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IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

IN RE DOLLAR GENERAL	)	Master Docket No. 07MD1
	)	
	)	(Consolidated Action)
	)	
	)	Judge Brothers

AFFIDAVIT OF JOHN C. COFFEE AND EXHIBITS THERETO

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

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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)	)
Judge Thomas Brothers	)
--	)

STATE OF NEW YORK :
: ss.
COUNTY OF NEW YORK :

AFFIDAVIT OF PROFESSOR JOHN C. COFFEE, JR.

I. Introduction

1. I submit this affidavit, as an expert witness specializing in corporate governance who has been retained by counsel for defendants in connection with the above litigation. Earlier, at the time of the motion for a temporary injunction in this case in 2007, I also filed an affidavit in opposition to that motion, which is attached hereto as Exhibit A[1]. In that earlier affidavit, I sought to provide an overview of the general procedures, customs, norms and conventions followed in merger and buyout transactions involving publicly held corporations, and I focused in particular on the performance of

[1] In addition, I attach hereto Exhibits B, C, D and E which consist of a list identifying documents relating to this matter that I have reviewed (Exhibit B), my curriculum vitae (Exhibit C), a list identifying my testimony given in the last four years (Exhibit D) and a statement of my compensation and time spent working on this matter (Exhibit E).

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backdrop of those conventions, norms and procedures The purpose of this affidavit is simply to update that earlier affidavit. As will be seen, I do not believe that any of my earlier conclusions need to be modified or qualified in any significant way. I continue to believe that an independent board ran an unconflicted auction-like process that produced an attractive transaction for Dollar General's shareholders. Indeed, with each passing day, that price looks more attractive and the consequences of further delay look as if they would have been potentially very adverse for Dollar General's shareholders. Still, documents and testimony necessarily arise in connection with discovery that were not available at the time of the injunction motion, and new Delaware decisions have been relied upon by Plaintiffs in a manner that, I believe, overstates their significance. Both require some comment and analysis.

2. This affidavit will basically (i) examine the new evidence, chiefly emails that have emerged in discovery, (ii) focus on a critical timing difference that separates when a board's and management's conduct should be examined under the traditional business judgment rule from when, if ever, a higher standard of "enhanced scrutiny" applies, (iii) analyze the new Delaware case law cited by Plaintiffs and an even more recent Delaware decision that clearly disagrees with Plaintiffs' interpretation of the Delaware law; (iv) assess whether Dollar General's 64 page proxy statement omitted any material information, including with respect to an alleged concealed plan to double Dollar General's number of stores, that investors reasonably needed to make an informed decision; and (v) evaluate whether Plaintiffs have adequately alleged any facts that, if proven at trial, would justify holding Kohlberg Kravis & Roberts Co. ("KKR") liable as an aider and abettor of a fiduciary breach.

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3. A more basic, overview comment is useful at the outset From a corporate governance perspective and holding aside for the moment the nuances and potential subtleties of different legal standards, this case is characterized by five "super-material" facts that overwhelm and overshadow everything else in this case:

(a) an extremely generous 31% premium was paid to the Dollar General shareholders;

(b) the strategic review conducted by Dollar General and later its negotiations with KKR were handled by an independent board, none of whose members had any affiliation with KKR and nine of whose eleven members were entirely independent of management as well;

(c) even before the negotiations with the private equity firms began, Dollar General's board had undertaken an extensive review of its operations and business model and determined the highest valuation that could be placed on the company under those assumptions or under the restructuring contemplated by its Project Alpha; thus, it was well positioned to respond to outside offers because it had already determined the highest valuation that could be assigned the company, absent an external offer;

(d) the Strategic Planning Committee ("SPC") of the board, with the advice and assistance of some of the preeminent legal and investment banking firms in the United States, conducted a two step auction-like process that gave an extensive due diligence opportunity to four of the best known firms in the private equity business, at the end of which three of the four firms simply dropped out and were unable to sustain their initial bids. One

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and only one firm (KKR) topped its initial bid by a healthy margin – and stood all alone;

(e) a 99% supermajority of the shareholders (including the institutional shareholder plaintiff in this case) voted in favor of the transaction approved by Dollar General's independent directors. Dollar General's former CEO and largest shareholder (controlling some 17% of the stock), Cal Turner ("Turner") elected to take the same $22 price as the other public shareholders, implying that he did not believe the transaction to be underpriced or that he was unaware of any concealed information suggesting a higher value from some alternative business strategy that Dollar General could pursue.

4. Ironically, history shows that a fact pattern involving a competitive auction in which one bidder tops the other sophisticated contenders by a considerable margin (indeed, with the others even backing off from their initial tentative bids) has all the classic characteristics of the "Winner's Curse" – that is, an auction contest in which the winner has overpaid. Because the "winner" has deviated from the consensus of expert opinion, one can understand that it might wish to re-consider if that were possible. In addition, this transaction was one of the last private equity deals to close before the market for buyouts began to close down in 2007 (with some other private equity firms even reneging, or attempting to renege, on their earlier commitments) All this suggests that Dollar General's shareholders were extremely fortunate that its board did not delay.

5. As the foregoing facts suggest, this was a case where delay or any procedural requirement that prevented the board from closing would have likely

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adversely impacted Dollar General's public shareholders. But Plaintiffs, as the self-appointed champion of Dollar General's shareholders and holding less than 0.016% of its stock, insist that Dollar General's independent directors should have delayed and rejected KKR's offer, seeking either another bidder or more extended negotiations, thereby exposing the Company both to a loss of an offer and to the risks of restructuring pursuant to Project Alpha. Such a legal claim simply ignores the teaching of the business judgment rule, long recognized and upheld in Tennessee courts, that the business and affairs of the corporation are to be run by its board and not by a dissident shareholder. Even in Delaware with its standard of "enhanced scrutiny," such claims are routinely dismissed at an early stage. Tennessee courts recognize the wisdom underlying the business judgment rule's fundamental view that boards, and not courts, are the appropriate decision-maker to determine the most sensitive decisions in a corporation's business life. To adopt Plaintiff's theory in this case would take Tennessee well beyond the mainstream of Delaware decisions, which are already more willing to subject an unconflicted and independent board to judicial scrutiny than Tennessee has been. Indeed, if Plaintiff's theory were adopted by this Court, the result would be unsettling to the corporate bar and even more disturbing to the directors of Tennessee corporations who would now know that in facing difficult decisions they could be easily "second guessed" by dissident shareholders, who could always claim that the board should have engaged in more process and due care

II. The New Evidence: Inappropriate, but Harmless

6. Between August 17, 2006 and November 19, 2006, a series of emails were sent by Mike Calbert ("Calbert") at KKR to George Roberts ("Roberts"), a founder and

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principal of KKR, commenting on the state of the discussions between KKR and Dollar General. These emails purport to quote or summarize the views of David Perdue ("Perdue"), the then CEO of Dollar General, or Cal Turner, a former officer, member of the founding family and Dollar General's largest shareholder. Although Perdue disputes some of Calbert's comments, I will assume for present purposes that these comments are essentially accurate and then assess whether they change my prior evaluation or show any distorting influence or taint that compromised the performance of the Dollar General board or its Strategic Planning Committee ("SPC"). Plaintiffs in their recent Omnibus Memorandum In Opposition to the Motions for Judgment on the Pleadings ("Omnibus Memorandum") lead off with these emails at pages 8 to 16, clearly believing that it is their strongest evidence. If these statements were made by Perdue, I would agree that his behavior was inappropriate. Yet, as next discussed, these emails mainly involve gossip more than material information. In sum, they tend to show (i) how limited and equivocal Perdue's power was with respect to Dollar General's board, (ii) how skeptical some of the most important actors in the Dollar General drama were of him, and (iii) how peripheral the impact of his disclosures was once the SPC took control of the process. While Plaintiffs aim their fire at Perdue, they ultimately need more than cosmetics to make their case.

7. In the initial August 17, 2006 email, Calbert advised Roberts that Perdue has informed him that he has had meetings with TPG and Goldman, but "wants to pursue a transaction exclusively with us."[2] At the same time and somewhat inconsistently, Perdue allegedly also told him that he was "concerned he will get in 'too deep' before the [board] meeting" on August 29th. Clearly then, Perdue was holding back and showing

[2] Exhibit 42 to Calbert Deposition

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some restraint. Lastly, Perdue allegedly advised KKR of the "importance of bringing Turner on side." This last statement approached the self-evident, as the former CEO and member of the founding family of Dollar General controlled an obviously significant 17% block of the Company.

8. Next, in a September 20, 2006 email from Calbert to Roberts, Calbert reported that Perdue told him that he had just met "with his 'most influential board member' . . . who was very supportive of him engaging exclusively with us."[3] Although these alleged selective revelations to Calbert about the attitudes of individual board members would be ill-advised, there is in contrast nothing wrong with a CEO trying to maximize value for all his shareholders by enticing a first bidder into a competitive auction. Nor does such a CEO have material information to report to his board if his only contacts with the potential bidder are casual, largely informational, and do not relate to any specific proposal. The real (and much more frequent) fiduciary abuse is committed by the very different and more common CEO who tells the prospective bidder to go away because it will meet only a stonewall of resistance.

9. Several weeks later, on October 6, 2006, Calbert emailed Roberts a summary of a phone conversation with Perdue in which Perdue discusses the general opinions of David Wilds and Cal Turner toward a buy out. The latter "still won't declare himself to David," while the former "is requesting a board meeting Sunday night during which he wants to disclose the conversation with KKR, form a special committee, and recommend" the start of due diligence.[4] Thus, by the date of that board meeting in early October, roughly five months before the merger is announced to the world, the Dollar

[3] Exhibit 7 to Calbert Deposition.
[4] Exhibit 10 to Calbert Deposition.

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General board was fully informed of KKR's interest, and it promptly took control of the process. In the world of "M&A" transactions, five months is a relative eternity.

10. The morning after the October 8th board meeting, on October 9, 2006, Calbert emailed Roberts that Perdue told him that "the board call last night was controversial with 2 directors (Thornburg and one other)" but that "David Wilds and Denny (head of governance committee) led the charge for the transaction."[5] Perdue further summarized "that Cal, Wilds and Denny all want to do the transaction."

11. Three days later, on October 11, 2006, however, Perdue allegedly reported to Calbert, and Calbert passed onto Roberts the following less optimistic message:

> ". . . spoke with Perdue; never caught up with Wilds. The BOD gave him a message to deliver to other bidders – "Pursuing (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. . . ."[6]

Although Perdue allegedly again outlined the positions of the individual directors, his basic message was that the board was focused on its own strategic plan, Project Alpha, and would not be prepared to consider any other transaction until it had further evaluated Project Alpha.

12. On November 8, 2006, Calbert sent Roberts an email summarizing a discussion with Cal Turner, which recites that Turner, a non-director, told Calbert that the board had "formed a committee headed by Denny Bortoff (sic)" and retained Lehman and Lazard. Turner also told Calbert that "the board isn't completely comfortable with the motive of Perdue" and that "[s]ome of the board members think Perdue was not in

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[5] Exhibit 11 to Calbert Deposition

[6] Exhibit 12 to Calbert Deposition.

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synch with his management team."[7] Calbert summarized: "It sounds like Perdue is losing some credibility with the board." At the least, this exchange shows that Perdue was having only marginal impact on Dollar General's board and was hardly dominating them.

13. The next day, on November 9, 2006, Calbert, after a conversation with Perdue, emailed Roberts that the board was "focused on understanding the restructuring charge and how the stock will trade post-announcement."[8] He adds: "It is clear they will make the restructuring announcement in early December before pursuing a going private transaction" – in short the board was still committed to Project Alpha. Essentially, this was the same "message" that Perdue had given Calbert as reflected in the October 11th email discussed above.

14. Finally, on November 19, 2006, Calbert emailed Roberts that he had again spoken with Turner and that Turner expected that "the board would approach him to come back into the company (implying they would fire Perdue)." Turner added that while Perdue "continues to push his agenda for going private," "Perdue didn't have perceptive self-awareness to the growing discontent for his performance." Turner lastly added a comment that Calbert deemed 'strange': "but you know I'm not wed to anyone. In fact, I kind of enjoy being courted."[9] So, at the end of this email exchange on which Plaintiffs place their primary emphasis and position at the front of their Omnibus Memorandum, we find that everyone is aware of KKR's interest in Dollar General, that the board remains committed to Project Alpha, and that its leading shareholder wants to be "courted" – presumably in a competitive process. Rather than suggesting that KKR has locked up a deal with Dollar General, the message in these emails increasingly became

[7] See Exhibit 14 to Calbert Deposition.
[8] Exhibit 15 to Calbert Deposition.
[9] Exhibit 16 to Calbert Deposition.

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that the board was focused on Project Alpha, and that the company's largest shareholder (Turner) wanted to be "courted" – meaning that he was happy to have multiple bidders. All of this is fully consistent with a board that is in control of the process, that has not been "deceived" in any material respect, and that is only ready to consider a strategic offer if it will maximize value for shareholders over and above what Project Alpha offers. Moreover, there were still almost four months to go before the deal with KKR is struck.

15. What does all this add up to? Unquestionably, Perdue's alleged behavior in sharing confidential information about the attitudes of individual board members was ill-advised and potentially destructive of good working relationships within any board. His behavior, which he himself described as "naïve,"[10] need not be justified here in order to conclude that by itself it caused no injury to shareholders (indeed, it could have helped them by soliciting KKR to make an expression of interest in a transaction). Still, Plaintiffs assert in their Omnibus Memorandum that these emails reveal "a corrupt sales process designed to benefit Dollar General's senior management and KKR." (Omnibus Memorandum at p. 7). That is a considerable and unsupported leap. To begin with, it is far from clear that Perdue passed truly material information to KKR, and KKR does not appear to have been able to use this information to any real advantage, as the SPC quickly took control and ran an auction-like process that gave KKR no special advantage. Nor do these emails show Perdue to be a dominating chief executive who could impose his will on the board. Just in the material quoted above, it is clear that Turner (a substantial shareholder but not a director) was skeptical of Perdue's performance and anticipated his removal by the board. Even more importantly, during this period from early October to November 9, 2006, the Dollar General board was focused on its current

[10] Perdue Aug. 25, 2008 Tr. at 128; 144

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strategic plan, Project Alpha. Even Perdue informed Calbert that the board is "focused on understanding the restructuring charge and how the stock will trade post-announcement" and will wait to see the market reaction to that announcement "before pursuing a going private transaction."[11] Thus, even if we deem Perdue to have made improper disclosures to Calbert, the essence of what he is disclosing is that the Dollar General board remains committed to Project Alpha and will consider an alternative project only if and when it decides that Project Alpha cannot maximize value for its shareholders. Such a disclosure is essentially harmless. Indeed, no auction was anywhere near being in view by the end of these emails and thus could not be tainted by them.

16. Finally, and most importantly, all these alleged disclosures were made to Calbert at a time when the discussions were at a very early stage and a sale or other transaction was far from inevitable. Although it is uncertain whether Tennessee would follow Delaware and give "enhanced scrutiny" to the board's actions at some later point, it is clear that, even in Delaware, "enhanced scrutiny" does not apply before that moment at which the sale or breakup becomes inevitable. Moreover, as discussed more fully at paragraph 25 infra, Tennessee courts have indicated that a duty of "enhanced scrutiny" should not apply in "the garden variety change of control transaction" where the board is not seeking to resist the bidder by implementing extraordinary deal protection devices and self-dealing does not taint the process. This is clearly such a "garden variety" case, and hence the standard business judgment rule should govern.

III. <u>During the Time Period On Which Plaintiffs Have Focused, Dollar General Had Not Approached the Zone of "Enhanced Scrutiny," and its Directors Are Therefore Entitled to the Full Protection of the Business Judgment Rule During This Period</u>

[11] See text supra at note 6

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17. Timing is critical. But Plaintiffs ignore it and assert that Perdue and Dollar General's board were subject to a unique standard of non-deferential review from the very first moment that the possibility of a buyout was discussed. This is not the law in any jurisdiction of which I am aware, including Delaware. Admittedly, in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 n. 16 (Del 1986) and later in Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 44 (Del. 1994), Delaware courts took the position that once a "sale" or breakup became "inevitable" so that the public shareholders would lose any further opportunity for a control premium, then the board was obliged to act so as to reasonably maximize the value of the sale to the shareholders. Other jurisdictions do not necessarily follow Revlon and its progeny, but even in Delaware, it would be clear that the Revlon rule could not be applied to conduct by officers and directors at the time of the preliminary discussions that were analyzed above The precise contours of this "Revlon" zone under Delaware law were most fully outlined in Arnold v. Society for Savings Bancorp, 650 A.2d 1270, 1290 (Del. 1994) where the Delaware Supreme Court ruled that "the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders" applied basically in "three scenarios: (1) 'when a corporation institutes an active bidding process seeking to sell itself or effect a business reorganization involving a clear break-up of the company," Paramount Communications, Inc. v. Time, Inc., Del. Supr., 571 A.2d 1140, 1150 (1990); (2) "where in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company," id; or (3) when approval of a transaction results in "a sale or change of control, QVC, 637 A.2d at 42-43, 47."

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18. None of these moments had even approximately been approached at the time of the foregoing emails between Calbert and Roberts. Indeed, more recent Delaware decisions have made it even clearer that Revlon duties are still not triggered even when the board considers strategic alternatives or conducts a market check (which is essentially what Dollar General was doing throughout all of 2006 and early 2007). As the Delaware Chancellor held in In re Paxson Communications Corporation Shareholder Litigation, 2001 WL 812028 (Del. Ch. July 12, 2001), the mere decision to "explore strategic alternatives," and even the pursuit of such alternatives through preliminary negotiations, does not trigger Revlon duties. There, in a case involving a board that was reviewing strategic alternatives, Chancellor Chandler wrote:

> "Revlon does not apply where the plaintiffs cannot allege that a sale or change of control has taken place or necessarily will take place such that the public shareholders of a corporation have been or will be deprived of a control premium." Id. at *7.

19. Between the period of the October 8, 2006 board meeting at which KKR's interest was revealed to all directors and the Strategic Planning Committee's request for bids from Bain and KKR in February 2007, Dollar General was essentially at the same juncture as Chancellor Chandler discussed in Paxson Communications above: namely, it was only reviewing strategic alternatives. Indeed, even Perdue was telling Calbert at the time of the November 9th email from Calbert to Roberts that the Dollar General board was still committed to Project Alpha. As he recognized, the restructuring contemplated by Project Alpha was to be announced in early December, and the board intended to evaluate progress under it "before pursuing a going private transaction." This means that at the stage that Plaintiffs assert that Perdue was leaking information to Calbert about individual directors' preferences, Dollar General's board was still governed by the

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standard business judgment rule. At most, KKR had made early stage "feelers" or expressions of interest that never discussed price or other sensitive terms. There simply was no deal that Perdue could have accepted, even if he had wanted to. In short, the attempt to assert that Revlon duties had been triggered misses the mark by a wide margin because the company never entered or approached the Revlon zone. Although Perdue may have wanted an overture to be made by KKR, this does not trigger "enhanced scrutiny." Even if improper, his gossiping with Calbert was innocuous. Only when the board commits itself to a transaction or an auction leading to an inevitable sale does Delaware law shift to the higher standard of enhanced scrutiny.

20. In contrast, Plaintiffs seem to be assuming that on the initial mention of the term "buyout" or "going private," Delaware law shifts to its highest standard and requires a CEO or director to turn the matter instantly over to an independent special committee. Delaware law does not do this, and certainly Tennessee would be poorly advised to adopt such a standard (even if Delaware had done so). It is simply unrealistic. As it was, Perdue did inform key directors – Wilds and Bottorff – promptly and the full board knew of KKR's interest by its October 8th meeting – a full five months before the deal was announced. To invalidate a transaction negotiated by independent directors after an elaborate auction and after 99% shareholder approval simply because the CEO was arguably slow in informing his board of the initial overture to him months earlier would elevate form over substance and accomplish nothing of value for shareholders.

21. Viewed from a more practical perspective, it is an unavoidable fact of corporate life that CEOs will come into occasional contact with investment banks and/or private equity firms – all of which are interested in doing deals if an attractive occasion

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presents itself. Naturally, "M&A" professionals want to maintain friendly relations with chief executives in order to be on the short list for the CEO's consideration if the company does later determine to seek a buyer. Correspondingly, virtually all CEOs are at least interested in what valuation the "M&A" market would place on them (and would like to get an estimate from the leading firms without necessarily placing themselves on the auction block) Against this backdrop, it is understandable that CEOs will have informal contacts with investment bankers in which they seek estimates of how their firm would be valued in this market. Every such contact and conversation cannot realistically be reported to the board.

22. Although Plaintiffs assert that Perdue's intent in this case in conducting preliminary discussions with private equity firms during the Summer and early Fall of 2006 was predatory and self-seeking, he may have only been seeking a "free valuation" of his company, or he may have been convinced that a buyout was simply the best option for Dollar General's shareholders. Neither purpose amounts by itself to a fiduciary violation and both are fully consistent with the pursuit of the shareholders' best interests. What is clear, however, is that the Dollar General board was fully apprised of KKR's interest at an early stage before any due diligence was undertaken. The board and its SPC then assumed control, and not until the request for formal bids in February, 2007, did Dollar General even arguably enter the zone of enhanced scrutiny

23. In this case, in order to survive Dollar General's exculpatory charter provision, Plaintiffs must show not simply negligence or lack of due care, but a breach of the duty of loyalty. Nothing in the foregoing emails shows any involvement by Dollar General's SPC or its independent directors, even under the most favorable interpretation

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of these facts from Plaintiffs' perspective. Even if Perdue is deemed to have engaged in improper conduct, no reason exists to believe, based on these asserted facts that the SPC, assisted by skilled professionals, did not fulfill their duties by conducting an active search after having already conducted an intensive review of the company's existing business model. As discussed later (at paragraph 27), Vice Chancellor Strine of Delaware has recently held that Delaware law, even in the special context where enhanced scrutiny applies, does not permit a court to characterize what it sees as "deficiencies in the deliberation of an independent board . . . as not merely negligence or even gross negligence, but as involving bad faith." In re Lear Corporation Shareholder Litigation, 2008 WL 4053221 at *1 (Del. Ch. September 2, 2008). Here, while any claim of negligence seems itself tenuous, there is not even a hint of bad faith or a loyalty violation by the SPC or the independent majority of the board.

IV. Plaintiffs' Claims Rely Desperately On a Single Delaware Chancery Court Decision – Ryan v. Lyondell Chemical Co. – a Case Which They Overread With Abandon

24. In Ryan v. Lyondell Chem. Co., 2008 Del Ch. LEXIS 105 (Del. Ch July 29, 2008), Delaware Vice Chancellor Noble did refuse to grant summary judgment to defendants on certain Revlon-based claims (while granting summary judgment to these defendants on all other claims). Plaintiffs cite Ryan constantly in their Omnibus Memorandum, relying on it like the proverbial drunk relying on a light post, not for illumination, but for desperate support. Still, the only fact in common between this case and Ryan is that its merger was also priced at a substantial premium. The differences between the two cases overwhelm this one similarity. They include.

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1. In Ryan, the "board of directors had neither sought the advice of investment bankers to value the company, nor was it actively seeking strategic business partners." Id. at *3;
2. In Ryan, "[i]n response to [the acquirer's] unsolicited offer for the Company, the Board avoided an active role in negotiating the Merger, instead delegating much of that task to [the Company's] Chairman and Chief Executive Officer . . ." Id.;
3. Similarly, "[t]he Board never conducted a formal pre-signing market check to determine whether a better price could be obtained;" Id ;
4. "The final merger agreement also employed several deal-protection devices," and "[t]he Board eventually pulled [its poison] pill with respect to [the acquirer] but, otherwise, the pill remained 'active' against other unsolicited bids " Id. at *6 n.6;
5. Ryan was a single bidder case in which there was no other interested potential acquiror, nor any process to attract them, nor any market check on the offered terms;
6. Most of all, "the whole deal was considered, negotiated, and approved by the Board in less than seven days." Id., and
7. As the Court in Ryan stressed in a subsequent letter to counsel with respect to the issue of an interlocutory appeal, its decision was reached on a sparse record and without discovery, leading it to feel uncomfortable in dismissing the case on such a thin record. See Letter, dated August 29, 2008 from Vice Chancellor John Noble to Counsel in Ryan v. Lyondell Chemical Co., supra,

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at page 5, n.13 ("The record, at this preliminary stage, simply is not sufficiently developed to rule out all material fact issues, and the Court may not weigh the evidence to reach those conclusions"). In short, the undeveloped state of the record in Ryan makes it a dangerous precedent for another court to rely upon.

25. Although Plaintiffs quote from Ryan liberally, they ignore the essential sentence in which the Court explains its rationale.

> "Essentially, the Board acted as a passive conduit to the stockholders for an unsolicited, attractive bid for the Company." Id. at *47.

That is not this case, because the Dollar General board and its SPC (1) were advised by preeminent "M&A" counsel, specially retained for this assignment, and highly experienced investment bankers; (2) had already conducted an intensive review incident to announcing a planned internal restructuring and had determined the highest valuation that could be assigned their stock based on all internal corrective measures, thus positioning them to be able more quickly to evaluate and respond to external offers; (3) conducted an active auction in which four major private equity firms conducted due diligence, (4) compared the offered price both to the best possible outcome under its own Project Alpha and to the preliminary indications of interest expressed by other bidders; and (5) did not rush to any outcome, but stretched out the entire process for several months, not seven days. The winning bidder topped the rest of the field by a non-trivial margin, and the other bidders withdrew with no desire to continue the contest.

26. Based only on this authority, Plaintiffs have asked this Court to ignore the decision in City of Pontiac General Employees' Retirement System v. Thomas Nelson,

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Inc., No. 06-501-I (III), (Tenn. Ch. Ct. Davidson Cty., May 4, 2007), which held that the Revlon doctrine was inapplicable to a "garden variety change of control transaction":

> "The Court dismisses this argument because its review of Delaware law reveals that this doctrine has been applied mostly in hostile bid take-over cases to assess protection devices. The doctrine does not appear to have majority application in the garden variety change of control transaction where there is no controlling shareholder on each side of the transaction." Id. at 22.

Plaintiffs assert that Ryan essentially extends the doctrine to "garden variety" mergers See Omnibus Memorandum at p 57 Not only can a single Delaware Chancery Court decision not reverse settled Delaware Supreme Court law, but Ryan did not by any means involve a "garden variety" merger in which an independent committee, advised by its own investment bankers and counsel, negotiates the transaction; rather, it involved a rushed seven day deal in which the board shut its eyes and deferred wholly to its CEO. Here, the CEO was taken out of the process at the outset; other bidders were invited in; the process continued for months; and a poison pill was not used to block other bidders. These differences suggest that Ryan supplies little basis for ignoring City of Pontiac or assuming that Delaware law has changed significantly.

27. The status of the Ryan decision, even in Delaware, is controversial. An article in the New York Times blog "Dealbook" describes the decision as "a bombshell and will likely result in more procedure for boards considering a sale of their company." See "Strine Speaks as Delaware Decision Makes Waves," (available at http://dealbook.blogs.nytimes com/category/professor) (September 9, 2008). Also according to the New York Times' Dealbook, a subsequent Delaware "change of control" decision by Vice Chancellor Leo Strine was an implied criticism of Ryan. In In re Lear Corporation Shareholder Litigation, 2008 WL 4053221 (Del. Ch. September 2, 2008), Vice

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Chancellor Strine granted the defendants' motion to dismiss plaintiffs' alleged duty of good faith violations where the board had been advised by independent experts that the deal was fair, writing:

> "When a discrete transaction is under consideration, a board will always face the question of how much process should be devoted to that transaction given its overall importance in light of the myriad other decisions the board must make. . . . Courts should therefore be extremely chary about labeling what they perceive as deficiencies in the deliberation of an independent board majority over a discrete transaction as not merely negligence or even gross negligence, but as involving bad faith.[62] In the transactional context, a very extreme set of facts would seem to be required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties. Where, as here, the board employed a special committee that met frequently, hired reputable advisors, and met frequently itself, a Caremark-based liability theory is untenable." Id. at *11.

Then, in footnote 62 to the above text, Vice Chancellor Strine made a pointed comment, which, the New York Times blog said, "addresses the issues raised by Ryan." Noting that courts should "recognize that not all situations governed by Revlon have the strong sniff of disloyalty that was present in . . . [that] case," he observed:

> "When . . . a Revlon case simply involves the question of whether a board took enough time to market test a third-party, premium-generating deal and there is no allegation of a self-interested bias against other bidders, a plaintiff seeking damages after the deal was closed cannot . . . rest on quibbles about due care. And in that sort of scenario, the absence of an illicit directorial motive and the presence of a strong rationale for the decision taken (to secure the premium for stockholders) makes it difficult for a plaintiff to state a loyalty claim." Id. at *11 n. 62.

Of course, it is only if Plaintiffs here can state a loyalty claim that they can escape Dollar General's exculpatory charter provision. Vice Chancellor Strine's comments about Delaware courts normally avoiding construing negligence as evidence of a duty of loyalty violation indicate that Ryan is a case seemingly outside the mainstream of the Delaware case law and not likely to be followed by others on the Delaware Chancery Court. In any

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event, the facts of the instant Dollar General case are far closer to those in Lear Corporation than those in Ryan, because they involve an active search, an independent special committee, and the use of expert professional advisors. It would thus be ironic if a Tennessee court were to depart from Tennessee's normal allegiance to the standard business judgment rule and follow a debatable Delaware decision that was later reversed on appeal.[12]

V. Plaintiffs' Disclosure Theory of Liability Fails Because It (a) Overlooks the Requirements in Both Delaware and Tennessee that the Omissions Cause Actual Injury to the Shareholders, (b) the Omitted Information Was Not Material, and (c) Dollar General's Exculpatory Charter Provision Applies to this Case

28. Although Plaintiffs are eager to rely on Ryan v. Lyondell Chemical Co., 2008 Del. Ch. LEXIS 105 (Del. Ch. July 29, 2007) in some contexts, they overlook that it dismissed disclosure claims closely resembling those here (but asserted in a case where the board's performance was extremely passive). As Ryan explained, Delaware law disfavors and discourages "ex post litigation of disclosure claims." Id. at *101. Ryan particularly relied on In re Staples, Inc. Shareholders Litig., 792 A 2d 934, 960 (Del. Ch 2001), quoting it for the proposition that:

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

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[12] It is also noteworthy that Vice-Chancellor Noble has supplemented his original opinion in Ryan v. Lyondell Chemical Co., supra, with a decision on defendants' motion for an interlocutory appeal to the Delaware Supreme Court. There, in denying that appeal, he stressed how modest his original opinion was:

> "It simply denied a motion for summary judgment on a sparse preliminary injunction record where the facts, unfortunately, suggest an inference of conscious board inaction in the face of a known duty to act"

See Letter, dated August 29, 2008, from Vice Chancellor John Noble to counsel in Ryan v. Lyondell Chemical Co., supra, at pages 6 to 7. Here, in contrast, there has been ample discovery and the record is far from sparse

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29. As Chancellor Chandler has similarly written this year in In re Transkaryoptic Therapies, Inc., 2008 Del. Ch. LEXIS 76, at *40 n.55 (Del. Ch. June 19, 2008), plaintiffs may lack standing when they sue on a disclosure cause of action after the fact because:

> "The injury suffered by plaintiffs was an infringement of their right to cast informed votes on the merger . . . [T]hat injury is no longer redressable. Alternatively, to the extent plaintiffs can argue that the alleged disclosure violations' injury was the illegal consummation of the merger, they lack standing for potentially two reasons. First, there is no evidence of causation; plaintiffs have pointed to nothing in the record indicating that the vote would have been different but for the allegedly bad disclosure Plaintiffs merely speculate. Second, the injury cannot be redressed properly because the merger cannot be undone . . . Further, rescissory damages are exceptional . . . and are unwarranted here. . . ."

At a minimum then, Chancellor Chandler is requiring that plaintiffs "point" to something in the record suggesting that the vote would have been sufficiently different had the shareholders known the omitted information. That is a particularly high and frankly insurmountable hurdle here where there was a 99% shareholder vote in favor of the transaction. Moreover, one plaintiff in this case (the City of Miami General Employees' & Sanitation Employees' Retirement Trust) actually voted for the transaction, and the other plaintiff (William Hochman) did not vote. This hardly suggests that more (and frankly abstruse) information would have elicited a negative vote from either.

30. Tennessee seems to have adopted a position similar to Delaware's skepticism of ex post disclosure litigation, with its Chancery Court recently holding, in an alleged nondisclosure case, that "the nondisclosure itself . . . must cause injury." See Indiana State District Council of Laborers and Hod Carriers Pension Fund v. Brukardt, Case No. 05-1392-II at 24. (Chancery Ct August 27, 2007); see also, City of Pontiac

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General Employees' Retirement System v. Thomas Nelson, Inc., No 06-501-I (III) (Tenn. Ch. Ct Davidson City, May 4, 2007) at pp. 14-15. In Brukardt, the Chancery Court found that plaintiff "had failed to demonstrate that any alleged omission in the Proxy . . . caused any actual harm to the shareholders." It added:

> "For instance, Plaintiff has not alleged that the merger would not have been approved had the omitted information been disclosed. . . . More importantly, Plaintiff has not alleged that the shareholders would have been better off had the deal not been approved " Id. at 24.

31. In the instant case, Plaintiffs have strenuously argued that the omitted information was material. See Omnibus Memorandum at pp. 43-56. But that is simply not enough. They have not pled, and cannot hope to prove, that the Dollar General shareholders under Brukardt "would have been better off had the deal not been approved." Their allegations are thus insufficient under both Delaware and Tennessee law in this ex post context.

32. Plaintiffs' theory of materiality is deficient for several independent reasons. First, although the standard of materiality is that specified in TSC Industries v. Northway, 426 U.S. 438, 449 (1976), that standard requires the "showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder." Here, Plaintiffs press a theory of materiality based on their claim that Dollar General planned to grow "from 8,000 stores to 15,000-18,000 stores – more than doubling in size." Omnibus Memorandum at 45. Although, as next discussed, this alleged store expansion plan seems simply a fabrication of Plaintiffs, the initial problem with it is that it was never a relevant option for Dollar General's shareholders. Their choice was between the merger with KKR or the restructuring that their own board would have undertaken pursuant to Project

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Alpha (which actually contemplated store closings and a restructuring, not a willy-nilly expansion and the doubling of stores). Whatever post-transaction plans KKR had (and Plaintiffs have not alleged them with any particularity), Dollar General's public shareholders never had the option of participating in the restructured enterprise after the closing. This is the standard and largely inevitable choice that is involved in a "going private" transaction, which typically does not allow public shareholders to participate on a post-transaction basis. Thus, the Dollar General shareholders had to accept or reject the merger terms approved by their board, and they could not opt to participate in the post-merger firm.

33. Next, there is no credible evidence that Dollar General's board had any concealed plan to increase store openings (and would have done so but for the KKR merger). In fact, Plaintiffs, themselves, assert that the Dollar General board knew nothing of any plans to double, or even increase, their number of stores. See Omnibus Memorandum at pp. 45 and 47 n.100 Even if Plaintiffs believe that Perdue had such a plan, Perdue did not possess the power to impose any dramatic growth program on a board that had already become skeptical of him and that favored Project Alpha's focus on trimming operations.

34. Plaintiff's allegation that there was a "secret" plan to expand from 8,000 to 15,000 or more stores lacks any "real world" foundation in the testimony of any witness. First, the idea that there was a "saturation level" for Dollar General and its competitors of 15,000-20,000 stores had appeared in analyst reports.[13] Second, the possibility of increasing Dollar General's stores depended on increasing store "margins

[13] See Perdue Deposition, August 25, 2008, at 179.

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by 200 basis points" and accepting a "20 percent internal rate of return."[14] And store margins had been declining.[15] Third, as David Beré, the successor to Perdue as chief executive of Dollar General, testified, the Dollar General board was focused not on store expansion, but on increasing store profitability, which required that Dollar General "slow the store growth so we could work on some of the operations."[16] As he emphasized, Dollar General had grown too fast and needed to be brought under control:

> "Historically, we were opening a lot of stores every single year. A few years ago, . . . the management team and the board really evaluated whether that was the right strategy to continue that growth. We made a decision as part of Project Alpha to slow that store growth down for a few years, and really focus on, if you will, getting-better-before-you-get-bigger-type thing."[17]

In essence, Project Alpha's goal "was to close the stores that weren't performing well,"[18] and this implied that to open a new store, Dollar General would need to project an internal rate of return that "had to be in the 20 percent range."[19] As part of Project Alpha, Dollar General had for the first time undertaken a systematic review of all its stores and reached the decision to close 400 stores.[20] Beré further estimated that Dollar General planned to replace these closures with new stores with a higher internal rate of return, but growth would be slower. Dollar General's two year "new-store-growth-plan" estimated no more than 300-to-350 openings in the first year and 200 in the second (or current) year.[21] On this basis, with 400 closures and a total of 500 to 550 new openings over two years (for a net gain of 150 stores at best), Dollar General was certainly not about to

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[14] See Calbert Deposition, July 10, 2008, at 164.
[15] Id at 164
[16] See Beré Deposition, June 6, 2008, at 116
[17] Id. at 139
[18] Id at 143.
[19] Id. at 144.
[20] Id
[21] Id at 145.

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increase its size significantly. As Beré added, annual new store openings is "not ever going to be 700 again."[22] Finally, as Beré testified in detail, Dollar General's plans about store opening and store closings did not shift as it moved from a public company to a private company.[23] For the future, Beré estimated that Dollar General could open 400 to 500 new stores a year.[24] On this basis, it would take at least sixteen years to double Dollar General from 8,000 to 16,000 stores (and that also unrealistically assumes no store closings).

35. Ultimately, the evidence that best refutes Plaintiffs' theory that KKR and Perdue conspired to conceal a secret plan to profit from doubling Dollar General's number of stores is the post transaction record. According to Dollar General's Annual Report on Form 10-K for 2007, Dollar General operated 8,229 stores as of February 2, 2007. See Dollar General Annual Report on Form 10-K for 2007 at p. 2. As of August 1, 2008, it operated 8,308 stores in 35 states. This is a net increase of only 79 stores (or less than 1%). See Dollar General Corporation, Quarterly Report on Form 10-Q for the Quarterly Report ended August 1, 2008 at p. 27 So much for Plaintiffs' phantom theory about a plan to double the number of stores!

36. Finally, Plaintiffs' scenario that KKR had conspired with Perdue to conceal the future profits in expanding Dollar General's stores does not explain why KKR's own invited partner, TPG, withdrew and did not join in KKR's bid. Windfalls of the kind that Plaintiffs allege are not lightly rejected, and KKR invited TPG to join it as a co-bidder. Thus, TPG's withdrawal strongly suggests that Plaintiffs' story about a plot to

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[22] Id. at 146-147.
[23] Id. at 147 ("That was public . . . Dollar General and private Dollar General, the plan hasn't changed now")
[24] Id. at 177

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conceal from Dollar General's shareholders the doubling of its stores sounds fanciful. For all these reasons, information about a non-option that Dollar General's shareholders did not possess to double the number of stores was not material.

37. In any event, Dollar General's board is entitled to the protection of the exculpatory provisions in the Dollar General charter, because any failure to disclose information that they did not know can only be called a violation of the duty of care, and not the duty of loyalty. Plaintiffs concede that the board lacked knowledge of any plan to expand Dollar General's store base. See Omnibus Memorandum at 45 and 47 n.100. Hence, they could not have failed to disclose this information because of bias, disloyalty, or personal self-interest. This indeed is precisely what Ryan v. Lyondell Chemical Co., 2008 Del. Ch. LEXIS 105 (Del. Ch., July 29, 2008), recently held. There, Vice-Chancellor Noble concluded in a case where the board did indeed seem to have been extremely passive:

> "In any event, absent any evidence suggesting something more nefarious than a mere oversight, the Court concludes that Lyondell's exculpatory charter provision absolves the Board of liability for money damages resulting from the alleged disclosure violation." Id. at 99.

To sum up, one can, at least in theory, be negligent for not being aware of information never presented to the board, but one cannot breach the duty of loyalty with regard to nondisclosures of information of which one had no knowledge

VI. Plaintiff's Aiding and Abetting Theory Against KKR Cannot Stand Because KKR Negotiated the Merger At Arm's Length with Dollar General's SPC and Because Loss Causation Cannot Be Shown

38. Plaintiffs rely heavily on Ryan v. Lyondell Chemical Co., 2008 Del. Ch. LEXIS 105 (July 29, 2008), but in so doing they must accept the bitter with the sweet. Ryan is a case that may prove to be outside the mainstream of Delaware corporate law in

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some respects, but it is certainly consistent with Delaware law (and the law of other jurisdictions as well) in dismissing the aiding and abetting claims against the acquiring company Id. at *110 to *112. Delaware law traditionally requires the plaintiff asserting such a theory to prove: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted actions of the fiduciary and non-fiduciary." Globis Partners, L.P. v. Plumtree Software, Inc., 2007 Del. Ch. LEXIS 169, 2007 WL 4292024, at *15. Here, only the first of these four factors can be shown Following other Delaware cases, Ryan found that:

> "Evidence of arms-length negotiations with fiduciaries negated a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries." (citing In re Gen Motors (Hughes), 2005 Del. Ch. 65, 2005 WL 1089021, at *26." Id. at 110.

Other Delaware decisions have insisted that plaintiff must allege credibly that the acquirer "participated in the board's decisions, conspired with the board, or otherwise caused the board to make the decision at issue." Malpiede v Townson, 780 A 2d 1075, 1098 (Del. 2001). KKR did none of those things. Moreover, because Dollar General's SPC sought other bidders in good faith, this alone shows the absence of any conspiracy.

39. Dollar General's SPC clearly negotiated at arm's length with KKR Its efforts to maximize shareholder value are far clearer than in Ryan, where the board did virtually nothing, but the "aiding and abetting" cause of action was still dismissed. Plaintiffs' only evidence of less than arm's length conduct depends on their interpretation of the earlier discussed emails from Calbert to Roberts about the attitudes of Perdue and

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Turner.[25] But Perdue did not negotiate the transaction and was prophylactically isolated from it from the October board meeting on. Moreover, his disclosures to Calbert came at a preliminary stage before active negotiations began and well before the "enhanced scrutiny" standard could possibly apply (if indeed that doctrine ever applies in Tennessee). Even if they were ill-advised, they were essentially harmless, causing no damage to the Dollar General shareholders and in no way tainting the subsequent negotiations between the SPC and KKR. Thus, Plaintiffs cannot meet the fourth and final factor under the Delaware case law by showing a causal connection between Perdue's alleged lapses and any injury to Dollar General's shareholders Dollar General's other directors and its SPC simply had no reason to be aware of these communications, and hence its SPC could not have "conspired" with KKR.

40. Tennessee law is entirely consistent with that of Delaware in requiring a plaintiff who alleges an aiding and abetting theory to allege the aider's "knowing participation" in that breach. See Journal Comm. v. Sabo, 2008 WL 821524 at *7 (M.D. Tenn March 26, 2008); Carr v. UPS, 955 S.W. 2d 832, 836 (Tenn. 1997) (requiring alleged aider to know that "his companions' conduct constituted a breach of duty and that he gave substantial assistance or encouragement to them in their acts"), overruled on other grounds by Parker v Warren County Utility Dist., 2 S.W 3d 170 (Tenn. 1999) At most, Plaintiffs here have alleged errors – probably more naïve than culpable – by Perdue. His alleged gossipy characterizations of other directors to Calbert were not the

[25] Plaintiffs also assert that someone tipped KKR as to Bain's decision not to bid, but here they offer no evidence or testimony to support this claim In their Omnibus Memorandum, they rely only on an email from Calbert to Roberts in which Calbert recommends that they not bid before Bain This proves nothing and appears to have been a tactic to avoid any danger that KKR's bid might be leaked to Bain, who could then top it. See Omnibus Memorandum at pp. 19-26. In any event, no evidence exists that KKR was ever told that Bain had not submitted a bid A claim of "bid tipping" must be based on much more than this strained inference.

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product of any illegitimate inducements by KKR (which never offered Perdue any job, bribe or any other inducement), and they occurred at an early stage at which they could not assist KKR in any substantial respect. Because Plaintiffs have not alleged KKR wrongly induced Perdue, they have not shown that KKR "substantially assisted" any breach by Perdue (assuming for the sake of argument that Perdue's preliminary revelations could amount to a fiduciary breach).

VII. Conclusions

41. Plaintiffs' entire case hangs by two very slender threads. First, they rely on a recent Delaware lower court decision – i.e., Ryan v. Lyondell Chemical Co., supra – that addressed the legal responsibilities of a board that sat passively through the sale of their company, deferring entirely to their CEO, and they ask this Court to apply its already controversial language to a case in which the board clearly took control from its CEO and reached its own decision regarding the best interests of the shareholders. Second, they have advanced at the 12th hour a new and unsupported disclosure theory that posits that Perdue and KKR concealed a secret plan to profit by doubling Dollar General's number of stores. This plan was indeed so secret that neither Dollar General's board nor its subsequent CEO had any knowledge of it. Both the depositions and the post-transaction record show that, as a public firm and as a private one, Dollar General was intent on actually slowing growth and eliminating stores with a low internal rate of return. In fact, it has subsequently done so and has expanded its number of stores only modestly. If, based on conclusory allegations and Plaintiffs' phantom theory of a plan to double the number of stores, the defendants in this case were to be subjected to a trial at which a jury could speculate whether the board should have rejected KKR's 31%

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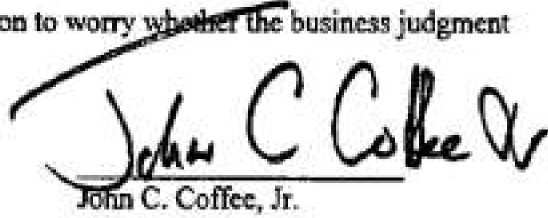
premium and instead pursued some indefinite, alternative strategy, then directors of Tennessee corporations would truly have reason to worry whether the business judgment rule still survived in Tennessee.



John C. Coffee, Jr.

Subscribed and sworn to before
me this 19 day of September 2008

Notary Public

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