believe they have viable claims against a majority of the directors, having made the unusual offer to drop them from the case if they will testify for Plaintiffs Opp. at 5 n.8.

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Plaintiffs here concede that 9 of 11 Directors are disinterested, SUF ¶ 5, and have never attempted to argue the Board was dominated.

In their zeal to find some dispute to point to, Plaintiffs argue Chancellor Lyle's *Thomas Nelson* decision is wrong and that *McRedmond v. Estate of Marianelli*, 46 S.W.3d 730 (Tenn. Ct. App. 2000), creates a conflict between Delaware and Tennessee law as to whether ratification by a disinterested majority precludes claims for breach of the duty of loyalty. As an initial matter, this claim is hard to reconcile with Plaintiffs' acknowledgment elsewhere in their brief that *Thomas Nelson* is "persuasive" and "instructive" Opp. at 57 n 38. Secondly, *McRedmond* addressed a different issue. *McRedmond* involved a closely held company incorporated in Kentucky with a controlling shareholder who sponsored a transaction that favored his son *Id* at 733. Applying Kentucky law, the Court held that approval by disinterested directors could render the transaction non-voidable under a Kentucky conflict statute. However, the court found that statute did not preclude fiduciary duty claims where the business judgment rule had been rebutted by virtue of the fact that there was a controlling shareholder on both sides of the transaction. *Id* at 735, 737-38, 741. *McRedmond* has no applicability to a case such as this that does not involve a controlling shareholder. Tennessee law is – and remains – that a non-controlling person transaction approved by a disinterested majority of directors will be subject to the protections of the business judgment rule *Thomas Nelson*, slip op at 10

C. The Duty of Good Faith

To avoid the protections of the business judgment rule on a duty of good faith claim, Plaintiffs must persuade this Court to find that these Directors – including some of the most experienced and respected figures in Tennessee (many with national reputations) – "consciously acted in a manner contrary to the interests of [the Company] and its stockholders." *In re Lear*

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Corp. S'holder Litig., 2008 WL 4053221, at *10 (Del. Ch. Sept 2, 2008) Not even proof of gross negligence or reckless indifference is sufficient to show bad faith. *See In re Walt Disney Co Derivative Litig.*, 906 A 2d 27, 64-65 (Del 2006) ("fiduciary action taken solely by reason of gross negligence . . . without more" cannot constitute bad faith); *McPadden v Sidhu*, 2008 Del. Ch. LEXIS 123, at *35-36 (Del Ch Aug. 29, 2008) (dismissing bad faith claims where the board "acted with gross negligence or else reckless indifference").

D. The Duty of Disclosure

Because the exculpatory provision in Dollar General's charter shields the Directors from liability for duty of care claims, any disclosure claim must involve **intentional** misconduct by the Directors. *Goodwin*, 1999 WL 64265, at *7. Plaintiffs must show that any misstatement was intentional, material and caused compensable economic injury. *Thomas Nelson*, slip op. at 13; *Indiana State Dist Council of Laborers & HOD Carriers Pension Fund v Brukardt*, No 05-1392-II, slip op. at 24 (Tenn. Ch. Aug 27, 2007) (the "nondisclosure itself ... must cause injury"); *Transkaryotic*, 954 A.2d at 362-63 & n 55 (dismissing disclosure claims in merger case where "plaintiffs merely speculate" that challenged disclosures caused an injury), *see also Loudon v Archer-Daniels Midland Co*, 700 A 2d 135, 146-47 (Del 1997) ("[T]here is no *per se* rule that would allow damages for all director breaches of the fiduciary duty of disclosure ").

II. The "Secret" Store Growth Plan Is a Desperate Fiction

Plaintiffs' case hinges on the claim that management had a secret "long-standing plan to add 7,000-plus stores" that it hid from the Board and the shareholders. Opp. at 2, 24. But there was no plan to open 7,000 or more new stores. Plaintiffs deliberately confuse a **plan** with an **opportunity**, freely mixing references to store growth "opportunities," store growth "expectations," store growth "plans" and store growth "strategies," before lumping them all

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together as store growth "issues." But these terms are not interchangeable A plan is a "detailed scheme or method for the accomplishment of an objective," while an "opportunity" is a mere "chance for advancement." *See* WEBSTER'S II DICTIONARY (3d Ed. 2005). Plaintiffs' alleged plan is not a plan on its face since Plaintiffs do not allege over what period of time the 7,000 new stores would be opened – 1 year, 10 years, 20 years? Plaintiffs' expert Prof. Black conceded this very point:

> Q Is there a distinction in your mind between the opportunity to open a store and a plan to open a store?
>
> A **Of course.**
>
> Q What's the difference, in your mind?
>
> A An opportunity is in some sense – no one was saying, for example, they could open 10,000 stores tomorrow. They had – you know, they could roll out new stores at some pace, and exactly what that pace was was uncertain.
>
> The opportunity to open a new store might be there today and not there tomorrow. It's going to change over time, all right? A plan is a more discrete concept of here's what we're going to do over a finite future period of time

Bernard S. Black Dep. Tr. ("Black Tr ") at 261·11-262 4 (emphasis added). Prof Black also concedes that Perdue and Beré had no "concrete plan" to open a huge number of additional stores. Black Tr. at 262.5-15. Prof. Black even explained that "logistics" demonstrate why a retailer's **plan** to open new stores is so different from an **opportunity** to open new stores "Moving to a new area would be a much bigger jump It would be a major capital investment. You'd have to build a new distribution center…." Black Tr at 42 19-22, 41 6-13 (a retailer has to confront issues such as, "[c]an trucks reach this store from an existing distribution center

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within a reasonable period of time?"). These admissions by their own expert preclude Plaintiffs from proving the key "secret plan" element of their case.[3]

Plaintiffs' strategy is to try to ignore their own expert; Prof. Black is invisible in their brief. Instead, they point to four pieces of "evidence" of a secret plan. (1) a 2003 study by Claritas that indicated there were 17,484 potential sites across the U.S for discount retail stores; (2) a 2007 report from Applied Predictive Technologies ("APT") commissioned by KKR that identified a similar potential opportunity, (3) manipulated excerpts of Beré's testimony, which, unaltered, make perfectly clear there was never a plan to open 7,000-plus new stores; and (4) an entirely misleading excerpt of a KKR presentation to potential lenders and investors, which actually shows that KKR expected to open few stores – and which happens to be exactly what has happened.

(1) The Claritas Study. The 2003 Claritas study is a statistical analysis of the number of potential sites for new discount retail stores based on geographic and demographic factors[4] The study found that, excluding certain urban areas, in 2003 there was potential demand sufficient to support 17,484 additional discount retail stores nationwide Affidavit of Dennis C Bottorff ("Bottorff Aff") Ex 3 at DG 372671, DG 372686 Management concluded that if one were to

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[3] Plaintiffs' allegation that management was incentivized to withhold this information by the expectation of a profitable investment in the post-Merger company is belied by the record Beré's unrebutted testimony is that he did not expect to be with the Company after the Merger, and that he was not asked to stay on as interim CEO until weeks **after** the Board approved the merger David Beré Dep Tr ("Beré Tr") at 53:7-54:22. The rest of management was "stunned" when "they learned that they would have to invest money into the new deal," and they believed that the investment level KKR initially proposed to management was "too high" Beré Tr at 57 17-58:16; Supplemental Affidavit of Steven A. Riley ("Riley Supp. Aff.") Ex. 1 (May 11, 2007 Email between Beré and Lowe) at DG 159759 Beré subsequently negotiated with KKR to **reduce** management's required level of investment Beré Tr at 57 17-58 16.

[4] The study was performed by a division of Claritas known as Integras, but Dollar General management referred to the firm as "Claritas" Bottorff Ex 3 at DG 372671

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assume that Dollar General could obtain a 40% market share, there were 6,949 (or approximately 7,000) potential sites for new Dollar General stores, if Dollar General ever decided that it made sense to open them. But the Claritas study was in no stretch of the imagination a **plan** to open that many new stores.

There is no genuine issue as to the fact that Management discussed the Claritas study with the Board in November 2003 and then again in July 2004. Bottorff Ex. 3 at DG 372671, Bottorff Ex. 4 at DG 373044. The results of the study were summarized to the Board in a slide that showed:

DG Site Opportunities

- **Total # of US "dollar" sites (1/04): 17,484***
- **Total # of DG Sites (@ approx. 40% share): 6,949**

Bottorff Ex. 3 at DG 372686 The growth opportunity discussions are documented in the minutes of the Board meetings. Bottorff Aff. ¶ 19; Bottorff Ex. 3 at DG 372671, DG 372686; Bottorff Ex. 4 at DG 373044.[5] Tehle, Dollar General's CFO, also testified that he regularly discussed growth potential with the Board. David Tehle Dep. Tr. ("Tehle Tr") at 113:15-25. This evidence is conclusive even if one director (Knuckles) did not recall these specific presentations at her deposition five years later, Opp at 71, and a second director (Thornburgh) was also unaware of the Claritas study because he did not join the Board until 2006 *Id* Both

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[5] Plaintiffs go to great lengths to distort the record. Plaintiffs assert that the Outside Directors "admitted that they never saw the various materials showing Dollar General's tremendous growth prospects" Opp at 29, n.17 But Plaintiffs' only cite is to responses to Requests for Admission that relate **exclusively** to documents **created by or on behalf of KKR** *See* Affidavit of Douglas S Johnston, Jr. in Support of Plaintiffs' Omnibus Memorandum in Opposition to Defendants' Motion For Judgment on the Pleadings, Ex. WW. That admission is irrelevant and inadmissible with respect to the Outside Directors' knowledge.

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Knuckles and Thornburgh testified that they were aware of discussions of store growth opportunities at Board meetings. Barbara Knuckles Dep Tr ("Knuckles Tr ") at 31 21-33·25 ("[I]f we did our job right, if the company had the right distribution centers, the right people, the right equipment, if you will, and the right suppliers, we could grow the business in other stores -- other states where we were not and other counties where we were not."); Richard Thornburgh Dep. Tr. ("Thornburgh Tr.") at 235-237 (recalling discussions that the Company could open 500-700 stores per year after Project Alpha).

As the Board was advised, the Claritas study was a "market capacity tool" that only identified "potential target areas " Bottorff Ex 3 at DG 372671 This was the same description of the Claritas study given to Bain and KKR in 2007 A summary of the Claritas study was included in the due diligence data room with a cover note stating that it was a study of "unfilled demand for general merchandise retail sales" and a "500,000 FT snapshot in time" that was "[n]ot intended to be a tactical tool." Riley Supp. Aff. Ex. 2 (Dollar General summary of Claritas study) at DG001492- DG001493; Riley Supp. Aff. Ex. 3 (summary of Claritas study produced by Bain) at BA00017356.[6] There is simply no evidence that the Claritas study was a plan to open stores.

(2) The APT Study. As part of its due diligence, KKR – not Dollar General – commissioned a study of the discount retail market by a group called APT. Like the Claritas study, the APT report was merely an opportunity study. *See, e g .* Affidavit of Douglas S. Johnston, Jr. in Support of Plaintiffs' Memorandum in Opposition to Defendants' Motion For

6 Lazard maintained the data room and had full access to the Claritas results that were placed in the data room Michael Wilkerson of Lazard confirmed that Lazard was aware of Dollar General's growth prospects and the sector's growth potential in general October 10, 2008 Michael Wilkerson Dep Tr. ("October 10, 2008 Wilkerson Tr ") at 34 20-35 8, 99 13-102 4

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Summary Judgment ("Johnston S.J Aff"), Ex. 14 at KKRE 0194863 (explaining the APT study predicted "growth potential" and "expansion opportunities" not a plan for store growth) It did not project any potential rate of store growth or set forth any plan for expansion. Furthermore, the study belonged to KKR and was not provided to the Dollar General Board at any time prior to the execution of the Merger Agreement. Thus, the Board could not have considered it in deciding whether to accept KKR's offer, and it is irrelevant to any analysis of whether the Directors acted in bad faith. *See Wayne County Employees' Ret Sys v Corti*, 954 A 2d 319, 332-33 (Del Ch 2008) (projections prepared by a bidder and not relied upon by the board are immaterial as a matter of law), *Guiseppone v Hilton Hotels Corp* , BC-373765, slip op at 6 (Cal Super Ct Jan 28, 2008) (documents prepared by a bidder that were not reviewed by the board were irrelevant in action asserting breach of fiduciary duties against the board); *Zirn v VLI Corp* , 1995 WL 362616, at *6 (Del. Ch. June 12, 1995) (no duty to disclose information obtained by board relating to the bidder's motivations and noting "'[w]here a third party offeror is involved, the stockholder should be able to conclude for himself that the offeror is trying to acquire the stock at a favorable price'") (quoting a prior opinion in the case).

As Beré testified, the APT study is "just an opportunity piece. What it doesn't deal with, of course, is, you know, **whether** you should build them. All it just says is that, you know, sites exist, if you choose to do that." Beré Tr. at 150:19-23 (emphasis added)

> Q. Sites exist, meaning that assuming you can keep your costs and everything in check, there's room to grow upwards towards that number if you choose to do that?
>
> A. Right
>
> * * *
>
> A. Right **You're missing – there may be 8,000 sites out there, but it may be the worst business decision in the world to go build 8,000 stores.**

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> You may be a lot better off taking your investment and putting it somewhere else, and indeed, that's what we decided to do, is to slow and put our investment in other places, versus the new stores.
>
> **So the fact that there's a site there doesn't necessarily – the first step of many steps is to suggest whether you should go build it.**

Beré Tr at 150:24-151:17 (emphasis added). Tehle, agreed:

> I think what they were trying to do here [in the APT study] is show a potential – total potential market for new stores, **not a business plan**, but what's the potential that's out there for – for new sites. **That doesn't mean we were going to open up that number of stores.**

Tehle Tr at 133.17-134 3 (emphasis added); *see also* Thornburgh Tr. at 243:16-21 ("Q. Is this a plan to open up stores? A No. Q. What is this, based on your review? A It is an **opportunity** that is there in the future showing the **potential ability** to grow the footprint of the company.") (emphasis added). There is no evidence to the contrary.

(3) Beré's Testimony About Project Alpha. The only **plan** for store growth was set out in Project Alpha, which the Company publicly announced in November 2006, after months of discussion and analysis. SUF ¶ 34. Project Alpha included a series of initiatives to improve the Company's performance, including a plan to **slow** new store growth and focus on improving inventory and real estate operations. SUF ¶ 15 The press release announcing Project Alpha said:

> As part of its new store strategy, the Company currently expects to open a total of approximately 600 new stores in fiscal 2006 Going forward, the Company plans to open approximately 300 and 400 new stores in fiscal 2007 and 2008, respectively, and to relocate or remodel approximately 300 stores in each of these years The Company plans to return to a higher rate of store openings thereafter, beginning in fiscal 2009, when it plans to open approximately 700 new stores and relocate or remodel 450 stores. The Company will continue to apply rigorous criteria to new and existing stores and will look for other enhancements to optimize its real estate strategy for profitable growth.

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Bottorff Ex. 2 at Ex. 99.1, p. 2. Consistent projections were disclosed in the Proxy Statement: 310 new stores in 2008 and 615 new stores in 2009, net of store closings. Bottorff Ex. 23 at 27. There were no other plans.

Plaintiffs try to circumvent these disclosures by manipulating Beré's deposition testimony. Plaintiffs start by selecting out of context a snippet that Dollar General "had a plan – a new store growth plan The Company's had it for years." Opp. at 24. Plaintiffs then juxtapose this selected snippet about Project Alpha with Beré's testimony – 4 pages later – that the Company had room to grow up to over 16,000 stores, attempting to imply there was a plan to open up over 16,000 stores But Beré's testimony about a plan (Beré Tr. at 143) is unrelated to his answer about the Company's room to grow (Beré Tr. at 147). Absent this unfair editing, Beré's testimony is clear that the only "plan" was Project Alpha, and that it was a three-year plan to grow 300 stores in year 1, 200 in year 2 and 400-500 in year 3 Beré Tr. at 143:9-145:19, 172:4-181:14:

Q. Okay. **So the business plan as I understand it – you had a business plan that went up three years, correct? Is that a yes?**

A. **Yes.** I'm sorry.

Q. And Project – the Project Alpha you anticipated would take two to three years to do the 400 closures plus replacement with high IRR stores, correct?

A. Well, the – again, we had a closure plan. We had a new-store-growth plan. **The new-store-growth plan for the two years was a two-year program.** The first year was around 300 to 350, and the second year, which we are in now, is 200. And then this question was going to become, when do you think – should you continue doing that, or when do you think you should start, you know, growing those again.

Q. And a old public Dollar General never made a determination as to how many stores to grow post-Alpha, correct?

A. Certainly, in our **three-year plan**, it would suggest that you would have to open up stores in year three.

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Q How many stores?

A It was probably the 4- to 500 range

Q. What about that. What about –

A After that, we hadn't got – I think the strategic thinking at the time – we hadn't done the analytical. **As I said, we didn't look much beyond three years out,** is that we really felt that we had to be more balanced between a bunch of factors One is new store growth. One is remodels. And two is – three is relocations, plus investment in the current store.

Beré Tr. at 145:3-146:11 (emphasis added) So while Plaintiffs would suggest that Beré testified about a "secret" plan to have 16,000 stores, he actually said that Dollar General only had a **three year** plan that would add a total of approximately 950-1000 new stores, not including store closings, and that was fully disclosed to investors as Project Alpha.

Knuckles similarly testified that the Company had no long-term plans for store growth.

Q. All right So you believed that as of two – that even after 2011, there was opportunity for profitable store growth, correct?

A That's pretty far out. We didn't – we didn't have any numbers that looked that far out that I can recall.

Johnston S.J Aff. Ex. 29, Knuckles Tr. at 51.7-12; *see also* Bottorff Aff. ¶ 20 ("[T]he growth model adopted by the Board as part of Project Alpha anticipated that the near-term closures and slowed growth would lead to an eventual ability to 'exploit the potential' to grow by as much as ten percent per year in the '[l]ong-term'") There is no contrary evidence

(4) The KKR Presentations. After the Merger Agreement was signed, KKR had to raise the money to pay shareholders the 31% premium for their shares Accordingly, KKR made presentations to potential lenders and investors in April-June 2007. Opp at 23-25 These presentations were not shared with the Board and did not even exist at the time the Board voted to accept KKR's offer. They could not have played any role in the Board's decision and are therefore irrelevant as a matter of law. *See Corti*, 954 A.2d at 332-33, *Hilton Hotels*, slip op. at

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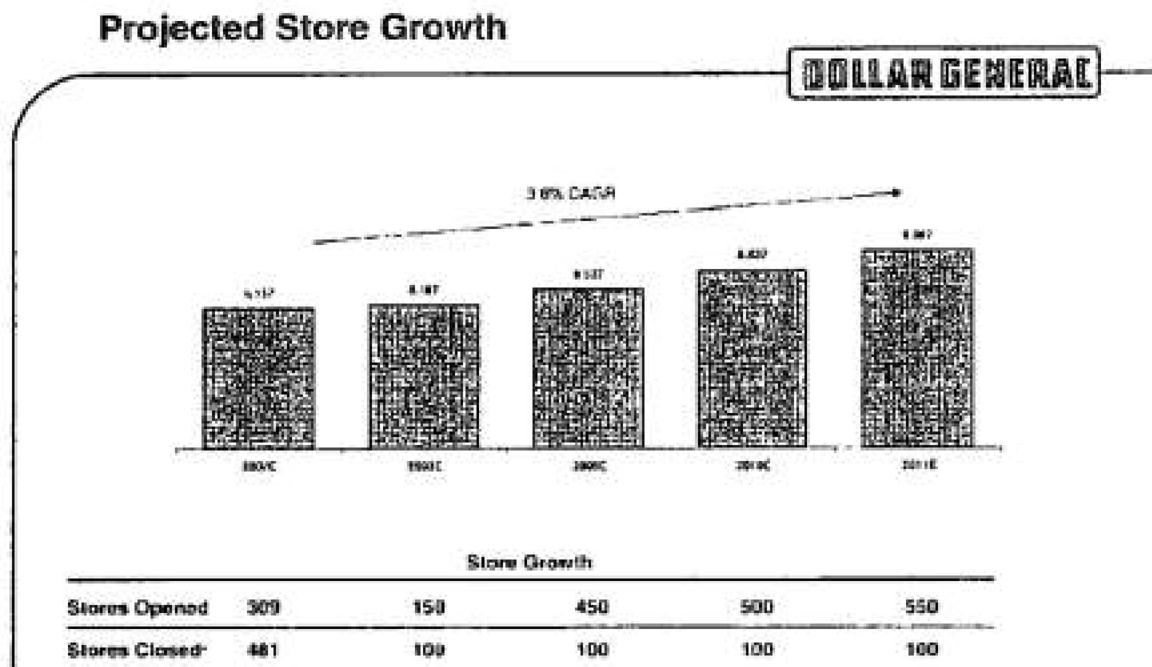
6. Equally important, the presentations themselves provide absolutely no support for Plaintiffs' claim that there was a secret plan for massive store growth. They plainly show that KKR planned to add new stores at a rate even **slower** than Project Alpha.

Plaintiffs cherry pick one page from the presentations based on the APT report, which reflects a "new store **potential**" of over 7,000 new stores. Opp. at 23. But it is plain on the face of even this one page, by its reference to new store **"potential,"** that it is not a **plan** to open thousands of new stores And even more disingenuously, Plaintiffs ignore the page that is actually titled **"Projected Store Growth:"**



Johnston S J Aff Ex 86 at DG 158643

This slide projects net new store openings of 50 in 2008, 350 in 2009, 400 in 2010 and 450 in 2011. *Id*, *see also* Johnston S.J Aff. Ex. 14 at KKRE 0194913; Johnston S.J. Aff. Ex. 15 at WACH05305; Johnston S.J. Aff. Ex. 86 at DG 158651. This is less than projected in the Proxy Statement:

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Year	Net New Stores Projected in Proxy Statement	Net New Stores Projected in KKR Presentation
2008	310	50
2009	615	350
2010	N/A	400
2011	N/A	450

Bottorff Ex. 23 at 27.

The KKR presentations also assume a new store growth rate of roughly 5% in 2010 and 2011, **half** the 10% rate that Dollar General announced might be possible in connection with Project Alpha Bottorff Ex. 2 at Ex. 99 1 , p 3 Moreover, in 2011 KKR planned to decrease its capital expenditures "by lowering new store growth." *See, e g* , Johnston Aff. Ex. 14 at KKRE 0194913. Thus, KKR's already lower rate of growth was expected to slow even further. The KKR presentations are most assuredly **not** a plan to add 7,000 or more stores

For further confirmation that there was no secret plan to open 7,000 stores, the Court need look no further than the current store count. At the time of the Proxy Statement, Dollar General operated 8,182 stores. Bottorff Ex. 23 at 11. As of August 1, 2008 Dollar General operated 8,308 stores SUF ¶ 2 In the first half of 2008, Dollar General opened 125 new stores and has announced plans to open an additional 75 in the second half of 2008. Riley Ex 1 at 27 Even if Dollar General opens these 75 additional stores and no additional stores are closed in 2008, Dollar General will have grown only by **201** net new stores in two years, or 100 stores per year That is a 2 4% increase [7]

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[7] Plaintiffs concede that their secret store growth plan allegation has nothing to do with any success Dollar General has had in the post-closing period and everything to do with the current economic

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Finally, even assuming there was a duty to disclose the potential **opportunity** to open new stores, the parties agree that the information about potential growth was in the market. Dollar General management repeatedly discussed and answered questions about the Company's room to grow, and securities analysts such as Goldman Sachs, Merrill Lynch, and Lehman Brothers publicly stated their views about growth potential or "saturation." *See* Defs.' S.J. Br. at 39-43. Plaintiffs' experts, Prof. Black and Mary O'Connor, agree that this information was in the public domain *See* Black Tr at 263 15-264.8. 271.4-272.13; O'Connor Tr. at 77.21-78.11, 93.8-16. Even the investment advisor for the City of Miami knew that Dollar General could open "14, 15, 16,000 stores" when he voted Plaintiff City of Miami's shares in favor of the Merger. James Norris Dep. Tr. ("Norris Tr.") at 167:4-14. While some analysts publicly questioned whether Dollar General could open so many stores, Opp. at 32-33, these questions only confirm that the information was available to investors to draw their own conclusions [8]

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downturn that has driven consumers to discount retailers. *See* Opp. at 1 n 2, 43 n.25 While Plaintiffs' brief suggests that post-closing financial performance is somehow relevant to whether $22/share was fair, Plaintiffs' own experts testified that post-closing events are entirely irrelevant to the issue of whether KKR's offer represented fair value Mary A. O'Connor Dep Tr ("O'Connor Tr.") at 162.7-17, Black Tr. at 287:7-288.9.

[8] Plaintiffs inaccurately assert that Defendants' experts did not opine that the market for Dollar General stock was efficient In fact, Prof. Kenneth Lehn. former Chief Economist at the SEC. analyzed Dollar General's stock and determined that it traded efficiently September 25, 2008 Kenneth Lehn Dep Tr ("September 25, 2008 Lehn Tr."), Ex 1 at 11, n 24, App B. Plaintiffs' valuation expert, Robert Reilly, and Prof Black agree. Johnston S J Aff. Ex. 32, Robert F. Reilly Dep. Tr ("Reilly Tr") at 140:19-141:3; Black Tr at 272:14-17 (agreeing that "the market price reflects the information in analyst reports" and other public information) Thus, Dollar General's stock price reflected all information in the market about the Company's store growth potential, including the November 29, 2006 disclosure that it could expand square footage by 10% per year after 2009 BREALEY, MYERS & ALLEN, PRINCIPLES OF CORPORATE FINANCE, 350 (8th ed 2006) ("In an efficient market you can trust prices, for they impound all available information about the value of each security")

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III. Plaintiffs Cannot Show the Board Acted in Bad Faith in Structuring the Process or Approving the Merger

Plaintiffs' 85-page opposition brief ignores the devastating testimony of their own corporate governance expert Prof Black:

- Prof Black agrees that Perdue and Wilds acted appropriately in informing the balance of the Board about their October 5, 2006 meeting with KKR Black Tr at 101:16-102:2.
- Prof Black said he could not draw the conclusion that the Perdue-Calbert communications corrupted the process. *Id.* at 241.21-245:16
- Prof. Black agrees that it was "customary" and "good practice" for "the board to form a special committee of outside directors to take control of the process"; and that both "the creation of the [SPC]" and "the membership of the [SPC]" were "appropriate" *Id* at 102:21-104.4, 110.13-18.
- Prof. Black agrees that as of October 8, 2006, management was not "unilaterally deciding how to respond" to KKR. *Id* at 111 11-15
- Prof. Black agrees that it was appropriate for the SPC to retain its own legal advisors. *Id* at 126:11-19
- Prof Black agrees 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 132:12-134:11.
- Prof. Black agrees that it was reasonable for the Board in structuring a strategic review process to consider that increasing the number of possible bidders could risk the confidentiality of the process. *Id* at 206.14-207 6.
- Prof. Black agrees 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 thinks "it was a reasonable decision" to permit KKR and Bain to conduct additional due diligence given the Board was advised 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 agrees it was reasonable for the Board to rely on Lazard's fairness opinion. *Id* at 212:17-19.

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- **Finally, Prof. Black agrees that it was reasonable for the Board to approve KKR's $22 per share offer and related deal terms. *Id.* at 215:13-17.**

Defs.' S J Br. at 27. Plaintiffs do not even try to explain away these dispositive admissions, which preclude Plaintiffs from showing that the Board acted in bad faith

A. The Early Contacts Between Perdue and KKR Are Irrelevant

Plaintiffs claim that certain early contacts between Perdue and KKR between August 11, 2006 and November 9, 2006, were improper and tainted the process, Opp at 9-18, even though their expert Prof. Black did not reach that conclusion. The undisputed record shows that the Board recognized the potential for management to have a conflict in a going private transaction and formed the SPC consisting of Outside Directors. Bottorff Aff. ¶ 10. Prof Black agreed that this was exactly what Outside Directors should do in this situation. Black Tr at 102 21-104:4, 111:11-15. What Prof. Black, himself, calls "good practice" cannot constitute an intentional disregard of fiduciary duties. Plaintiffs are left in the awkward position of arguing against their own expert

Plaintiffs also seek to obscure the timing of the contacts between Perdue and Calbert in relation to the Board's strategic review process But the undisputed chronology conclusively refutes any suggestion that the process was corrupted.

- **August 11, 2006** Perdue meets with Calbert and KKR co-founder George Roberts in KKR's offices in California. Johnston S J. Aff. Ex 45.
- **August 17, 2006**· Calbert sends an email to Roberts describing a conversation with Perdue "[Perdue] repeated he has met with TPG (Bonderman) and Goldman PIA (Adrian Jones) and that he wants to pursue a transaction exclusively with us He wants to wait until after his board mtg week after next (8/29) before he engages in due diligence " Johnston S J. Aff Ex. 46.
- **August 29, 2006**· Perdue tells the Board that he had "discussions with certain investment bankers and private equity firms regarding the Company's position in light of its stock price and the active mergers and acquisition market." Bottorff Ex. 6 at DG149939

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- **September 20, 2006**. Calbert sends an email to Roberts: "I had a good conversation with David Perdue last night. He had just left a meeting with his 'most influential board member' (not technically lead director) who was very supportive of him engaging exclusively with us." Johnston S.J. Aff. Ex. 48.

- **October 5, 2006**: Calbert and Roberts meet with Perdue, Wilds and Turner, the former CEO of Dollar General and controller of the largest block of Dollar General stock. At the meeting KKR requests permission to conduct due diligence on Dollar General subject to a confidentiality agreement. SUF ¶ 17.

- **October 6, 2006**. Calbert writes to Roberts recounting the conversation he had with Perdue "David Wild [sic] (lead director) is requesting a board meeting Sunday night during which he wants to disclose the conversation with KKR, form a special committee and recommend we be allowed to begin our due diligence. . . . Perdue and Wild [sic] spoke with Denny Bottorff, board member and head of governance committee, today and according to Perdue, Denny is in favor of the transaction Dick Thornburgh . appears to not be excited about the transaction. David and I spoke about the need to get him on side. David and I went through his 'pitch' to the board again focusing on the positive merits of the transaction." Johnston S.J. Aff. Ex. 7.

- **October 8, 2006**: The Board discusses 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 decides to defer responding to KKR until the Governance Committee had a chance to recommend an appropriate process *Id*

- **October 9, 2006**: Calbert sends an email to Roberts stating that he had a conversation with Perdue "this morning " "He said the board call last night was controversial with 2 directors (Thornburgh and one other) expressing views that going private wasn't the right course of action . . . David Wilds and Denny [Bottorff] (head of governance committee) led the charge for the transaction." The email states that Perdue communicated to Calbert, among other things, that "[t]he official response from the board to [KKR] is ' we have taken your proposal under consideration '" Johnston S J Ex 6

- **October 12, 2006**: Calbert advises Roberts that he spoke to Perdue and "The BOD gave him a message to deliver to other bidders – "Persuing [sic] strategic plan, not interested in looking at anything else " Perdue doesn't think the BOD will do anything before 11/3 board mtg when he will outline the restructuring plan He went through the BOD identifying for and against I encouraged him to get 2 directors to be his advocates for the transaction. He doesn't think a letter should be sent until after Sunday night's board call." Johnston S.J. Aff. Ex. 54.

- **October 19, 2006**: The SPC is created. SUF ¶ 21

- **November 1, 2006**: The SPC holds its first meeting Bottorff Ex. 10

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- **November 9, 2006.** Calbert emails Roberts that Perdue said the Board was **not** interested in pursuing a going private transaction until after they announce the "restructuring [*i e* , Project Alpha] " Calbert Ex. 1
- **November 20, 2006**· At a Board meeting, Bottorff informs the Board that the SPC "recommends that the Board should pursue Project Alpha or some variant thereof and table discussions of other strategic alternatives for the time being." Bottorff Ex 13 at DG150096 (emphasis added).
- **November 28, 2006**: The Board approves Project Alpha, which is publicly disclosed the following day SUF ¶¶ 34-35
- **Early December, 2006**: The Board decides it would be in the shareholders best interests to determine the potential offer price if the Company were sold. The SPC meets with representatives of Bain and KKR. SUF ¶¶ 39, 43.
- **December 19, 2006**· The Board receives preliminary indications of interest from Bain and KKR that are at the high end of the Company's valuation under Project Alpha SUF ¶ 44.
- **January 5, 2007**: The Board meets to discuss the preliminary indications of interest Both Perdue and Beré are excluded from the deliberations of the Outside Directors The Outside Directors, with the assistance of Lazard and Wachtell, decide to permit Bain and KKR to conduct due diligence and to limit the number of bidders. It is undisputed that Perdue had no role in these key decisions by the Outside Directors. SUF ¶ 50.

Plaintiffs concede that there is no evidence of any Perdue/KKR contacts (other than due diligence) after November 9, 2006 *See* Defs.' S.J Br at 16, n.14.[9] As Prof. Black admitted, this is well before any transaction was even being considered by the Board Black Tr at 149:11-149·15 (testifying the Board was not considering a transaction "as of November 20, 2006")

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[9] Plaintiffs also refer to a February 12, 2007 meeting between Perdue and KKR. Opp at 16 n 14, 24 This meeting was part of due diligence and was attended by Michael Wilkerson of Lazard and representatives from TPG. Riley Supp. Aff. Ex. 4 (February 7, 2007 Email from Wilkerson to Perdue and Beré) at LAZ0016025; Riley Supp Aff Ex. 5 (February 12, 2007 Email chain between Wilkerson and Perdue) (LAZ0016026); Riley Supp Aff Ex 6 (February 12, 2007 Email chain among KKR and TPG representatives) at KKRE 0073148-KKRE 0073149 Bain also had the same opportunity to meet with Perdue. Riley Supp. Aff Ex. 4, Riley Supp Aff Ex 7 (February 20, 2007 Email chain between Moseley and Perdue) at DGE-MOSELEY00116.

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Even assuming Perdue communicated non-public information to Calbert between August 11 and November 9 – which Perdue cannot recall – that information became worthless once the Board started a **non**-exclusive process involving multiple bidders. Johnston S.J. Aff. Ex. 33, John C. Coffee Dep Tr at 32:16-23 (testifying that Perdue's conduct was "essentially harmless" and did not injure shareholders). Plaintiffs complain that in mid-August Perdue told KKR he was interested in an exclusive transaction with KKR. But in October and November the Board said no to a going private transaction and later when the Board said it would seek indications of interest, the process was **not** exclusive. Even Plaintiffs' expert Prof. Black could not identify any harm resulting from these contacts, observing that their effect was "uncertain" Black Tr. at Ex 2, ¶2(a) (On the other hand, if Perdue's recollection is right and there were no non-public disclosures, then by definition the process could not have been corrupted It follows, therefore, that the supposed "dispute" of recollection between Calbert and Perdue is entirely immaterial since in either event the communications did not affect the process.)[10]

Plaintiffs repeatedly cite Richard Thornburgh's testimony that around the time of the October 8, 2006 Board meeting Thornburgh was concerned Perdue might have been "looking to line his pockets" Thornburgh Tr. at 106:19-23; *see* Opp. at 2, 14, 55 n.35. As Thornburgh said, "[y]ou don't want the CEO involved if it looks like the CEO is going to be part of the buying

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[10] Plaintiffs make a number of additional allegations about Perdue, for example that Perdue expected to be retained as CEO after the Merger (Opp. at 9, 17, 18 n.15, 48-49, 54), that **before** the Board and SPC took control of the process Perdue put a "gag" on Lehman (Opp. at 15), that Perdue was less than candid with the Board in the summer of 2006 about his contacts with KKR (Opp. at 11-12) and that Perdue told KKR about Project Alpha before it was publicly disclosed (Opp at 16) These are all similarly irrelevant. Even if these allegations were true, they are mooted by the fact that the Board and the SPC took control of the process In all events, the allegations are not true For example, the Company publicly discussed its consideration of the steps outlined in Project Alpha on August 31, 2006, well before the Calbert email mentioning the pending "restructuring" *Compare* Riley Supp Aff. Ex 8 (August 31, 2006 Dollar General Press Release) *with* Johnston S.J. Aff. Ex 5, *see also* Defs.' Resp. to Plts.' Stmt of Disputed Facts, ¶¶ 86-147.

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group." Thornburgh Tr. at 106:9-11; *see also* Bottorff Aff. ¶ 10 ("In the end, the Board decided that it needed to take control of the process, including by directing communications with KKR or any other potential acquirors, and to put in place an independent method for evaluating all the Company's strategic alternatives."). But Thornburgh's caution only highlights the Board's active role in evaluating the Company's strategic alternatives, responding to KKR's request to conduct confidential due diligence and creating the SPC to run the process. Bottorff Ex. 9. And Prof. Black agreed that after October 8, management was not "unilaterally deciding how to respond" to KKR. Black Tr. at 111:11-15. This is just what a Board should do.

Absent evidence that Perdue dominated the Board or otherwise influenced the process, his early contacts with KKR are legally irrelevant. *See McMillan*, 768 A.2d at 504 n.54 (absent a showing that conflicted directors dominated the Board, "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"). To hold otherwise would penalize shareholders because independent directors could not take control of a process to sell a company when a member of management allegedly engaged in unauthorized communications, without exposing themselves to potential liability.

B. Plaintiffs' Other Process Complaints Are Meritless

Plaintiffs raise a number of other process issues that, even if well-founded, are simply second-guessing the nature of the process and therefore cannot constitute bad faith: (1) the Board decided not to open up the process to additional financial or strategic buyers, beyond four of the largest private equity firms (KKR, TPG, Bain and Blackstone); (2) KKR allegedly "possessed a sizeable information and strategic advantage" because Bain was invited into the process after KKR, and (3) Plaintiffs speculate that Bain did not have a serious interest in

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acquiring Dollar General. Opp at 37-41 None of these hindsight criticisms, even if true, comes close to establishing bad faith or disloyalty. And, once again, Plaintiffs' own expert undermines their claims

With respect to the number of bidders, Plaintiffs do not challenge the numerous authorities cited by Defendants finding sale processes were reasonable with as few as one bidder. *See generally* Defs.' S.J. Br. at 28 [11] In addition, the Board considered the possibility of a strategic transaction with Family Dollar, one of Dollar General's competitors, but Lazard advised the Board that such a transaction was unlikely. Bottorff Aff. ¶ 24. The Board also carefully weighed the pros and cons of inviting additional financial bidders before deciding to proceed with KKR and Bain, *id* ¶ 25, and Prof. Black specifically testified that the considerations on which the Board based its decision not to include additional bidders were reasonable *See* Black Tr. at 206.14-22, 207 1-6, 208:5-9 (agreeing that disruption to the Company's business and confidentiality risks posed by additional bidders were reasonable considerations); *see also* Defs.' S J Br at 28-30. In the face of Prof. Black's testimony, Plaintiffs cannot create a genuine issue of fact by merely asserting that the Board should have sought out additional bidders. *See Mechs. Laundry Serv v Auto Glass Co of Memphis, Inc.*, 98 S.W.3d 151, 158 (Tenn. Ct App. 2002) ("Mere conclusory allegations will not suffice to support or defeat a motion for summary

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[11] The one case Plaintiffs cite concerning the number of bidders, *Barkan v Amsted*, actually demonstrates the reasonableness of this Board's process. In *Barkan*, the court held that it was reasonable for the board not to canvass the market after engaging with a single bidder because the board already "possess[ed] a body of reliable evidence with which to evaluate the fairness of a transaction." *Barkan v Amsted Indus Inc*, 567 A.2d 1279, 1287 (Del. 1989). Here, it is undisputed that the Board had already spent months analyzing the operations, strategies and profitability of the Company in connection with Project Alpha, which provided it a substantial body of reliable evidence to "evaluate the fairness of a transaction" SUF ¶ 34

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judgment.") (citation omitted). Nor can Plaintiffs create an issue of material fact by disagreeing with their own expert.

Plaintiffs' argument that KKR had an insurmountable information advantage is premised on a gross misrepresentation of a single piece of evidence:

- Plaintiffs assert that Perdue wrote an email admitting that KKR "[knew] more about us and has an idea [of] what they would do' **while Bain would struggle to catch up**." Opp. at 39 (emphasis added, brackets in original)
- What Perdue actually wrote was: "Clearly, the TPG/KKR team knows more about us and has an idea what they would do **but Bain/Blackstone will catch up fast.**" Johnston S.J. Aff. Ex. 77 (emphasis added).

Replacing the words "will catch up fast" with "would struggle to catch up" is not a good faith argument. Misrepresentations cannot create a genuine issue of fact.

Finally, Plaintiffs' speculation that Bain was not a serious bidder is entirely unsupported and improbable Bain already owned a dollar store chain (Dollarama), Opp at 40, and had direct experience with the discount retail industry. Indeed, the SPC and the Board specifically included Bain in the process because of its experience with retail businesses. Bottorff Aff ¶ 22. Thornburgh testified that Bain had more expertise in the discount retail sector than KKR Thornburgh Tr. at 210:3-6 Plaintiffs also offer no explanation why Bain would have submitted an indication of interest and spent time and money conducting due diligence if it had no interest in acquiring the Company. The record also shows that KKR believed Bain had a serious interest and treated the process as a competitive auction *See* Calbert Ex 7 at KKRE 0045142

C. The Deal Protections Were Reasonable

Plaintiffs complain in perfunctory fashion about routine provisions in the Merger Agreement known as "deal protections" Opp. at 42-43. Plaintiffs' expert, however, concedes that it was not improper for the Board to agree to "the level of deal protections" in the Merger

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Agreement Black Tr. at 293:12-17. Plaintiffs do not challenge this admission or cite a single authority to support their assertion that the deal protections were improper.[12]

D. The Board Relied on Lazard's Fairness Opinion in Good Faith

There is no dispute that directors may rely on the advice of financial advisors. *See* Tenn. Code Ann. 48-18-301(b)(2) In fact, Delaware courts routinely find that reliance on outside advisors is itself evidence of the directors' "good faith and the overall fairness of the process" *Cinerama, Inc v Technicolor, Inc* , 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd*, 663 A 2d 1156 (Del. 1995); *see also McMillan*, 768 A.2d at 505 n.55; *In re Vitalink Commc'ns Corp S'holders Litig* , 1991 WL 238816, at *12 (Del. Ch. Nov 8, 1991)

Plaintiffs assert that "Lazard's fairness opinion, presented to the Board, rested on the assumption that Dollar General would have no store growth after 2011" Opp. at 2. This is not so As set forth in the Proxy Statement, Lazard's fairness opinion "rested" on **four** different valuation methodologies. Bottorff Ex. 23 at 21 (Lazard's opinion is based on "its experience and professional judgment after considering the results of **all** of the analyses.") (emphasis added), October 10, 2008 Wilkerson Tr. at 98:10-14. Lazard found that KKR's offer price was higher than the projected fairness ranges under every one of the four methodologies SUF ¶ 64(d). Plaintiffs' own valuation expert, Robert Reilly, also agrees that the four methodologies employed by Lazard are commonly used and appropriate methodologies Reilly Tr at 119:13-121:6. Reilly testified that the fact that KKR's price exceeded the highest point on each of the four

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[12] Plaintiffs' contention that the Board could not accept a superior offer because Dollar General might not have had enough cash on hand to pay the termination fee is preposterous If the Company accepted a superior proposal from another bidder, the termination fee would ultimately have been funded by the other bidder *See In re Toys "R" Us, Inc , S'holder Litig* , 877 A.2d 975, 1019-20 (Del Ch. 2005) (charts and discussion illustrating termination fee's effect on bidder)

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analyses was "uncommon" and suggests the offer price was "**unusually fair**." Reilly Tr at 160:20-162:1 (emphasis added)

Plaintiffs concede that the perpetuity growth rate assumption used in the discounted cash flow analysis had no impact on the other three valuation methods. the stock price, comparable public companies, and precedent transactions analyses. Black Tr at 226:5-8 ("The perpetuity growth rate is part of the [discounted cash flow] analysis. It's not part of the comparable transactions analysis or the comparable companies analysis.") So even if the growth rate Lazard used in its discounted cash flow was "wrong" – which Plaintiffs cannot show – Plaintiffs still could not show that it ultimately undermined Lazard's fairness opinion. And even Prof. Black testified that the Directors reasonably relied on Lazard's fairness opinion. Black Tr. at 212:17-19.

The Lazard fairness opinion also was not the only thing that the Board considered The Proxy Statement specifically said:

> Lazard's opinion and financial analyses were not the only factors considered by Dollar General's board of directors in its evaluation of the merger and should not be viewed as determinative of the views of Dollar General's board of directors or Dollar General's management.

Bottorff Ex. 23 at 25; *see also id* at 18-19 (listing all the factors considered by the Board), Bottorff Aff. ¶¶ 30-32, SUF ¶ 64(c),(d),(f), Knuckles Tr. 35.16-37.15.[13]

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[13] While not necessary to resolve for purposes of this motion, it is far from clear that using a different assumption with respect to store openings after 2011 would result in a fairness range above $22 per share because Lazard's assumption with respect to store openings after 2011 also results in lower capital expenditures Moreover, while Plaintiffs suggest that O'Connor's damage calculation was based on "management projections," Opp. at 62, they were in fact based on projections prepared solely by KKR, as Ms. O'Connor conceded at her deposition. O'Connor Tr. at 109.5-110:18. These projections were not provided to or considered by the Board when it accepted the $22 per share offer

Plaintiffs similarly contend that Lehman was in possession of "management" projections extending out until 2016 Opp at 28 The document Plaintiffs cite in support of their assertion is an internal

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Even if one were to disagree with Lazard's growth rate assumption, there is no evidence that the Board had any reason to doubt its accuracy. Directors do not conduct their own discounted cash flow analysis; bankers do. Moreover, the Board had no planned or projected store growth numbers past 2009, and so would hardly find it unusual that Lazard did not either

In light of this undisputed evidence, Plaintiffs cannot show that the Directors consciously acted in bad faith and contrary to the interests of shareholders when they relied on Lazard's opinion as one of factors they considered. *See, e g , McPadden*, 2008 Del Ch. LEXIS 123, at *35-36; *Ash v McCall*, 2000 Del. Ch. LEXIS 144, at *29 & n.23 (Del. Ch. Sept. 15, 2000). In *McPadden*, the fairness opinion relied on by the board was based on two sets of projections created by the members of management who were buying the company, and the offer price was at the low end of the valuation range calculated based on the more pessimistic projections. 2008 Del. Ch. LEXIS 123. at *27. The court found that "the two sets of projections described in the [fairness opinion] should have alerted the board to carefully consider whether [the] offer was high enough." *Id* Nevertheless the court found no bad faith and held that the board was protected by the exculpatory clause. *Id* at 36. In *Ash*, even in the face of "red flags" and "shoddy" work by the board's advisors, the court found no bad faith and dismissed the breach of fiduciary claims 2000 Del. Ch. LEXIS 144, at *29

Lehman memorandum containing projections that were prepared by Lehman, not management, and are merely extrapolations from management's projections. Johnston S.J. Aff. Ex 11 at LB 00002869 There is no evidence in the record suggesting that management ever saw these projections The Lehman memorandum is also not admissible The only Lehman witness who was shown this document had never seen it and could not authenticate it because it was prepared by a separate business unit. Dana Perlman Dep. Tr at 118.3-120 22

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Because Plaintiffs cannot show the Directors acted in bad faith, their reliance on the exception in Tenn. Code 48-18-301(c) is misplaced The exception provides that "[a] director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted." Tenn. Code Ann. § 48-18-301(c) In order to constitute bad faith, a director's "unwarranted" reliance on an expert must be more than mere negligence or even gross negligence or reckless indifference – it must constitute a "conscious disregard" for his or her fiduciary duties and the interests of the corporation. *See, e g , McPadden*, 2008 Del Ch. LEXIS 123, at *31-32. No reasonable finder of fact could reach that conclusion here.

E. Plaintiffs' Quibbles About the Process Fall Well Short of Bad Faith as a Matter of Law

Even if – contrary to Prof. Black's own opinion – the Board's actions in structuring the process and approving the Merger were not reasonable, they cannot amount to bad faith. Plaintiffs cannot show that the Outside Directors had "an illicit directorial motive" or consciously disregarded their fiduciary duties. *In re Lear*, 2008 WL 4053221, at *11 n 62. Complaints about the number or bidders, deal protections, reasonableness of the fairness opinion and the like – "quibbles about due care" – simply do not state a claim for bad faith. *Id*

Plaintiffs attempt to argue from *Ryan v Lyondell*, which, on an undeveloped record, found that one board's failure to take *any action whatsoever* to discharge its duties *could* possibly constitute bad faith and a breach of the duty of loyalty. *Ryan v. Lyondell Chemical Co* , 2008 Del. Ch. LEXIS 105, at *47, 48 (Del. Ch. July 29, 2008). But, as reflected in the chart below, this case is nothing like *Ryan*:

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Case	Duration of Process	Advisors Relied on by Board	Board Involvement In Negotiations	Pre-Signing Market Check
Ryan v. Lyondell	Less than seven days. *Id.* at *5	"The Board did not retain an investment banker." *Id.* at *64	"[The] Board avoided an active role in negotiating" and acted as a "passive conduit." *Id.* at *4, 47.	None *Id.* at * 4.
In re Dollar General	More than 3 months – from December 2006 to March 2007	The Board retained an independent financial advisor and legal counsel.	The Board controlled the process, the full Board met nine times and the Strategic Planning Committee seven times.	Competitive bid process involving four major private equity firms

Other recent cases confirm Plaintiffs' insurmountable hurdle. For example, in *In re Lear*, the proposed merger agreement was negotiated by the target company's CEO "who had much of his wealth tied up" in the company and feared that if it went into bankruptcy "his retirement benefits could be lost." *In re Lear*, 2008 WL 4053221, at *2 Nevertheless, the court dismissed the bad faith and disloyalty claims against the directors. *Id* at *1. In *McPadden*, the board appeared "to have engaged in little to no oversight of that sale process" and delegated negotiations to a vice president known to have an interest of leading a management group to purchase the subsidiary at issue *McPadden*, 2008 WL 4017052, at *7-8. The court still held that Plaintiffs failed to allege conduct that rose to the level of bad faith *Id.* at *10.

Plaintiffs cannot show that the Board "consciously acted in a manner contrary to the interests of [the Company] and its stockholders" when it accepted KKR's premium offer of $22 per share. *In re Lear*, 2008 WL 4053221, at *10. All the evidence in the record shows that the Board acted reasonably, with full information, and in good faith when it voted unanimously to accept the offer on March 10.

- The Board had conducted a detailed study of the Company's business and prospects when it evaluated Project Alpha from July through November 2006 After Project

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Alpha was announced, the market reaction was mixed, with analysts questioning whether it was sufficient and could be implemented successfully. SUF ¶¶ 34, 40.

- The merger price of $22 per share was (1) higher than the projected valuation of the Company under Project Alpha, but without any of the risks of implementing Project Alpha, (2) a 31% premium over the most recent share price ($16.78), and (3) a 43% premium over the one-year average share price ($15.43). Bottorff Ex. 22 at LAZ0057625.

- The merger price was $2 per share (or $630 million) higher than KKR's preliminary indication of interest and $1 higher than Bain's preliminary indication of interest Calbert Ex. 3; Riley Ex. 7.

- Four large private equity firms had engaged in a multi-month process and KKR was the only firm willing to bid. Bottorff Ex. 23 at 16

- Mr. Reilly testified that this was an arm's length transaction and the price of an arm's length transaction is presumptively fair. Reilly Tr. at 112:10-19. Courts have also recognized that "a merger price resulting from arms-length negotiations where there are no claims of collusion is a very strong indication of fair value." *M P M Enters., Inc v Gilbert*, 731 A.2d 790, 797 (Del. 1999).

- Lazard provided a fairness opinion that showed the offer price was higher than the price range under four separate analyses. SUF ¶ 64(d). Mr Reilly, Plaintiffs' valuation expert, testified that this is "uncommon" and suggests the offer price is "unusually fair." Reilly Tr. at 161:16-162:1.

The undisputed events after the Board's vote only confirm the reasonableness of the Board's decision:

- Securities analysts and independent shareholder advisory services praised the offer price as fair. SUF ¶¶ 70, 74-75.

- The market price never traded above the offer price of $22 per share, which shows that market did not expect a higher bid to emerge. September 25, 2008 Lehn Tr Ex. 1 at Chart 8.

- In the three months between the merger announcement and the shareholder vote, no higher bid was received, including from the other private equity firms that had conducted due diligence. SUF ¶ 71. Courts recognize that the lack of a superior bid after a merger announcement "supports the board's decision to proceed." *Barkan v Amsted Indus , Inc* , 567 A 2d 1279, 1287-88 (Del 1989)

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- The Merger was approved by 99% of the voting shares, including Cal Turner, the largest shareholder and Plaintiff City of Miami SUF ¶¶ 76, 77. Mr. Reilly, Plaintiffs' expert, testified that these shareholders found the offer price "attractive" and "had a preference for cash now at $22 a share as opposed to the possibility of $25 or $26 per share some years down the road." Reilly Tr. at 68:8-69:14, 242:20-243.5.

IV. Plaintiffs Have No Disclosure Claims

Because the Directors are protected by the Tennessee business judgment rule and the exculpatory provision in the Dollar General charter, *see* Section I above, Plaintiffs must prove the Directors "intentionally omitted material information or knowingly disseminated false information" to Dollar General shareholders and that the alleged misstatements caused a compensable economic injury. *Goodwin,* 1999 WL 64265, at *7, *Thomas Nelson*, slip op. at 13. They cannot.

A. There Was No Secret Store Growth Plan to Disclose

Plaintiffs' claim that the Proxy Statement failed to disclose "the Company's huge growth prospects," Opp. at 78, is based on the fiction there was such a plan. As a matter of law and common sense, directors cannot be faulted for failing to disclose something that never happened. *JCC Holding Co , Inc S'holders Litig* , 843 A.2d 713, 721 (Del. Ch. 2003) ("[T]here is no obligation on the part of a board to disclose information that simply does not exist."). Plaintiffs' own cases make clear the distinction between disclosing business plans versus mere opportunities or potential. *See* Opp. at 57, 60-61; *Delaware Open MRI Radiology Assocs. v Kessler*, 898 A 2d 290, 315-318 (Del. Ch. 2006) (distinguishing whether new stores were part of the "operative reality" of the business at the time of the merger or mere speculation); *ONTI, Inc v. Integra Bank*, 751 A 2d 904, 907-911 (Del. Ch. 1999) (distinguishing between post-merger event that was knowable at the time of merger as opposed to a "product of speculation"); *In Re Emerging Commc'ns, Inc S'holders Litig* , 2004 WL 1305745, at *13 (Del. Ch. June 4, 2004)

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(concrete business projections contemplated by management pre-merger were relevant in performing valuation in statutory appraisal action); *see also Globis Partners*, 2007 WL 4292024, at *10 (no need to disclose "'inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information'") (quoting *Arnold v Soc'y for Sav. Banc* , 650 A.2d 1270, 1280 (Del 1994))

B. The Proxy Statement Did Not Make Any Representation as to What Store Growth Would Be After 2011

Building on the false premise that there was a plan to add 7,000 or more stores, Plaintiffs argue that shareholders were misled by a single sentence in the Proxy Statement describing a mathematical assumption used by Lazard in modeling one of its four analyses, namely assuming that after 2011 there would be no new stores. Plaintiffs' sleight of hand fails for several reasons. First, there was no 7,000 new store "secret plan" to conceal or contradict Lazard's assumption was not inconsistent with management's plan. Second, investment bankers do not make projections about new store openings, management does. Here management had no projections beyond 2009, and neither did Lazard. Third, the Proxy Statement explicitly disclosed the number of stores Dollar General expected to operate at the end of 2007, 2008, and 2009:

Alpha Case	2007E	2008E	2009E	2010E[(4)]	2011E[(4)]
* * *					
Stores Operated (End of Year)	8 354	8 664	9 279	N/A	N A

Alternative Case	2007E	2008E	2009E	2010E[(4)]	2011E[(4)]
* * *					
Stores Operated (End of Year)	$ 8.354	$ 8 664	$ 9 279	N/A	N/A

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Bottorff Ex. 23 at 27. Plaintiffs pretend these explicit store growth projections do not exist and attempt to limit the focus to a single sentence taken out of context of a seven-page discussion of Lazard's financial analysis:

> In calculating the terminal value of Dollar General, Lazard assumed perpetuity growth rates ranging from 2.00% to 2.50% for the projected free cash flows for period subsequent to 2011. **The perpetuity growth rates were applied to the projected free cash flow for 2011, as adjusted to reflect no additional store openings in perpetuity, resulting in a lower sales growth rate and lower capital expenditures.**

Bottorff Ex. 23 at 22 (emphasis added).

To perform a discounted cash flow calculation, Lazard had to make an assumption about future store openings beyond 2011. Lazard assumed zero and the Proxy Statement disclosed this assumption. This assumption does not negate the possibility of future store growth after 2011, it simply does not assume it will in fact occur. No one knows if this assumption will prove right or wrong until 2011. However, notwithstanding the possibility that there could be growth after 2011, it is not unreasonable for Lazard to assume there will be no growth in 2011 when management's projections do not go beyond 2009. There is no evidence that any shareholder was confused by this assumption. Indeed, James Norris, the City of Miami's financial advisor, had no confusion. He read the Proxy Statement at the time of the Merger and still understood that Dollar General could potentially have as many as 16,000 stores. Norris Tr. at 46:2-5, 167:1-14. Prof. Black agrees that the fact that Dollar General could grow is "common sense." Black Tr. 258:17-259:8.

Plaintiffs' assertion that management "endorsed" or "approved" Lazard's terminal value assumption is also demonstrably false. Management had nothing to do with the assumption. The assumption is described in a section of the Proxy Statement labeled "Opinion of Financial

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Advisor." Bottorff Ex. 23 at 20. The Proxy Statement also specifically cautioned **not** to misconstrue Lazard's assumptions to be a representation of expected future performance:

> The estimates contained in Lazard analyses and the ranges of valuations resulting from any particular analysis are not necessarily indicative of actual values or predictive of future results or values, which may be significantly more or less favorable than those suggested by the analyses.

Bottorff Ex. 23 at 21. As Prof. Black admitted, the Proxy Statement does not say management approved Lazard's assumptions "beyond 2011." Black Tr. at 223:15-224:1. Lazard banker Michael Wilkerson confirmed Dollar General management had no input into Lazard's perpetuity growth assumption – it was based solely on Lazard's professional judgment. October 10, 2008 Wilkerson Tr. at 108:8-109:5.

Lastly, as a matter of law, the description of Lazard's terminal value calculation cannot give rise to a disclosure claim because it is a true and correct description of what Lazard did. Prof. Black himself admits it is an accurate description of Lazard's work performed. Black Tr. at 228:1-9 ("I'm not quibbling with how they disclosed it or how they did their calculations, given their assumptions."). A long line of cases in both Tennessee and Delaware hold that a challenge to the reasonableness of a banker's assumption, rather than the accuracy of a proxy statement's description of that assumption, fails to state a disclosure claim as a matter of law.[14]

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[14] *See JCC Holding*, 843 A.2d at 721 ("This kind of quibble with the substance of a banker's opinion does not constitute a disclosure claim."); *Thomas Nelson*, slip op. at 15-16 (dismissing disclosure claims, in part, because the Proxy Statement "included a fair summary of the work" performed by financial advisors); *see also In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 28 n.52 (Del. Ch. 2004) ("[A] complaint about the accuracy or methodology of a financial advisor's report is not a disclosure claim."); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *20 (Del. Ch. Aug. 18, 2006) ("So long as the valuation work is accurately described and appropriately qualified, that is sufficient."); *Nebel v. 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").

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Thomas Nelson is squarely on point. The plaintiffs in *Thomas Nelson* (represented by the same counsel for plaintiffs here) argued that the assumption of the company's financial advisor (SunTrust) of a "conservative terminal multiple growth rate of 2%-4%" when the company was "projecting a 24% growth rate" misled shareholders about the company's value. *Thomas Nelson*, slip op. at 14 (emphasis added). Chancellor Lyle rejected this argument for two reasons (1) as here, the Proxy Statement explained the "limited reliance" an investor could place on the banker's analysis, and (2) Thomas Nelson, like Dollar General, was a publicly-traded company and therefore shareholders had access to extensive information about the company, including SEC filings and analyst reports. *Id.* at 14-15. Chancellor Lyle held that the proxy statement "included a fair summary of the work performed by SunTrust" enabling shareholders to "accurately assess the weight to place on the SunTrust opinion," *id* at 15-16, and dismissed the case Plaintiffs' disclosure claim here is far weaker. Whereas Thomas Nelson's financial advisor made an assumption that **contradicted** the company's **projected** growth rate, Lazard's assumption about store openings after 2011 was consistent with the fact that the Company had no projections beyond 2009. Lazard's fairness opinion could not have misled shareholders about the Company's value

C. Plaintiffs' Other Disclosure Claims Fail

Plaintiffs make a half-hearted attempt to assert a number of additional disclosure claims, none of which raises a genuine issue of material fact. First, while the Proxy Statement disclosed that prior to the SPC's formation, Perdue was in contact with "private equity firms and investment bankers regarding potential interest in a transaction involving Dollar General." Bottorff Ex 23 at 15, Plaintiffs want to hold the Directors liable for not including a blow-by-blow description of those contacts *See* Opp at 58-59 Not only do Plaintiffs fail to cite any

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authority for the proposition that a board could be held liable by failing to disclose such details, their own expert, Prof. Black, could not conclude that Perdue's early contacts with private equity firms were material Black Tr. at 228 10-229.20.[15]

Second, Plaintiffs fault the Directors for not including more disclosure about bidders that were **not** included in the process. *See* Opp. at 41, 59 The Proxy Statement plainly disclosed that four private equity firms participated in the process. That is all that is required. *See, e g ,* *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992) ("Delaware law imposes upon a board of directors the fiduciary duty to disclose fully and fairly all material facts within its control that would have a significant effect upon a stockholder vote. The board is not required to disclose all available information.") (citations omitted); *Skeen v Jo-Ann Stores, Inc* , 750 A.2d 1170, 1174 (Del 2000) ("Omitted facts are not material simply because they might be helpful. To be actionable, there must be a substantial likelihood that the undisclosed information would significantly alter the total mix of information already provided."). Plaintiffs do not cite a single authority for the absurd proposition that directors could act in bad faith by failing to disclose any number of things that did not happen. Such disclosures could only confuse, not inform, investors *See* *Globis*, 2007 WL 4292024, at *10.

Third, Plaintiffs complain that Lehman's fee arrangements were not disclosed. *See* Opp. at 40-41. Dollar General was under no obligation to disclose anything about Lehman's compensation because Lehman did not provide a fairness opinion relied upon by the Board or included in the Proxy Statement *See, e g* , Item 1015(b) of Reg M-A, 17 CFR § 229.1015(a). (b) (providing for disclosure in a proxy of compensation received by an advisor giving a fairness

[15] Nor do directors have a duty to accuse themselves of wrongdoing when no misconduct has been found by a court *See, e g* , *Brody v Zaucha*, 697 A.2d 749, 754 (Del. 1997)

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opinion but not the compensation of other advisors who provided reports not deemed material to the transaction).

Finally, Plaintiffs challenge the Proxy Statement's disclosure about management's potential investment in the Company:

> As of the date of this proxy statement [May 21, 2007], none of our executive officers has entered into any agreement, arrangement or understanding with KKR, Parent or Merger Sub or any of their respective affiliates regarding employment with, or the right to purchase or participate in the equity of the surviving corporation However, prior to the closing, some or all of our executive officers may discuss or enter into such arrangements and/or amendments to their existing agreements

Bottorff Ex. 23 at 37. Plaintiffs have no evidence there was any agreement, arrangement or understanding in place as of May 21, 2007 The documents they cite show that KKR and members of management were discussing the issue and, as of May 22, 2007, management had retained counsel to advise them in connection with KKR's proposed **draft** management equity agreement. Johnston Exs 64-67. Importantly, there were no discussions concerning management investment in the post-Merger Company until after the Board approved the Merger. August 25, 2008 David Perdue Dep. Tr at 21:20-22:17, Michael M. Calbert Dep. Tr. at 52.2-12, 196.10-23.

D. Plaintiffs Cannot Show That the Alleged Misstatements Caused Any Compensable Economic Injury

Under Tennessee and Delaware law, Plaintiffs must show, by admissible evidence, that any omission or misstatement caused a compensable economic injury *Thomas Nelson*, slip op. at 13; *Brukardt*, slip op at 24; *Transkaryotic*, 954 A.2d at 362-63 & n.55. Even if a misstatement were "material" for disclosure purposes (and none are here), Plaintiffs must still satisfy the separate elements of causation and injury.

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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*, 700 A.2d at 146-47; *accord In re J P Morgan Chase & Co S'holder Litig*, 906 A.2d 766, 773 (Del. 2006). Rather, compensatory damages may only be awarded where they "arise logically and directly from the lack of disclosure" *In re Tyson Foods, Inc*, 919 A.2d 563, 601-02 (Del Ch 2007). This is especially true in the merger context because courts recognize that pre-closing injunctions are the preferred remedy and that post-closing disclosure claims are generally too speculative to be "adequately quantified or monetized" *Transkaryotic*, 954 A 2d at 360-61. Thus, courts reject disclosure claims where the plaintiffs offer no evidence showing "that the vote would have been different," *id.* at 362 n.55, or that the shareholders would have been better off if the merger had been rejected by shareholders *Brukardt*, slip op at 24

Plaintiffs do not even try to offer such evidence here and cannot because the merger price was 31% above the pre-announcement market price of $16.78. Rather than offer evidence of causation and a compensable injury, Plaintiffs ask the Court to speculate and assume the existence of an injury *See* Opp Br at 80 (arguing that duty of candor claims require "only that the undisclosed information be material"). The law does not permit the Court to indulge in that speculation

V. Shareholder Ratification and Acquiescence

Given Plaintiffs' inability to show any material misstatement or omission in the Proxy Statement, the shareholder vote overwhelmingly in favor of the Merger ratified the transaction The shareholder ratification restores the presumption of the business judgment rule against duty of loyalty claims and Plaintiffs must prove the transaction was irrational or amounted to waste in order to prevail. *See Thomas Nelson*, slip op. at 21, *Solomon v Armstrong*, 747 A.2d 1098, 1117

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(Del. Ch 1999), *Rosser v New Valley Corp*, 2005 WL 1364624, at *4 (Del. Ch. May 27, 2005). The 31% all-cash premium precludes any such finding and Plaintiffs do not even attempt to argue otherwise.

Under the doctrine of acquiescence, shareholders who cast an informed vote in favor of a transaction are also 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 S'holders Litig*, 2006 WL 2403999, at *21 (Del Ch. Aug 18, 2006). Here, the Proxy Statement provided a description of the litigation related to the merger, enumerating the alleged claims and explicitly identifying the case number and Court of the instant action. Bottorff Ex. 23 at 40. The disclosure of this information provided shareholders with notice of "substantially all of the alleged improprieties identified by Plaintiff[s]" *Brukardt*, slip op. at 11 Those shareholders who voted in favor of the Merger – including Plaintiff City of Miami – therefore have no standing to sue.[16]

VI. The Aiding and Abetting Claims Against KKR and Dollar General Fail

Now that Plaintiffs have abandoned the baseless "tipping" allegation, their aiding and abetting claim against KKR rests exclusively on certain communications between Perdue and KKR that took place well before any transaction was under consideration *See* Opp at 84; *see also* Black Tr. at 149:11-149 15.[17] Those communications are factually and legally irrelevant.

[16] The City of Miami was clearly informed During the class certification proceedings, the City of Miami represented that it had reviewed and approved the motion for a temporary injunction, which specifically enumerated the alleged deficiencies in the Proxy Statement identified by counsel following discovery With all of this information, the City of Miami still voted in favor of the Merger and thereby acquiesced in the transaction. *See PNB Holdings*, 2006 WL 2403999, at *21

[17] Plaintiffs refer to "KKR's [alleged] illicit involvement with Lehman" relating to KKR's debt offering without explaining why the involvement was "illicit" or how it could have contributed to a breach of fiduciary duty by the Board Opp at 84 Lehman was not the Board's financial advisor (it was the Company's) and the Board relied on the advice and fairness opinion of Lazard – not Lehman – in approving the Merger. And even if the Board had relied upon a fairness opinion from Lehman,

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Moreover, when the process ultimately commenced, it was driven by the SPC, not Perdue, so there was no reason for KKR to be concerned with the irrelevant and superseded communications with Perdue. Thus, there is simply no evidence that KKR participated – knowingly or otherwise – in any "inherently wrongful" or "per se illegal" fiduciary breach.[18] *See In re GM (Hughes) S'holder Litig*, 2005 WL 1089021, at *24 (Del Ch. May 4, 2005)

The record makes clear that KKR engaged in an arms-length, competitive and multi-month process run by a committee of Outside Directors. KKR submitted a premium bid for Dollar General that was not matched by any competitors. Instead of raising a genuine issue of material fact to the contrary, Plaintiffs' brief cites *In re Hechinger Inv. Co. of Del*, 278 Fed. Appx 125 (3d Cir. 2008) – a case in which the Third Circuit affirmed the district court's dismissal of an aiding and abetting claim against a private equity firm that structured a leveraged buyout in an arm's length transaction *Id* at 130 The court said "the Delaware Supreme Court has noted that purely arm's length negotiations generally are inconsistent with the level of knowing participation required for aiding-and-abetting liability to attach." *Id* (citing *Malpiede v Townson*, 780 A 2d 1075, 1097-98 & n 84 (Del 2001))[19] Plaintiffs point to no specific facts in the record that support any different result here.

Lehman's participation in the debt financing would not have been improper *Brukardt*, slip op at 21 n 23 (holding that a financial advisor's involvement in financing the transaction is not a conflict of interest).

[18] Plaintiffs aiding and abetting claims similarly fail for the reasons set forth in Defendants' opening brief, including that a corporation (*i e*, Dollar General) cannot be held vicariously liable for breaches of fiduciary duty by its own directors. *See* Defs.' S J. Br. at 48-52

[19] Plaintiffs cite no authority for their argument (Opp at 76-77) that KKR and Dollar General are not protected by the Company's exculpatory provision and therefore could be liable for damages for aiding and abetting a duty of care violation The argument also makes no sense. How could an aider and abettor knowingly participate in a duty of care breach which by definition only involves negligent conduct by the fiduciary?

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CONCLUSION

It is undisputed that the SPC and Board were advised by their independent experts that the 31% premium price of $22/share was more than fair. Their own experience told them that as well. Shareholder advisory firms and securities analysts agreed The largest shareholder, Cal Turner, and Plaintiff City of Miami alike voted for the deal, fully knowledgeable that the Company had the potential to add additional stores.

In the ultimate analysis, Plaintiffs' case falls on the bogus "secret" store growth claim Despite their 85-page brief and 187-paragraph statement of facts, Plaintiffs have not pointed to any fact in the record that would be admissible at trial that creates a genuine issue of material fact as to the existence of a secret plan. And their own expert entirely undercuts their claim, testifying that management had no long term formal plans and that "of course" there was a significant difference between "plans" and "opportunities." The arguments that Plaintiffs do make in an effort to twist the facts simply do not withstand the light of day.

The Court has given Plaintiffs more than enough opportunity to prove their case Plaintiffs have fallen far short of demonstrating anything like intentional misconduct by a majority of the Directors, who the record reflects acted in good faith to get the shareholders a substantial premium In fact, their allegations are frivolous, as shown by their offer to dismiss eight Directors The allegations against the Defendants should be dismissed

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

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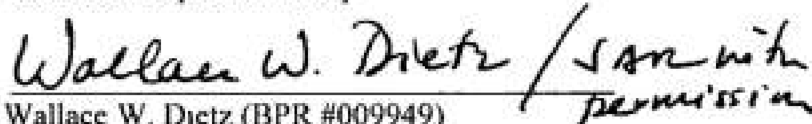

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