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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAVINDER SINGH and DAVID PILL Plaintiffs-Below/Appellants, v. NEALE ATTENBOROUGH, YUVAL BRAVERMAN, TERRY BURMAN, DAVID F. DYER, KENNETH B. GILMAN, THEO KILLION, JOHN B. LOWE, JR., JOSHUA OLSHANSKY, BETH M. PRITCHARD, SIGNET JEWELERS LIMITED, and MERRILL LYNCH, PIERCE, FENNER & SMITH, Defendants-Below/Appellees.	No. 645, 2015 COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 9388-VCMR (CONSOLIDATED)

[CORRECTED] SIGNET AND ZALE APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from the dismissal of a post-closing damages action arising from the strategic merger of two leading companies in the specialty retail jewelry business—target Zale Corporation ("Zale" or the "Company") and acquirer Signet Jewelers Limited ("Signet")—for $21 cash per share of Zale stock (the "Merger"). It is undisputed that a majority of the Zale directors who negotiated the Merger (the "Board" or the "Director Defendants") was disinterested and independent, and that the Board negotiated a 41% premium to Zale's unaffected market price, as well as a fiduciary out. It also is undisputed that the Board was fully informed as to the Company's value, prospects, and options and that it met numerous times to discuss the Merger and evaluate alternatives.

Signet and Zale announced the Merger on February 19, 2014. Plaintiffs soon filed suit, alleging that the Director Defendants breached their fiduciary duties by, among other things, failing to take steps to maximize value for Zale's public stockholders. Plaintiffs also alleged that Signet and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), the Board's financial advisor, aided and abetted the Director Defendants' alleged breaches of fiduciary duty.

On May 1, 2014, Zale filed a Definitive Schedule 14A with the United States Securities and Exchange Commission (the "Proxy"), which disclosed the Company's various financial projections. A proxy fight over the Merger ensued.

During this contest, a hedge fund argued that $21 per share was "too low" and that Signet should increase its bid. The Company's financial projections and prospects were much debated. No other bidder emerged. Signet did not increase its offer.

On April 23, 2014, Plaintiffs moved to preliminarily enjoin the stockholder vote on the Merger. Expedited discovery followed. On May 23, the Court of Chancery denied Plaintiffs' motion, holding, *inter alia*, that the Proxy disclosed all material projections and valuations. On May 29, a majority of Zale's stockholders approved the Merger and the transaction closed.

On September 30, 2014, Plaintiffs filed their Verified Consolidated Second Amended Class Action Complaint (the "Amended Complaint" or "AC"). On December 10, all of the Defendants moved to dismiss the Amended Complaint. On October 1, 2015, the Court of Chancery granted the Director Defendants' motion to dismiss, holding that Plaintiffs had failed to state non-exculpated claims against them. The Court of Chancery also held that Plaintiffs had failed to state an aiding and abetting claim against Signet, but denied the motion to dismiss the aiding and abetting claim against Merrill Lynch. Following this Court's decision in *Corwin v. KKR Financial Holdings LLC*,[1] Merrill Lynch moved for reargument. On October 29, the Court of Chancery dismissed the action as to Merrill Lynch as well. Plaintiffs appeal both October 2015 rulings.

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[1] 125 A.3d 304 (Del. 2015).

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that the Amended Complaint fails to state a non-exculpated claim for breach of fiduciary duty against the Director Defendants. As a threshold matter, the Amended Complaint fails to challenge the disinterestedness of five of Zale's nine directors. Thus, Plaintiffs concede that a majority of the Board was disinterested with respect to the Merger. And with regard to the other four Director Defendants whose interestedness Plaintiffs do challenge, Plaintiffs fail to plead sufficient facts to support a reasonable inference that the interests of the four allegedly conflicted Director Defendants diverged from those of Zale's other stockholders in obtaining the best possible price for their shares. Plaintiffs also fail to allege facts that support a reasonable inference that a majority of the Board lacked independence or was dominated or controlled by the four allegedly conflicted Director Defendants. Finally, Plaintiffs' argument that the Director Defendants breached their duty of loyalty by acting in bad faith is premised on legally insufficient process and disclosure claims.

2. Denied. The Court of Chancery correctly held that, under *Corwin*, the business judgment rule—and not enhanced scrutiny under *Revlon*—applied because the Merger was approved by a fully informed vote of a majority of Zale's

disinterested stockholders.[2] The Court of Chancery correctly held that the vote on the Merger was fully informed because an alleged Merrill Lynch conflict and the Board's response thereto were disclosed and that those disclosures—as well as others regarding the Company's financial projections and Merrill Lynch's valuation work—were not misleading. And, as discussed in Point I, the Court of Chancery correctly found that the Merger was approved by a majority of Zale's disinterested stockholders because Zale's largest stockholder, Golden Gate Capital ("Golden Gate"), was not interested in the Merger.

3. Denied. Applying *Corwin*, the Court of Chancery correctly evaluated the Director Defendants' conduct under the business judgment rule and concluded that Plaintiffs had failed to plead facts overcoming that presumption in connection with (i) their retention of Merrill Lynch, (ii) their response to the alleged Merrill Lynch conflict when it was disclosed to them, and (iii) the negotiation of the Merger. Lacking any predicate breach of fiduciary duty by the Director Defendants, the Court of Chancery correctly dismissed the aiding and abetting claims against Signet and Merrill Lynch.

[2] In their opening brief ("Op. Br."), Plaintiffs mistakenly label the issue as one of "ratification." Op. Br. at 3, 5. But, as this Court made clear in *Corwin*, the approval of a merger by a fully informed, disinterested majority of a company's stockholders does not "ratify" the transaction, but rather subjects it to the business judgment rule. *Corwin*, 125 A.3d at 311 & n.24 (citing *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009)).

STATEMENT OF FACTS[3]

Zale Embarks on an Ambitious Turnaround Plan.

Before the Merger, Zale was a Delaware corporation and a competitor of Signet in the specialty retail jewelry business.[4] Defendants Neale Attenborough, Yuval Braverman, Terry Burman, David Dyer, Kenneth Gilman, John Lowe, Jr., Joshua Olshansky, and Beth Pritchard were the eight outside, non-management directors of Zale's nine-member Board.[5] Defendant Theo Killion was Zale's CEO and a director.[6]

Following the financial crisis in 2007-2008, Zale experienced extreme volatility and poor performance.[7] In 2010, Zale's management implemented a

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[3] The facts are taken from the allegations in the Amended Complaint, without conceding their accuracy, and the documents that are incorporated by reference, including the Proxy (B3-185). *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013) (where a proxy "is integral to a plaintiff's claim and incorporated in the complaint," the plaintiff "cannot fairly, even at the pleading stage, ask a court to draw inferences contradicting [it] unless he pleads nonconclusory contradictory facts").

[4] A36-37, AC ¶¶ 27, 30.

[5] A33-36, AC ¶¶ 15-19, 21-23. Messrs. Attenborough and Olshansky were appointed to the Board by non-party Golden Gate, a private equity firm that owned approximately 23% of Zale's stock at the time the Merger was announced. A33, A35, A42, AC ¶¶ 15, 22, 48.

[6] A35, AC ¶ 20.

[7] Plaintiffs acknowledge that "[d]ue to the 2008 financial crisis, Zale experienced declining sales and was forced to close many of its stores." A40, AC ¶ 39. Indeed, as recently as July 2012, Zale's stock traded below $3.00, and during 2013, Zale's stock price ranged from just below $4.00 to around $17.00 per share. *See* B216-B217 (chart of Zale stock prices); *see also In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) (the Court may "take judicial notice of matters that are not subject to reasonable dispute"); *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 656 n.65 (Del. Ch. 2008) ("The court may take judicial notice of the trading price of a listed stock . . . .").

multi-year turnaround plan.[8] In accordance with this turnaround program, the Board approved a three-year business plan in July 2013.[9] This plan (disclosed as the "business plan case" in the Proxy) set aggressive goals for management, who would have received the maximum bonuses possible under the Company's long-term incentive plan—up to 200% of their annual salaries—if they achieved the earnings targets set for fiscal years 2014 through 2016.[10]

Golden Gate Files a Registration Statement and Signet Bids for Zale.

On October 2, 2013, Zale filed a preliminary registration statement with the United States Securities and Exchange Commission for a potential secondary offering of the shares owned by Golden Gate (the "Preliminary Registration Statement").[11] It is undisputed as a matter of federal securities law that this preliminary filing did not obligate Golden Gate to sell its Zale stock (much less at any specific price), and that Golden Gate never committed publicly or otherwise to sell its Zale shares at any specific time or any specific price.[12]

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[8] A26, A40-41, A79, AC ¶¶ 2, 39, 40, 106.

[9] A26, AC ¶ 2.

[10] A67-68, AC ¶ 88.

[11] A43-45, AC ¶¶ 49, 51.

[12] The Amended Complaint alleges that the Preliminary Registration Statement provided Golden Gate's "maximum offering price" for its Zale shares of $15.035 per share. A26-27, 30, 43-44 57, AC ¶¶ 3, 9, 49, 50, 77. But Plaintiffs now acknowledge (Op. Br. at 29-30) that, as the Preliminary Registration Statement makes clear, $15.035 was "[e]stimated solely for the purpose of calculating the registration fee" in the event that a definitive registration statement was filed and was calculated "based on the average of the high and low prices of the common stock on the New York Stock Exchange on September 30, 2013," as required by SEC rules. B188.

On October 6, 2013, Signet's CEO, Michael Barnes, contacted Mr. Olshansky (a Zale director appointed by Golden Gate) to convey Signet's interest in pursuing a transaction with Zale.[13] Mr. Olshansky referred Mr. Barnes to Mr. Burman, the chairman of the Board.[14] On November 6, Mr. Barnes again contacted Mr. Olshansky to indicate that Signet was finalizing a letter to Zale regarding a potential acquisition of Zale.[15] The Board met the next day to consider whether and how to explore a potential transaction.[16] That same day, the Board received a letter from Signet indicating its interest in acquiring Zale for $19.00 per share in cash.[17]

The Board promptly set up a process to consider both Signet's offer and Zale's strategic alternatives. On November 8, 2013, the Board retained Cravath, Swaine & Moore LLP ("Cravath") as its legal counsel and formed a negotiation committee to engage a financial advisor.[18] Prior to retaining Merrill Lynch, the committee expressly asked the bank to disclose any conflicts from prior engagements that might impact its ability to work with Zale in response to Signet's

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[13] A46, AC ¶ 54.

[14] A46-47, AC ¶¶ 54-55.

[15] A47, AC ¶ 55; B35, Proxy at 24.

[16] A47-48, AC ¶ 57; B35, Proxy at 24.

[17] A47, AC ¶ 55; B35, Proxy at 24.

[18] B36, Proxy at 25.

offer.[19] On November 11, 2013, after considering various factors, including Merrill Lynch's prior work in connection with the Preliminary Registration Statement and the absence of material conflicts, the Board engaged Merrill Lynch as its financial advisor.

The Board also evaluated its own members for potential conflicts and concluded there were none. The Board considered, among other things, Mr. Burman's (the Chairman's) stock ownership in and prior affiliations with Signet, Mr. Killion's compensation in a change of control transaction, and Messrs. Olshansky's and Attenborough's affiliation with Golden Gate, and concluded that "each such director's interests were aligned with the Company's stockholders, and that no material conflicts of interest existed."[20]

The Board Weighs Signet's Proposal and Bargains for More.

In response to Signet's initial bid of $19.00 per share in cash, the Board told Signet that it would not agree to engage in due diligence absent an increased bid.[21] On December 3, 2013, Signet increased its offer from $19.00 cash to $19.00 in cash, plus $1.50 in Signet common stock, subject to due diligence.[22] After discussions with its advisors, the Board agreed to permit Signet to proceed with

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[19] B36-37, Proxy at 25-26.

[20] A51, AC ¶ 63.

[21] B37, Proxy at 26.

[22] B37, Proxy at 26.

due diligence with a view towards increasing its offer.[23] From the time Zale was first approached by Signet in October, Zale and its advisors engaged in a four-month long diligence and negotiation process with Signet.

On February 10, 2014, Signet conveyed an improved all-cash offer of \$20.50.[24] The Board countered, subject to negotiating acceptable deal terms, requesting that Signet increase its offer to \$21.00 in cash.[25] On February 11, Signet agreed to increase its offer to \$21.00 cash per share.[26]

On February 19, 2014, Merrill Lynch delivered to the Board its opinion that the Merger consideration of \$21.00 per share was fair, from a financial point of view, to Zale's stockholders.[27] Using the higher "business plan case" projections previously prepared by Zale's management, Merrill Lynch analyzed Zale's standalone value using a discounted cash flow methodology, yielding a valuation range of \$18.05 to \$25.65.[28]

The \$21.00 per share offered by Signet was within the value range calculated for each of the strategic alternatives considered by the Board, including

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[23] B37-38, Proxy at 26-27.

[24] B39, Proxy at 28.

[25] B40, Proxy at 29.

[26] B40, Proxy at 29.

[27] B41, Proxy at 30.

[28] B51, Proxy at 40; *see also In re Zale Corp. S'holders Litig.*, 2015 WL 5853693 (Del. Ch. Oct. 1, 2015) ("*Zale I*"), attached to Plaintiffs' opening brief as Exhibit A, at 8 (referencing an earlier version of this analysis which was cited in the Amended Complaint (¶ 64) and that generated a range of \$19.55 to \$25.25).

remaining as an independent company and continuing to try to execute and achieve management's business plan case projections.[29] It was also within the ranges Merrill Lynch derived in November 2013, using the same projections, based on several other strategic alternatives, including (i) a leveraged recapitalization ($20.00 to $25.60), (ii) the sale of Zale's Piercing Pagoda business ($18.55 to $23.90), (iii) the sale of Zale's Canadian operations ($19.55 to $24.65), (iv) the sale of both Piercing Pagoda and Zale's Canadian operations ($19.75 to $24.25), and (v) a leveraged buyout ($14.86 to $20.25).[30]

The $21.00 per share price was also above the standalone valuation range ($16.40 to $20.10) calculated using the lower "alternative case" projections, which had been prepared by Zale's management in connection with the Board's evaluation of the Signet bid and which discounted the more aggressive business case projections to account for execution risk.[31] The Proxy discloses how and why those alternative projections were prepared, and makes clear that Merrill Lynch only considered the more optimistic business plan case projections in preparing its opinion that the Merger was fair, from a financial point of view, to Zale's stockholders.[32] In light of the substantial value represented by Signet's offer, the

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[29] *Zale I* at 8; A51-52, AC ¶ 64.

[30] *Zale I* at 8-9; A52, AC ¶ 64.

[31] *Zale I* at 8-9; A51-52, AC ¶ 64.

[32] B45-46, B49, Proxy at 34-35, 38.

heavily negotiated deal terms, and the lack of an alternative bidder or attractive strategic alternative, the Board voted unanimously to approve the Merger and recommend that Zale's stockholders do the same.[33] Signet and Zale announced the Merger on February 19, 2014.[34]

The Board Learns of Merrill Lynch's Business Development Efforts with Respect to Signet.

Prior to the filing of the preliminary Proxy, but after the merger agreement had been signed, Merrill Lynch informed the Board that on October 7, 2013 (*i.e.*, before being engaged by Zale in connection with Signet's November 7 bid), Merrill Lynch made an unsolicited presentation to Signet of various ideas, including a potential acquisition of Zale at an illustrative price range of $17 to $21 per share.[35] But as fully disclosed in the Proxy, and not disputed by Plaintiffs, that presentation was made in the ordinary course of Merrill Lynch's business development efforts, was based only on publicly available information, and did not generate any interest from Signet in engaging Merrill Lynch.[36] When the fact of this presentation was brought to the attention of the Board, the Director Defendants, advised by Cravath, immediately reviewed and considered the relevant facts and assessed whether the Merrill Lynch meeting with Signet affected the

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[33] B41-42, Proxy at 30-31.

[34] B35-45, Proxy at 24-34.

[35] *See, e.g.*, A31-32, AC ¶ 10.

[36] B41, Proxy at 30.

advice the Board received in regards to the Merger. After three meetings to discuss the issue, the Board concluded that Merrill Lynch's contact with Signet did not impact its decision to recommend the Merger to Zale's stockholders.[37]

Following a Proxy Fight, Zale's Stockholders Approve the Merger.

On May 1, 2014, Zale filed the Proxy, which disclosed the background to and negotiation of the Merger, as well as extensive financial information, including both the business plan and lower alternative case projections prepared by Zale's management.[38] The Proxy also disclosed Merrill Lynch's October 7, 2013 meeting with Signet and the Board's investigation into and resolution of the alleged conflict caused by that solicitation.[39] On May 9, 2014, hedge fund TIG Advisors, LLC ("TIG") launched a solicitation opposing the Merger during which TIG publicly filed several presentations that included Plaintiffs' allegations concerning Zale's supposed better value as a standalone company and the alleged conflict of Merrill Lynch resulting from its prior Signet presentation.[40] Zale responded in several public filings of its own.[41] Yet no other bidder emerged, and a majority of Zale stockholders voted to approve the Merger, which closed on May 29, 2014.[42]

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[37] B41-42, Proxy at 30-31.

[38] *See* B35-48, Proxy at 24-37.

[39] B41, B55-57, Proxy at 30, 44-46.

[40] *See* A65-67, A69-75, AC ¶¶ 87, 91, 93, 95-97.

[41] *See* A67-69, AC ¶¶ 88, 89, 92.

[42] A77, AC ¶ 101.

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO STATE A NON-EXCULPATED CLAIM AGAINST THE DIRECTOR DEFENDANTS FOR BREACH OF FIDUCIARY DUTY.

A. QUESTION PRESENTED

Did the Court of Chancery correctly hold that Plaintiffs failed to plead a non-exculpated claim for breach of fiduciary duty against the Director Defendants, where (i) Plaintiffs concede that five of the nine directors were disinterested with respect to the Merger and, while not necessary here given this majority, Plaintiffs' allegations concerning the remaining four are insufficient to establish a conflict, (ii) Plaintiffs have failed to allege any facts showing that a majority of the Board lacked independence or was dominated by the four allegedly conflicted directors, and (iii) Plaintiffs' allegations of bad faith conduct are premised on process and disclosure claims that are insufficient to establish a duty of loyalty breach given that the Board negotiated a premium, all-cash transaction with a "fiduciary out" and the Proxy was neither materially misleading nor omitted any material facts?[43]

B. SCOPE AND STANDARD OF REVIEW

This Court reviews *de novo* "the Vice Chancellor's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)."[44]

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[43] This position was presented below by Defendants. A252-255, A392-399.

[44] *Allen*, 72 A.3d at 100; *see also id.* (although well-pleaded allegations must be accepted as true, the Court will not "credit conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in the plaintiff's favor").

C. MERITS OF THE ARGUMENT

Zale's charter included an exculpatory provision pursuant to Section 102(b)(7) of the Delaware General Corporation Law.[45] Thus, to withstand dismissal, Plaintiffs must "plead[] facts supporting a rational inference that [the Director Defendants] harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith."[46] Here, the Court of Chancery correctly dismissed the Director Defendants because Plaintiffs failed to plead facts that would support a reasonable inference that a majority of them was interested, lacked independence, or acted in bad faith.

1. Plaintiffs Fail to Plead Facts that Would Support a Reasonable Inference That a Majority of the Board Was Interested with Respect to the Merger.

a. Five of the Nine Members of the Board Were Concededly Disinterested.

As the Court of Chancery correctly noted, the Amended Complaint "alleges that Attenborough, Olshansky, Killion, and Burman were conflicted," but "is silent

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[45] B223.

[46] *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173, 1179-80 (Del. 2015); *see also id.* at 1175-76 ("A plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct[.]"); *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (where an exculpatory charter provision applies, only claims that "implicate [the directors'] duty of loyalty" may proceed).

as to the other five directors."[47] Plaintiffs do not and cannot contend otherwise on appeal. Thus, Plaintiffs concede that a majority of the Board was disinterested.

b. The Four Purportedly Conflicted Directors Were In Fact Disinterested.

Plaintiffs concede the disinterestedness of five of the nine Director Defendants. The four other Director Defendants were disinterested as well.

i. The Golden Gate Designated Directors Were Not Interested.

Plaintiffs contend that Golden Gate, which appointed Messrs. Attenborough and Olshansky to the Board, was not inclined to seek the highest price for its Zale stock because it had "already decided to sell" as of the filing of the Preliminary Registration Statement on October 2, 2013, and therefore "no longer had a long-term interest in Zale's stock price" or in "pursuing the maximum value for Zale's stockholders."[48] Essentially, Plaintiffs allege that because Golden Gate took the first step in making its shares marketable (at $15 per share on the date the Preliminary Registration Statement was filed), it lost any appetite to obtain the highest possible price from Signet or any other buyer.

But this argument suffers from a glaring flaw, acknowledged by Plaintiffs on appeal and emphasized by the Court of Chancery: "Plaintiffs did not plead or argue that Golden Gate *needed* to exit its position or that it had an 'exigent need for

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[47] *Zale I* at 31.

[48] Op. Br. at 25-26.

liquidity.'"[49] Yet that is precisely what courts have required to overcome the presumption ingrained in our law that a large stockholder, such as Golden Gate, shares with other stockholders the desire to obtain the highest price possible in a sale transaction for the corporation.[50] While Plaintiffs contend on appeal that it is enough to allege that Golden Gate "*wanted* to exit its position and otherwise would have done so in the Offering,"[51] the Court of Chancery correctly observed to the contrary that "much more specific liquidity needs than a simple desire to 'sell quickly'" must be alleged to show interestedness.[52]

Here, the filing of the Preliminary Registration Statement did not *obligate* Golden Gate to sell its shares at any particular time or at any specific price.[53] Plaintiffs therefore have failed to allege any facts that would explain why Golden Gate would accept an alleged "fire sale" price and thereby "forgo the additional

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[49] Op. Br. 28.

[50] While "[l]iquidity has been recognized as a benefit that may lead directors to breach their fiduciary duties[,]" *In re Answers Corp. S'holder Litig.*, 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012) (quoting *NJ Carpenters Pension Fund v. InfoGroup, Inc.*, 2011 WL 4825888, at *9 (Del. Ch. Sept. 30, 2011), revised Oct. 6, 2011), plaintiffs must allege specific facts regarding the source of the exigency and/or the reason that the required liquidity could only be obtained in the challenged transaction. *See McMullin v. Beran*, 765 A.2d 910, 921 (Del. 2000) (alleging that a controlling stockholder initiated a merger "to fund [a] $3.3 billion cash acquisition"); *In re Answers Corp.*, 2012 WL 1253072, at *4 (alleging that a change of control transaction was the only way for the seller to monetize its investment in a thinly traded stock); *NJ Carpenters*, 2011 WL 4825888, at *9 (alleging that a large stockholder needed liquidity to fund SEC and derivative settlements as well as loans used to buy shares). Plaintiffs failed to plead such facts to support their "speculative 'liquidity' theory" of interestedness against Golden Gate. *Zale I* at 45.

[51] Op. Br. at 28.

[52] *Zale I* at 22 & n.36 (citing cases).

[53] *See supra* pp. 6-7 & n.12.

value that could be brought about" by allowing a thorough exploration of alternatives.[54] Nor have Plaintiffs alleged here that Golden Gate could only have exited its investment in Zale through the Merger. Because Golden Gate could have sold its position in the secondary market, it had no reason (and none is alleged) to leave any money on the table in the negotiations with Signet.[55]

In short, because Golden Gate received the same treatment and per share consideration as all other stockholders, the only reasonable inference is that Golden Gate wanted to obtain the highest price possible for its Zale stock.[56]

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[54] *See In re Morton's Rest. Grp., Inc. S'holder Litig.*, 74 A.3d 656, 667 (Del. Ch. 2013).

[55] *Compare with In re Answers Corp.*, 2012 WL 1253072, at *4 ("[A]ccording to the Plaintiffs . . . the only way that [the stockholder seeking liquidity could monetize its investment] was if [the company] engaged in a change of control transaction; [the company's] common stock was so thinly traded that [the stockholder] could not sell its entire 30% equity interest in the public market."); *see also supra* pp. 6-7 & n.50.

[56] *See*, *e.g.*, *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1038 (Del. Ch. 2012) (a stockholder's "supposed liquidity conflict was not really a conflict at all because he and the minority stockholders wanted the same thing: liquid currency and, all things being equal, at the highest dollar value amount of that currency"); *see also Iroquois Master Fund Ltd. v. Answers Corp.*, 2014 WL 7010777, at *1 n.1 (Del. Dec. 4, 2014) ("When a large stockholder supports a sales process and receives the same per share consideration as every other stockholder, that is ordinarily evidence of fairness, not of the opposite, especially because the support of a large stockholder for the sale helps assure buyers that it can get the support needed to close the deal."); *C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1069 n.92 (Del. 2014) (same). Plaintiffs halfheartedly argue that Golden Gate conspired with Signet to install Mr. Burman as Zale's chairman so that they could cause Zale to merge with Signet at a higher price than what would have been available to Golden Gate in a secondary offering. A56-57, AC ¶ 76. Plaintiffs' theory is entirely unsupported by any pleaded facts. Nor does Plaintiffs' theory explain why Golden Gate would accept anything less than the highest possible price in the Merger. *See Zale I* at 22, 47 (concluding that if Golden Gate was seeking a higher price for its shares than was available in a secondary offering, "there would be no reason for it to attempt to depress Zale's stock price").

ii. Messrs. Burman and Killion Were Not Interested.

Plaintiffs assert that Messrs. Burman and Killion were interested because they stood to make "millions of dollars" through the accelerated vesting of stock options, restricted shares, and restricted stock units ("RSUs") if the Merger was approved.[57] But accelerated vesting is "a routine aspect of merger agreements," and, "without more, does not suffice to impugn the disinterestedness of the members of the Board."[58] Here, Plaintiffs have failed to allege any facts from which the Court reasonably could infer that any benefit from the accelerated vesting was material to Messrs. Burman and Killion.[59]

Plaintiffs allege that Mr. Burman "stood to receive approximately $240,000 from the accelerated vesting of his RSUs" and "$2.1 million from his Zale restricted shares."[60] However, as disclosed in the Proxy, all of Mr. Burman's RSUs and half of his restricted shares were scheduled to vest by December 31, 2014, regardless of whether the Merger was consummated.[61] Plaintiffs also

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[57] Op. Br. at 21.

[58] *In re OPENLANE, Inc. S'holder Litig.*, 2011 WL 4599662, at *5 (Del. Ch. Sept. 30, 2011); *see also Globis Partners, LP. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (accelerated vesting "does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price"); *Zale I* at 33-34.

[59] *Zale I* at 34 (because the Amended Complaint "contains no allegations regarding the relative materiality of [the vesting,]" there is "no reference point by which to measure [the] comparative impact on the Director Defendants' impartiality").

[60] A32, AC ¶ 11.

[61] The Proxy discloses that as of April 28, 2014, Mr. Burman held 11,414 unvested RSUs, all of which were expected to vest before December 31, 2014, *regardless of whether the Merger*

misleadingly allege that Mr. Killion "stood to receive approximately . . . $9.6 million from his Zale stock options,"[62] but ignore that most of this sum ($8,751,500) was from 632,000 stock options that already had vested by April 28, 2014.[63] In reality, Mr. Killion's incentive to maximize the value of his 632,000 vested stock options—plus the 155,739 shares of common stock he owned[64]—far outweighed any incentive to agree to a lower Merger price in order to trigger the vesting of his unvested stock options or RSUs. Moreover, Signet's statements to Mr. Killion that, if the proposed Merger were consummated, it was their "preference that [he] continue to lead the Zale division of Signet," without more, do not make him interested in the Merger. This is particularly so where, as here, Plaintiffs do not allege that Mr. Killion ever discussed any employment terms with Signet during the sale process, that Mr. Killion was otherwise aware, prior to the execution of the deal, of what the head of a division within Signet "stood to earn," or that the prospect of a continued role in any way influenced Mr. Killion's decision-making.[65]

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occurred. B61, Proxy at 50. Mr. Burman also owned 100,000 restricted shares of Zale stock, 50,000 of which were expected to vest before December 31, 2014. B62, Proxy at 51.

[62] A32, AC ¶ 11.

[63] B60, Proxy at 49.

[64] B95, Proxy at 84.

[65] A61, AC ¶ 81; B38-39, Proxy at 27-28.

2. Plaintiffs Fail to Plead Facts that Would Support a Reasonable Inference That a Majority of The Board Lacked Independence.

Plaintiffs' sole allegation that a majority of the Board lacked independence from the four allegedly conflicted directors is the unsupported and wholly conclusory assertion that the five disinterested Director Defendants "simply followed their lead."[66] This falls far short of alleging facts that rebut the presumption of independence and from which the Court could reasonably infer that any of these four directors controlled the sales process or dominated the five concededly disinterested directors. The Court does not "credit conclusory allegations that are unsupported by specific facts."[67] "Absent specific allegations of actual control, the facts Plaintiffs allege cannot support a reasonable inference that [the Company's] . . . outside directors lacked independence."[68] Thus, the Court of Chancery correctly found that the Amended Complaint "fails to present any facts that would support a reasonable inference that one or more of the four allegedly conflicted directors dominated the other five directors."[69]

Nor do Plaintiffs' allegations that Messrs. Olshansky and Burman served on the negotiating committee support a reasonable inference that the five disinterested directors lacked independence. Indeed, an allegedly conflicted director's

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[66] Op. Br. at 19.

[67] *Allen*, 72 A.3d at 100.

[68] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *8-9 (Del. Ch. Oct. 13, 2011).

[69] *Zale I* at 32.

participation in the sales process does not taint the process if the Board is aware of the facts giving rise to the purported conflict and "fully committed to the [sale] process."[70] Here, as the Court of Chancery correctly noted, Plaintiffs "*do not* allege that the Board ever delegated any of its ultimate authority to the Negotiating Committee," and they "*do* admit that the Board knew about all of the relevant conflicts" and "discussed [them] openly during the Board's meeting on November 18, 2013."[71] As a result, even if Plaintiffs had alleged adequately that Messrs. Olshansky and Burman were conflicted (which, as discussed above, they have not), Plaintiffs' allegations do not support an inference that a majority of the Board lacked independence.

3. Plaintiffs Fail to Plead Bad Faith Conduct.

In light of Plaintiffs' failure to plead that a majority of the directors lacked disinterestedness or independence, "the sole issue" is whether the directors "breached their duty of loyalty by failing to act in good faith."[72] In an attempt to support an inference of bad faith, Plaintiffs assert a hodge-podge of process and disclosure challenges.[73] Specifically, they allege that the Board engaged in bad faith by (i) "fail[ing] even to demand a price from Signet at the high-end of [Merrill Lynch's] valuations," (ii) proceeding with the Merger after the issuance of

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[70] *OPENLANE*, 2011 WL 4599662, at *5.

[71] *Zale I* at 32.

[72] *Lyondell*, 970 A.2d at 239-40.

[73] Op. Br. at 19-20.

the Preliminary Registration Statement indicating Golden Gate's interest in selling its shares, (iii) providing Merrill Lynch with the alternative case financial projections, (iv) "fail[ing] to make reasonable[e] inquiries to determine whether [Merrill Lynch] was conflicted," and (v) committing disclosure violations.[74] The Court of Chancery correctly determined these allegations—taken alone or together—do not support an inference of bad faith.[75]

"There is no single blueprint that a board must follow to fulfill its duties."[76] The key inquiry is "whether the directors made a *reasonable* decision, not a *perfect* decision."[77] Plaintiffs' assertions regarding the Board's negotiating strategy do not establish that the directors acted unreasonably, let alone in bad faith. Zale bargained hard, obtained an all-cash deal with a fiduciary out, and forced Signet to make three increasing offers, the third of which resulted directly from the Board's request for an additional $.50 per share in consideration.[78]

Similarly, the fact that the Board provided Merrill Lynch with both sets of management projections (*i.e.*, the business plan case and a revised alternative case that reflected a more conservative view as to future performance) did not constitute bad faith. In the face of a potential final-stage transaction, directors should take a

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[74] Op. Br. at 19-20.

[75] *Zale I* at 35-36.

[76] *C & J*, 107 A.3d at 1067 (citation omitted).

[77] *Id.* (citation omitted).

[78] *Zale I* at 36-37.

hard look at current plans, projections, and execution risks versus the immediate returns (in this case a 41% premium) from an all-cash offer. And in any event, it is undisputed that Merrill Lynch relied on the more aggressive business plan case when providing its fairness opinion and, "if the deal were fair on that basis, then it clearly [would be] fair based on the alternative projections."[79]

The alleged failure to withdraw the October 2014 Preliminary Registration Statement that, if effective, would have permitted Golden Gate to sell its shares, similarly does not constitute bad faith. According to Plaintiffs, the filing "immediately stopped [a] rise in Zale's stock price,"[80] and withdrawing it "would have allowed Zale's stock price to increase and put pressure on Signet to increase its offer."[81] But even if it were customary as a matter of practice to "withdraw" or eliminate from the public record a preliminary (*i.e.*, not yet effective) registration statement—which it is not—Plaintiffs have not explained how or why Golden Gate or the Board would have been obligated to do so. Nor have Plaintiffs alleged facts showing that Golden Gate needed liquidity or would have wanted to "depress" Zale's stock price. At most, Plaintiffs may have raised a reasonable inference that the filing of the Preliminary Registration Statement alerted Signet to the possibility of a transaction or somehow put Zale "into play," but that is a long way from

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[79] A224, P.I. Tr. at 127:11-14.

[80] Op. Br. at 8.

[81] *Id.* at 19.

alleging disloyal conduct by the Director Defendants once Signet approached Zale.

The Court of Chancery also correctly determined that the Board acted in good faith with regard to Merrill Lynch's alleged conflict of interest based on its presentation to Signet prior to Signet's offer. The Board made "an inquiry initially to discover a financial advisor's conflicts, and later, upon being advised of a possible conflict, consider[ed] the implications of and remedies for that conflict."[82] Plaintiffs contend the Merrill Lynch presentation to Signet placed a cap on the deal price because it included a potential acquisition price range for Zale of between $17 and $21 per share.[83] But the range was merely illustrative and based entirely on publicly available information. And all of these facts were disclosed to stockholders in the Proxy. Moreover, upon learning of the presentation, the Board, with the assistance of Cravath, immediately investigated, deliberated the facts surrounding the alleged conflict at three meetings, and concluded that Merrill Lynch's contact with Signet did not impact its decision to recommend the Merger to Zale's stockholders.[84] This conduct "hardly constitutes the conscious disregard of the directors' duties required to demonstrate bad faith."[85]

Plaintiffs' disclosure allegations likewise lack merit and certainly do not

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[82] *Zale I* at 45; *see also* B41, Proxy at 30.

[83] Op. Br. at 9.

[84] B41-42, Proxy at 30-31.

[85] *Zale I* at 45.

come close to raising a reasonably conceivable inference of bad faith on the part of the Director Defendants. This is not a case where directors hid from stockholders a valuation or a set of projections or some material fact. "[T]hough criticizing the overall transaction process, the Complaint makes no factual allegations that the board acted disloyally or in bad faith when authorizing the [Proxy] specifically."[86]

Finally, Plaintiffs' claim that the Merger price itself constituted bad faith fails as well. Where "a board exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal," the judgment of the Board will not be second guessed.[87] Here, where Zale's largest stockholder and an independent proxy advisory service both supported the 41% cash premium Merger price, there is simply no factual or legal basis on which to conclude that the Merger price was so inadequate as to constitute bad faith.[88]

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[86] *Alloy*, 2011 WL 4863716, at *14. *See infra* Point II.C.1.

[87] *C & J*, 107 A.3d at 1053.

[88] *Zale I* at 40. Plaintiffs' allegation that Golden Gate (a sophisticated fund with two directors on the Board) was eager to exit its position for approximately $15 per share is starkly at odds with its claim that the $21 Merger price was somehow so low as to be the product of bad faith.

II. A FULLY INFORMED MAJORITY OF ZALE'S DISINTERESTED STOCKHOLDERS APPROVED THE MERGER.

A. QUESTION PRESENTED

Did the Court of Chancery correctly hold that the Amended Complaint failed to raise reasonable inferences that: (i) stockholders were not fully informed of material facts before voting on the deal; or (ii) Golden Gate's interests in the Merger were not aligned with Zale's public stockholders, such that the transaction was approved by a fully informed, majority of disinterested Zale stockholders?[89]

B. STANDARD OF REVIEW

See supra Point I.B.

C. MERITS OF THE ARGUMENT

1. The Vote on the Merger Was Fully Informed.

Plaintiffs argue that the vote on the Merger was not fully informed. Specifically, Plaintiffs allege that the Board (i) failed to disclose that the Merger price was on the low end of Merrill Lynch's standalone valuation of Zale, (ii) failed to disclose that the Board and Merrill Lynch considered the business plan projections to be the "best" estimate of Zale's future financial performance, and (iii) made false statements during the proxy contest with TIG by describing the business plan projections as a "challenge" and a "stretch."[90] Plaintiffs also assert that the Court of Chancery erred in evaluating these claims by applying a preliminary injunction standard rather than a motion to dismiss standard. All of

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[89] This position was presented below by Defendants. A255-268, A408-411.

[90] Op. Br. at 22-24.

these arguments fail.

As a threshold matter, the Court of Chancery applied the appropriate standard.[91] And the underlying legal standard for materiality remains the same on a motion for preliminary injunction and motion to dismiss.[92]

With regard to Plaintiffs' first claim—that the Proxy failed to disclose that a Merrill Lynch analysis of Zale as a stand-alone company "showed that the status quo . . . would provide the highest value to stockholders"[93]—the Court of Chancery examined the analysis in question and correctly concluded that it showed no such thing. The face of the document in question unambiguously shows that even using the aggressive business plan case projections, the $21 Merger offer was within the range of expected values for each of the six alternatives, including the standalone option, calculated by Merrill Lynch.[94] The premise of this claim is false.

The same is true of Plaintiffs' claim that the Proxy failed to disclose that the

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[91] *See Zale I* at 24 ("Plaintiffs are not barred as a matter of law from pursuing claims now that failed at the preliminary injunction stage."); *id.* ("the pleadings stage test standard is lower than the merits-focused element of the preliminary injunction standard") (citation omitted).

[92] "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." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000). And while Plaintiffs' "allegations need not be pleaded with particularity," "some factual basis must be provided from which the Court can infer materiality of an identified omitted fact. This is inherently a requirement for a disclosure claim." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146 (Del. 1997).

[93] A88, AC ¶ 121; Op. Br. at 26-27.

[94] *See Zale I* at 41 ("[A]lthough Plaintiffs point out that each of the six alternatives . . . had a maximum valuation, in the upside case scenario, that exceeded the Merger Price, they ignore . . . that $21 . . . is still within the valuation range for each of those alternatives.").

business plan case "actually represent[ed] the best estimate of Zale's future financial performance."[95] First, the claim needs to be placed in appropriate context. The Proxy, in very clear language, identifies the business plan, explains that it was based on "management's three-year plan for the Company and, for fiscal year 2014, was updated to reflect actual financial performance for the first two quarters of such fiscal year[,]" and lays out the projections under the business plan.[96] The Proxy goes on in easily understandable language to explain that "alternative prospective financial information" that "was premised on the Company generating a lower level of future revenue growth and savings from its sourcing initiatives" was provided to Merrill Lynch and then lays out the different assumptions and projections in the two plans.[97] Our law does not assume that stockholders are incapable of understanding clear disclosures describing two sets of projections, nor does it require pejorative or other characterizations.[98] As the Court of Chancery twice found (in the context of the preliminary injunction motion and the motions to dismiss), stockholders received all material facts as to the two sets of projections and Plaintiffs plead no facts showing that the Board in fact

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[95] Op. Br. at 25.

[96] B45-46, Proxy at 34-35.

[97] B46, Proxy at 35.

[98] *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 100 (Del. Ch. 2011) ("[o]ur law should . . . hesitate to ascribe rube-like qualities to stockholders") (citation omitted) (alterations in original).

believed that the business plan case was "the best estimate[] of Zale's future financial performance."[99]

Plaintiffs' claim that the Board falsely described the business case projections as a "stretch" and a "challenge" during the proxy contest also has no basis. Plaintiffs fail to identify any facts suggesting that the Board did not believe that the projections were a "stretch" or "challenge" given that, among other things, the plan called for the company to more than double its EBITDA in three years (from $92 million to $200 million). Plaintiffs do not dispute that the achievement of the business plan case's EBITDA targets for fiscal years 2014 through 2016 would have resulted in Zale's management being paid the maximum amounts payable under the Company's long-term incentive plan—*i.e.*, up to 200% of their annual salaries. In other words, if management had significantly underperformed the plan, they still would have received bonuses exceeding 100% of their pay, a point that Zale highlighted during the proxy contest to emphasize that while achievable, the Board had adopted the business plan as a challenge to management and knowing full well that achieving it in all respects would in fact be a

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[99] A218-219, P.I. Tr. 121:20-122:5 ("The proxy explains that the business plan forecast was based on management's three-year plan as updated to reflect the actual financial performance for the first two quarters of fiscal year 2014. The proxy also specifies that the alternative forecast, as compared to the business plan forecast, was premised on the company generating a lower level of future growth and savings from its sourcing initiatives. I consider these to be fair and adequate characterizations[.]").

"stretch."[100] Before the vote on the Merger, Zale stockholders had both sets of projections and benefitted from a vigorous and public debate on the sufficiency of Signet's $21 per share, all-cash offer. No more was required as a matter of law.[101]

2. Golden Gate Was Not Interested in the Merger.

Plaintiffs argue that the Merger was not approved by a majority of Zale's disinterested stockholders because Golden Gate—which owned approximately 23% of Zale's stock and voted in favor of the Merger—was interested.[102] For the reasons set forth *supra* at Point I.C.1.b.i, the Court of Chancery correctly determined that Golden Gate was a disinterested stockholder whose interests were aligned with Zale's other stockholders.

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[100] *See* A222, P.I. Tr. at 125:8-23 (the fact that achievement of the business plan case would have resulted in Zale's management being paid up to 200% of their annual salaries "would appear to support the [Board's] characterization of the plan as a challenging and uncertain proposition.").

[101] Plaintiffs do not challenge the Company's disclosures regarding the alleged Merrill Lynch conflict in the portion of their Opening Brief concerning their disclosure claims, but elsewhere suggest that the Board's disclosure of the potential conflict was somehow inadequate. *See* Op. Br. at 34 (referring to an "undisclosed conflict" with Merrill Lynch). As explained *infra* (Point III.C.3), the Proxy contains a thorough description of the process by which the Board learned of the potential conflict, investigated it with the assistance of Cravath, and determined that it did not affect their decision to recommend that Zale's stockholders vote in favor of the Merger.

[102] Op. Br. at 25-30.

III. THE COURT OF CHANCERY CORRECTLY APPLIED THE BUSINESS JUDGMENT RULE AND DISMISSED PLAINTIFFS' AIDING AND ABETTING CLAIMS.

A. QUESTION PRESENTED

Did the Court of Chancery correctly hold that Plaintiffs' aiding and abetting claims failed because the business judgment rule applies under *Corwin* and Plaintiffs have failed to allege waste or that the Board acted with gross negligence?[103]

B. STANDARD OF REVIEW

See supra Point I.B.

C. MERITS OF THE ARGUMENT

The Court of Chancery correctly determined that, under *Corwin*, the Merger is subject to the business judgment rule.[104] "[W]here the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form."[105] Here, the Merger is entitled to review

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[103] We address this question even though the Director Defendants are exculpated from duty of care-based claims because it implicates their conduct and forms the predicate basis for Plaintiffs' aiding and abetting claims. This position was presented below by Defendants. A268-A271, A411-412.

[104] Plaintiffs repeatedly refer to the Court of Chancery as having held that the Zale stockholder vote "*ratified*" the Merger. Op. Br. at 2-3, 21. But the Court of Chancery held no such thing. Rather, the Court of Chancery correctly applied this Court's decision in *Corwin* and held that the approval of a transaction by a fully informed majority of disinterested stockholders invokes the business judgment rule where *Revlon* otherwise would apply. *In re Zale Corp. S'holders Litig.*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) ("*Zale II*"), Op. Br. Ex. B, at 4.

[105] *Corwin*, 125 A.3d at 314; *see id.* at 304-05.

under the business judgment rule because it was approved by the fully informed vote of a majority of Zale's disinterested stockholders.[106]

Delaware law is arguably unsettled as to whether plaintiffs must plead gross negligence or waste to overcome business judgment review under *Corwin*.[107] In *KKR*, the Court of Chancery stated that "the legal effect of a fully-informed stockholder vote . . . is that the business judgment rule applies and insulates the transaction from all attacks other than on the grounds of waste."[108] But as the Court of Chancery noted in *Zale II*, while this Court affirmed *KKR* in *Corwin*, it did not directly address the question of whether gross negligence or waste is the correct standard.[109] Here, the Amended Complaint should be dismissed regardless

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[106] *Id.* at 305-06 ("the business judgment rule is invoked as the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders"); *see also supra* Point II.C.

[107] *See Zale II* at 8 (noting that while "the Supreme Court generally affirmed *KKR*" in *Corwin* and "suggested that 'the gross negligence standard for director due care liability under *Van Gorkom*' is the proper standard for evaluating 'post-closing money damages claims[,]'" "the Court in *Corwin* quote[d] *KKR* and a law review article for the proposition that a fully informed majority vote of disinterested stockholders insulates directors from all claims except waste") (quoting *Corwin*, 125 A.3d at 308 n.13, 309 n.19). *Compare Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 654 (Del. 2014) (under the business judgment rule, "the claims against the Defendants must be dismissed unless no rational person could have believed that the merger was favorable to . . . stockholders"), *with Zale II* at 9 ("[A]fter the merger has been approved by a majority of disinterested stockholders in a fully informed vote, the standard for finding a breach of the duty of care under BJR is gross negligence.").

[108] *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 1001 (Del. Ch. 2014).

[109] *See supra* n.107 (citing *Zale II* at 8).

of which standard applies because, as the Court of Chancery correctly found, Plaintiffs have failed to plead gross negligence[110] or waste.[111]

Plaintiffs alleged that the Director Defendants acted with gross negligence by engaging Merrill Lynch despite the existence of material conflicts.[112] According to Plaintiffs, the Board should have probed Merrill Lynch further to suss out potential conflicts or negotiated for "representations and warranties concerning [Merrill Lynch]'s conflicts."[113] But "a board is not required to perform searching and ongoing due diligence on its retained advisors in order to ensure that the advisors are not acting in contravention of the company's interests, thereby undermining the very process for which they have been retained."[114] And here, Plaintiffs acknowledge that once Merrill Lynch informed the Board about its meeting with Signet, the Board investigated the issue, determined that it did not affect the deal, and fully disclosed the matter to stockholders.[115] Plaintiffs simply

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[110] *Zale II* at 15 ("Applying a gross negligence standard, I do not find it reasonably conceivable that the Director Defendants' conduct amounted to 'reckless indifference or a gross abuse of discretion' or that the facts 'suggest a *wide* disparity between the process the directors used . . . and [a process] which would have been rational.'") (citations omitted); *see Solash v. Telex Corp.*, 1988 WL 3587, at *9 (Del. Ch. Jan. 19, 1988) (grossly negligent conduct must "amount to reckless indifference or a gross abuse of discretion") (internal citations omitted).

[111] *Zale II* at 16 (Plaintiffs pleaded "no basis for a showing of waste").

[112] Op. Br. at 31-32.

[113] *Id.* at 10, 32.

[114] *RBC Capital Mkts., LLC v. Jervis*, 2015 WL 7721882, at *27 (Del. Nov. 30, 2015).

[115] *See* B41, Proxy at 30; *see also RBC Capital Mkts.*, 2015 WL 7721882, at *27 ("a board may be free to consent to certain conflicts, and has the protections of 8 *Del. C.* § 141(e)"). In *In re TIBCO Software Inc. S'holders Litig.*, the board relied on several capitalization tables that were

plead no facts showing a "wide disparity between the process the [Zale] directors used . . . and [the process] which would have been rational."[116]

Plaintiffs also have failed to plead any facts that would support an inference that the Board acted with gross negligence during the Merger negotiation process. While Plaintiffs argue that the Board "did not make any attempt to negotiate a price at or above the valuations supported by [Merrill Lynch's] analyses[,]"[117] Plaintiffs admit that the $21 Merger price was within the range of Merrill Lynch's valuations.[118] And while Plaintiffs contend that the Board "made a single demand for a price that fell in the mid-range of [Merrill Lynch's] valuations,"[119] Plaintiffs ignore that the Board rejected Signet's first offer of $19, received a second offer of $20.50, and countered that offer.[120] Thus, Plaintiffs have failed to plead any facts showing a "wide disparity" between the Director Defendants' conduct in

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inaccurate due to a mathematical error with respect to the total share count. 2015 WL 6155894, at *9-10 (Del. Ch. Oct. 20, 2015). Though the board learned of the error, it purportedly failed to fully investigate the effects of the error on the merger, which "raise[d] litigable questions over whether the Board acted in a grossly negligent manner and thus failed to satisfy its duty of care." *Id.* at *23. Here, Plaintiffs do not dispute that the Director Defendants investigated the potential conflict as soon as it was brought to the Board's attention, held several meetings with their advisors to determine whether it had any impact on their decision to recommend the Merger to Zale's stockholders, decided that it did not, and disclosed these facts in the Proxy.

[116] *TIBCO*, 2015 WL 6155894, at *23; *Zale II* at 11.

[117] Op. Br. at 34

[118] *See supra* Point II.C.1.

[119] Op. Br. at 34.

[120] B37, B39-40, Proxy at 26, 28-29. Plaintiffs also claim that the Board breached its duty of care by failing to withdraw the Preliminary Registration Statement for Golden Gate's potential secondary offering. Op. Br. at 34. This claim fails for the reasons set forth *supra* at Point I.C.1.

connection with the negotiation of the Merger and a rational course of action.

Because Plaintiffs did not adequately plead an underlying breach of fiduciary duty, their aiding and abetting claims against Merrill Lynch and Signet fail.[121] Additionally, with respect to Signet, Plaintiffs' only mention of an aiding and abetting claim appears in a single footnote at the end of their brief.[122] Because arguments in footnotes are not properly raised to this Court, Plaintiffs have waived their claim on appeal against Signet.[123] But even if they had not, the Amended Complaint lacks any allegation that Signet knowingly participated in any breach of duty by the Director Defendants, as the Court of Chancery correctly held.[124]

CONCLUSION

For each of the reasons explained above, this Court should affirm the decision of the Court of Chancery granting the Defendants' Motions to Dismiss.

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[121] *RBC Capital Mkts.*, 2015 WL 7721882, at *32 ("aiding and abetting breaches of fiduciary duty" requires "a breach of the fiduciary's duty").

[122] Op. Br. at 34 n.16.

[123] *See* Sup. Ct. R. 14(b)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *see also Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 988 (Del. 2013) ("an appellant may not preserve issues by raising them in footnotes . . . [and] has abandoned that issue on appeal irrespective of how well the issue was preserved at trial") (internal quotation marks and citation omitted); Sup. Ct. R. 14(d).

[124] *Zale I* at 56 ("[T]here are no allegations in the [Amended] Complaint that would support an inference that Signet knowingly participated in the Board's duty of care breach[.]"); *see also In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 448 (Del. Ch. 2012) (a counterparty cannot be "culpable as an aider and abettor" simply because "[i]t bargained hard, as it was entitled to do").