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Case Number 645,2015 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAVINDER SINGH and DAVID PILL, Plaintiffs-Appellants, v. ZALE CORPORATION, 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-Appellees.	No. 645, 2015 Court Below: Court of Chancery of The State of Delaware C.A. No. 9388-VCMR (Consolidated) PUBLIC VERSION Filed: March 1, 2016

APPELLEE
MERRILL LYNCH, PIERCE, FENNER & SMITH'S ANSWERING BRIEF

OF COUNSEL:

SHEARMAN & STERLING LLP
Alan S. Goudiss
Paula H. Anderson
Dennis D. Kitt
599 Lexington Avenue
New York, New York 10022
Tel.: (212) 848-4000

GREENBERG TRAURIG LLP
Gregory E. Stuhlman (No. 4765)
The Nemours Building
1007 North Orange Street
Suite 1200
Wilmington, Delaware 19801
Tel.: (302) 661-7000

Attorneys for Defendant Merrill Lynch, Pierce, Fenner & Smith Incorporated

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NATURE OF PROCEEDINGS

On this appeal, Plaintiffs attempt to resurrect a complaint that never should have been brought. It challenges the conduct of an admittedly majority independent and unconflicted board in approving a merger resulting in a 41% premium and seeks to find fault with conduct of the Company's financial advisor. The Court of Chancery properly dismissed the Complaint with prejudice, a judgment that should be affirmed forthwith.

The sale process at issue resulted in the merger (the "Merger") of Zale Corporation ("Zale") and Signet Jewelers Limited ("Signet"). The Merger was announced in February 2014 and conditioned on the approval of Zale's stockholders. Shortly after the Merger's announcement, Plaintiffs filed five complaints, which were consolidated on March 25, 2014. On April 23, 2014, Plaintiffs filed a consolidated amended complaint against Zale's directors for breach of fiduciary duty and against Signet for aiding and abetting, along with a motion to preliminarily enjoin the stockholder vote. At a hearing on May 23, 2014, the Court of Chancery denied Plaintiffs' motion for a preliminary injunction. On May 29, 2014, a majority of disinterested Zale stockholders approved the Merger in a fully-informed vote.

On September 30, 2014, Plaintiffs filed their Verified Consolidated Second Amended Class Action Complaint (the "Complaint"), which, in addition to the

original claims against Zale's directors and Signet, added a claim against Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") for aiding and abetting a breach of fiduciary duty. Defendants moved to dismiss. By memorandum opinion dated October 1, 2015, the Court of Chancery dismissed with prejudice the claims against Zale's directors and Signet, holding that: (a) the merger proxy did not contain any material misrepresentations or omissions, (b) Golden Gate Capital ("Golden Gate") was an unconflicted, disinterested stockholder, (c) the Zale board was not conflicted regarding the merger, and (d) the Complaint contained no support for an inference that Signet aided and abetted any alleged breach by Zale's board. (Exhibit ("Ex.") A to Appellants' Opening Brief ("Opening Br.")).

The Court of Chancery initially declined to dismiss the claim against Merrill Lynch, and Merrill Lynch moved for reargument. In a letter opinion dated October 29, 2015, the Court of Chancery dismissed with prejudice the aiding and abetting claim against Merrill Lynch, holding that, under the recent decision of *Corwin v. KKR*: (a) the approval of the transaction by a disinterested majority of Zale stockholders in a fully-informed vote required application of the business judgment rule, and (b) the Zale board did not violate its duty of care by acting in a grossly negligent manner. (Ex. B to Opening Br.)

Plaintiffs filed their Notice of Appeal on November 30, 2015 and their corrected opening brief on January 22, 2016. On appeal, Plaintiffs dispute the

Court of Chancery's holdings as to the independence and disinterest of the Board and Golden Gate, the sufficiency of the merger proxy ("the Proxy"), and the applicability of the business judgment rule. This is defendant Merrill Lynch's answering brief.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly concluded that the Complaint failed to allege facts showing the Board acted in bad faith or breached its duty of loyalty, or that Merrill Lynch aided or abetted any such breach.

2. Denied. The Court of Chancery correctly found that the merger was approved by a fully-informed majority vote of disinterested stockholders, requiring application the business judgment rule. Plaintiffs alleged no facts suggesting that Golden Gate had any interest other than obtaining the best value for its Zale shares, in line with all other stockholders. Further, the Proxy disclosed all relevant facts, including the facts Plaintiffs raise in this litigation, to the stockholders, who had the opportunity to consider them before voting in favor of the merger. Applying the business judgment rule requires dismissal because Plaintiffs failed to plead that the Board's conduct amounted to waste or gross negligence.

3. Denied. The Court of Chancery properly concluded that because the merger was approved by a fully-informed, disinterested majority vote, the business judgment rule applies. In any event, Plaintiffs allege no facts suggesting that the Board breached its duty of care or that Merrill Lynch acted with the requisite scienter.

COUNTERSTATEMENT OF FACTS[1]

A. Relevant Parties

Zale, a Delaware corporation headquartered in Texas, is a leading specialty retailer of fine jewelry in North America. (B12.) Zale's brands include Zales Jewelers, Zales Outlet, Gordon's Jewelers, Peoples Jewellers, Mappins Jewellers and Piercing Pagoda. (*Id.*) Prior to its merger with Signet, the Zale Board consisted of nine members (the "Board"), all of whom have been named as the Individual Defendants.[2] (A364.)

Defendant Signet, a Bermuda corporation, is the largest specialty retail jeweler by sales in the United States and the United Kingdom. (B12.) Signet's major U.S. brands include Kay Jewelers and Jared the Galleria of Jewelry. (*Id.*) On February 19, 2014, Zale and Signet entered into a definitive merger agreement

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1 The facts recited herein are taken from the allegations in the Complaint, without conceding their accuracy or Plaintiffs' ability to ultimately prove them, and the documents upon which the Complaint is based, including the Definitive Schedule 14A filed by Zale with the Securities and Exchange Commission ("SEC") on May 1, 2014 (the "Proxy," which appears in the record at B3–185). *See In re Morton's Rest. Grp. Inc. S'holders Litig.,* 74 A.3d 656, 659 (Del. Ch. 2013) (where the complaint is "largely based on pervasive references to the company's [proxy] . . . that document must also be considered as having been incorporated in the Complaint as well").

2 The Individual Defendants are Neale Attenborough, Yuval Braverman, Terry Burman, David Dyer, Kenneth Gilman, Theo Killion, John B. Lowe, Jr., Joshua Olshansky and Beth Pritchard. (A33–36.)

whereby Signet would purchase all outstanding Zale stock at the price of $21.00 per share (the "Merger"). (B41.)

Defendant Merrill Lynch, a Delaware corporation with its principal place of business in New York, is a wholly-owned subsidiary of Bank of America Corporation ("BAC"). A team of investment bankers at Merrill Lynch advised Zale in connection with Zale's merger with Defendant Signet. (¶¶ 58–60.[3]) Zale had also previously engaged Merrill Lynch in connection with a proposed secondary offering of Zale shares owned by Golden Gate. (¶¶ 3, 49.)

B. Pre-Merger Zale

Since the global financial crisis of 2007–2008, the jewelry industry in general, and Zale in particular, experienced historic volatility and lackluster performance. Between early 2009 and mid-2013, Zale shares traded as low as $0.97 per share (March 6, 2009) and as high as $9.41 per share (August 2, 2013), after trading above $30 per share in 2008. Faced with daunting market conditions and its own poor performance, Zale management implemented a multi-year "turnaround" program designed to improve productivity and stop financial losses. (¶ 39.)

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[3] Citations of "¶ _" refer to the paragraphs of the Verified Consolidated Second Amended Class Action Complaint, which appears in the record at A24–97.

In September 2013, Golden Gate, Zale's largest stockholder with 23.3% of Zale's outstanding stock, notified Zale that it intended to sell its Zale securities in a secondary offering. (¶¶ 48–49.) Zale selected Merrill Lynch to be the lead underwriter for the prospective secondary offering and filed a preliminary registration statement on Form S-3 (the "Registration Statement") with the SEC on October 2, 2013. (B35.) The Registration Statement listed an offering price for the secondary offering of $15.035 per share solely for the purposes of calculating the registration fees that would be payable but set neither a "maximum price" nor a deadline for the potential secondary offering. (¶ 49, A242–43.)

C. Merrill Lynch's Relationships with Zale and Signet

Merrill Lynch's relationship with Zale stretched more than a decade prior to its engagement for the secondary offering, including advising Zale on its 2000 purchase of Piercing Pagoda. (¶ 10; B35–36.) In November 2013, when the Board began internal discussions of a potential strategic transaction with Signet, Zale selected Merrill Lynch as financial advisor in part due to its general familiarity with Zale from its "historical relationship." (B36.) As disclosed in the Proxy, during the two years prior to the Merger, BAC, Merrill Lynch's parent corporation, derived aggregate revenues of approximately $10.5 million from Zale for corporate, commercial and investment banking services unrelated to the Merger. (B56.)

Compared to Merrill Lynch's relationship with Zale, Merrill Lynch's prior dealings with Signet were far less significant. (B36.) During the two years prior to the Merger, BAC derived aggregate revenues of approximately $2 million from Signet for corporate, commercial and investment banking services unrelated to the Merger. (B57.)

Additionally, Merrill Lynch bankers frequently met with managers of companies that were not regular clients to explore new business opportunities and to build knowledge relevant to the industry groups they covered. On October 7, 2013, a group of Merrill Lynch bankers unrelated to the Merrill Lynch team working on Zale's secondary offering, in the ordinary course of business, made an unsolicited presentation to members of Signet's senior management on the industry and potential strategic options. (¶ 61; B41.) The presentation covered, among other topics, the current market environment, recent mergers and acquisitions activity and a possible acquisition of Zale by Signet. This presentation included an analysis, based solely upon public information, of a potential acquisition of Zale at illustrative prices (based upon selected premia to Zale's then-current trading price and 52-week high trading price) ranging from $17.00 to $21.00 per share. (¶¶ 10, 61; B41.) This meeting took place after Merrill Lynch's selection to assist Zale in the secondary offering and after Signet had already expressed interest in a transaction with Zale, both facts which were unknown at the time to the Merrill

Lynch team that met with Signet. (B35, B41.) The meeting did not result in any engagement of Merrill Lynch by Signet.

While the Merrill Lynch team that had been working on Zale's secondary offering would have had access to Zale's non-public information, the separate group of Merrill Lynch bankers that met with Signet had no knowledge of the secondary offering team's work and did not use any non-public information from that engagement in its presentation to Signet. (*See* ¶¶ 62, 78; A209–10; B41; *see also* Opening Br. 10.) [redacted]

D. The Merger

On October 6, 2013, prior to Merrill Lynch's October 7 meeting with Signet, and without Merrill Lynch's knowledge, Signet's Chief Executive Officer, Michael Barnes, contacted a member of the Board expressing interest in purchasing Zale. (B35.) On November 7, 2013, Signet sent the Board a letter outlining its interest in acquiring all outstanding shares of Zale at a price of $19.00 per share in cash. (*Id.*) On November 11, 2013, the Board met with Merrill Lynch representatives to discuss possibly engaging Merrill Lynch to advise on a potential transaction with Signet. (¶¶ 58–59.) Merrill Lynch presented on its advisory services and "decade-

long relationship" with Zale (*id.*) and also stated that it had "limited prior relationships and no conflicts with Signet and no current strategic or capital markets assignments or lending relationships with Signet." (B36.) On November 26, 2013, the Board and Merrill Lynch executed an engagement letter for Merrill Lynch to serve as financial advisor to the Board in connection with the proposed transaction. (¶ 60.) [redacted]

After Signet's initial offer, Zale—with the assistance of Merrill Lynch—considered its strategic alternatives, including five stand-alone options and a leveraged buyout option. (¶ 64.) These stand-alone options were presented at a Board meeting with Merrill Lynch on November 18, 2013 and included not only the "status quo" option of continuing to execute management's challenging turnaround plan, but also selling certain of Zale's business units, including Piercing Pagoda and Zale's Canadian stores. (¶¶ 5, 64.) Merrill Lynch based its analysis on two sets of cashflow projections provided by Zale management: the "business plan case" (or "upside case") projections and "alternative case" (or "base case") projections. (¶ 64.) Based on management's aggressive business plan case projections, Merrill Lynch calculated that successfully executing these strategic

alternatives likely would have yielded a share price for Zale stock between a minimum of $14.86 and a maximum of $25.60. (*Id*.)

On December 3, 2013, Signet increased its initial offer of $19.00 in cash per share to also include $1.50-worth of Signet common stock per share. (B37.) On February 10, 2014, Signet reiterated its previous offer of $20.50 per share but now made the consideration 100% cash. (B39.) That same day, after the Board met with representatives of Merrill Lynch and counsel, the Board instructed Merrill Lynch to inform Signet that it might proceed with a transaction if the offer was increased to $21.00 per share. (B40.) The next day, Signet increased its offer to $21.00 per share, a 23% premium over the highest price at which Zale stock had traded over the past year. (B40, B55.)

On February 13, 2014, Merrill Lynch reviewed the financial terms of Signet's revised offer and presented its financial analysis of the proposed transaction to the Board. (B40.) The Board at this point decided not to solicit offers from other potential buyers after considering the low likelihood that a competitive proposal from another buyer would emerge, the risk of a possible leak of the proposed transaction and the fact that the proposed terms of the merger would not preclude or discourage another buyer from making an offer. (*Id*.) At a February 19, 2014 Board meeting, Merrill Lynch provided a financial analysis of the merger consideration and delivered a fairness opinion, stating that the merger

consideration was fair, from a financial point of view, to holders of Zale common stock. (B41.) Merrill Lynch based its fairness opinion on management's more aggressive business plan case projections. (A182–83, A187, B45.) After due consideration and review of a multitude of other relevant factors, the Board unanimously approved the Merger. (B41.)

In connection with the preparation of the Proxy, on March 23, 2014, Merrill Lynch informed Zale's counsel of the October 7, 2013 meeting between Signet and a team of Merrill Lynch bankers. (*Id*.) The Board met on March 25, March 30 and April 2, 2014 to discuss Merrill Lynch's October 7, 2013 meeting with Signet and whether it had any effect on Merrill Lynch's advice or the advisability of the Merger. (*Id.*) After reviewing and considering a number of factors, including that (a) the meeting was unsolicited and did not result in any engagement of Merrill Lynch by Signet and (b) Merrill Lynch's presentation to Signet reflected only public information, the Board concluded that the October 7 meeting (including the presence at that meeting of one Merrill Lynch employee who later joined the Zale merger team) did not impact the Board's "determination and recommendation regarding the merger." (*Id.*)

On May 1, 2014, Zale filed the Proxy with the Securities and Exchange Commission. (B12.) The Proxy detailed Merrill Lynch's use of both sets of projections and the valuation ranges derived therefrom. (B45–53.) It also

disclosed the details of Merrill Lynch's October 7 meeting with Signet and the Board's consideration of whether that meeting impacted its recommendation for the Merger. (B41.) After a vigorous proxy contest waged by TIG Advisors, LLC, which included questions about whether the October 7 meeting affected the sale process and the reliability of Zale's financial projections, 53.1% of shares voted in favor of the Merger on May 29, 2014. (¶¶ 87–98.)

ARGUMENT

I. The Court of Chancery Correctly Held that Absent a Sustainable Claim of Breach of Fiduciary Duty by the Zale Board, There Can Be No Aiding and Abetting Liability for Merrill Lynch

A. Question Presented

Whether aiding and abetting liability can be established without a showing of breach of fiduciary duty. The issue was presented to the Court of Chancery. (A294).

B. Scope of Review

This Court reviews *de novo* the "decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013). Although well-pleaded allegations are 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." *Id.*

C. Merits of Argument

As explained in the brief filed by the Zale Directors and Signet (the "Zale Brief" or "Zale Br."), the Court of Chancery correctly found that there was no breach of the duty of care or of the duty of loyalty. (Zale Br., Argument, Points I, III.) This necessarily precludes any aiding and abetting claim against Merrill Lynch. "As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability." *In re Alloy, Inc.*, 2011 WL 4863716 at *14, (Del. Ch. June 6, 2011); *see Malpiede v.*

II. The Court of Chancery Properly Applied the Business Judgment Rule to the Board's Decision to Retain Merrill Lynch, Consideration of the Alleged Merrill Lynch Conflict and Decision to Proceed with the Merger

A. Question Presented

Whether the Court of Chancery correctly applied the business judgment rule to the Zale Board's decision to retain Merrill Lynch and proceed with the Merger after learning of the meeting between Merrill Lynch and Signet. This issue was presented to the Court of the Chancery. (A542–47.)

B. Scope of Review

This Court's review is *de novo*. *See* Section I.B., *supra*.

C. Merits of Argument

1. The Business Judgment Rule Applies

As explained in the Zale Brief, the Court of Chancery correctly found that a majority of the disinterested shares approved the Merger in a fully-informed vote. (Zale Br., Argument, Point II.) Applying *Corwin v. KKR Financial Holdings*, – A.3d –, 2015 WL 5772262 (Del. Oct. 2, 2015), the Court of Chancery held that such approval makes the Board's actions subject to the business judgment rule. (Ex. B to Opening Br. at 5–6.) Because Merrill Lynch's meeting with Signet was fully disclosed in the Proxy prior to the stockholder vote, the business judgment rule properly applied to the Board's decisions to retain Merrill Lynch and to

proceed with the Merger after learning of the meeting and thoroughly investigating it. (Ex. B to Opening Br. at 6.)

As the Zale Brief shows, the Complaint alleges nothing that makes it reasonably conceivable that the stockholder vote, including Golden Gate's votes, was not disinterested. (Zale Br., Argument, Points I.C.1.b.i, II.C.2.) Nor do Plaintiffs present any "reasonably conceivable set of circumstances"[4] suggesting that the vote was anything other than fully informed, or that the Proxy contained any material misstatements or omissions. Notably, Plaintiffs have never alleged or argued that the Proxy failed to disclose all relevant facts with respect to the Board's decision to engage Merrill Lynch, Merrill Lynch's October 7, 2013 meeting with Signet or the Board's decision to proceed with the Merger after learning of the October 7 meeting. Instead, Plaintiffs seek to discredit the stockholder vote through the unsupported contention that Golden Gate was not disinterested. (Zale Br., Argument, Points I.C.1.b.i, II.C.2.)

Plaintiffs also argue that the Proxy did not disclose relevant information with respect to the stand-alone valuation of Zale and other strategic alternatives. (Opening Br. 24–25.) However, the Proxy presented two sets of projections and made clear that Merrill Lynch used the more optimistic business plan case in preparing its fairness opinion. (B45, B49.) The Proxy also described the Board's

[4] *Central Mortg. v. Morgan Stanley Mortg.*, 27 A.3d 531, 536 (Del. 2011).

consideration of strategic alternatives and explained the drawbacks of these alternatives. (B36–37.) These disclosures, which the Court of Chancery found to be adequate (Ex. A to Opening Br. 23–24), were further subjected to intense scrutiny and debate during the proxy contest waged before the stockholder vote (¶¶ 87–98). As further shown in the Zale Brief, Plaintiffs' attempts to discredit the Proxy and the vote are entirely without merit. (Zale Br., Argument, Point II.C.1.) Having already made these very same arguments during a proxy battle before a fully-informed, disinterested vote that they lost, the stockholder Plaintiffs do not get a second bite at the apple via litigation.

2. Plaintiffs Failed to Allege Waste or Gross Negligence

The Court of Chancery held that under the business judgment rule, Plaintiffs must show that the Board was "grossly negligent" to prevail on their duty of care claim and found that Plaintiffs had failed to plead gross negligence. (Ex. B to Opening Br. 7–15.) While other authorities have held that a breach of the duty of care under the business judgment rule cannot occur absent a showing of "waste"—*i.e.*, where "the board's decision cannot be attributed to any rational business purpose"[5]—and not just gross negligence, regardless of what threshold applies,

[5] *Calma on Behalf of Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 577 (Del. Ch. 2015); *see also Corwin*, 101 A.3d at 1001 ("[T]he legal effect of a fully-informed stockholder vote of a transaction with a non-controlling stockholder is that the business judgment rule applies and insulates the transaction from all attacks other than on the grounds of waste.")

Plaintiffs have not pled it here. The well-established standard for pleading gross negligence still requires "an extreme departure from the ordinary standard of care," *Jones v. Crawford*, 1 A.3d 299, 302 (Del. 2010) (citation omitted) or a decision "so grossly off-the-mark as to amount to 'reckless indifference' or a 'gross abuse of discretion.'" *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652 n.45 (Del. Ch. 2008) (citation omitted). As the Court of Chancery noted, "Plaintiffs made no argument that the Director Defendants breached their duty of care under a gross negligence standard." (Ex. B. to Opening Br. 13.) Plaintiffs thus cannot show a breach of duty under either standard.

III. Even If There Were a Breach of Duty, Plaintiffs Cannot Satisfy the High Standard for an Aiding and Abetting Claim

A. Question Presented

Whether, even if there were a breach of duty, the Complaint meets the pleading requirements for an aiding and abetting claim. This issue was presented to the Court of Chancery. (A294–302.)

B. Scope of Review

This Court's review is *de novo*. *See* Section I.B., *supra*.

C. Merits of Argument

Even if this Court were to reverse the trial court's conclusion that the Board did not breach a fiduciary duty, the Complaint fails to adequately allege that Merrill Lynch aided and abetted any breach.

In addition to showing an underlying breach of fiduciary duty, a claim for aiding and abetting a breach must establish "***knowing participation*** in that breach by" the alleged aider and abettor. *Malpiede*, 780 A.2d at 1096 (emphasis added). "The standard for an aiding and abetting claim is a stringent one, one that turns on proof of scienter of the alleged abettor." *Binks v. DSL.net, Inc.*, 2010 WL 1713629, at *10 (Del. Ch. Apr. 29, 2010). "[T]he requirement that the aider and abettor act with scienter makes an aiding and abetting claim among the most difficult to prove." *RBC Capital Markets, LLC v. Jervis*, 2015 WL 7721882, at *35 (Del. Nov. 30, 2015). "To establish scienter, the plaintiff must demonstrate

that the aider and abettor had actual or constructive knowledge that their conduct was legally improper." *Id.* at *33 (internal quotation and citation omitted).

The Complaint fails to allege "knowing participation" by Merrill Lynch. None of Plaintiffs' allegations suggest that Merrill Lynch had actual or constructive knowledge that not disclosing the fact that some of its bankers had a meeting with Signet, where no confidential information was disclosed, was legally improper. To be clear, there was no conflict here: Merrill Lynch's interests were aligned with Zale's stockholders, and there was no question of divided loyalties between Zale and Signet. [redacted]

Nevertheless, Merrill Lynch disclosed the fact of the Signet meeting to Zale before the Proxy was filed with the SEC, giving both the Board and the stockholders ample opportunity to consider any effect the October 7 Signet meeting might have had on the Merger. (B41.) These undisputed facts negate any possible inference that Merrill Lynch acted with scienter. *Jervis*, 2015 WL 7721882, at *33.

Merrill Lynch's conduct stands in stark contrast to recent examples of actionable conduct by financial advisors. Unlike the case in *Jervis* and *Del Monte*, Merrill Lynch did not actively seek to provide staple financing to the buyer once it had already secured a role advising the seller. *See Jervis*, 2015 WL 7721882, at *6–7, 12–16, 31–35; *In re Del Monte*, 25 A.3d 813, 832–36 (Del. Ch. 2011). Nor

did it distort the Board's decision-making process by working behind the scenes to *lower* a valuation analysis in order to make its preferred bid appear stronger. *Jervis*, 2015 WL 7721882, at *26–28; *see also In re El Paso*, 41 A.3d 432, 441 (Del. Ch. 2012) (sell-side advisor's *downward* revisions to the valuation of a competing alternative "could be seen as suspicious" in light of advisor's substantial ownership interest in the buyer). In contrast to the scenario in *Jervis* and *El Paso*, Merrill Lynch's valuation analysis utilized Zale's own aggressive business case projections without downward revisions and was fully disclosed to the Board and to stockholders. There is nothing comparable in the Complaint that could form the basis for attributing any improper motives or conduct to Merrill Lynch.

Merrill Lynch likewise cannot be responsible for any alleged "mischaracterization" of Zale management's projections in the Proxy. (*See* Opening Br. 23.) The Proxy makes clear that Merrill Lynch's role with respect to the projections was to analyze them under the "assum[ption] that [they were] reasonably prepared on bases reflecting the best currently available estimates and good faith judgments of . . . management," and not to vouch for the accuracy of the projections themselves.[6] (B49.) Plaintiffs accordingly have established no grounds for an aiding and abetting claim against Merrill Lynch.

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[6] In *Jervis*, this Court rejected the notion that financial advisors "function as gatekeepers," answerable for any flaws in the "design and [implementation]

of the sale process" or the "determin[ation] of a corporation's value." 2015 WL 7721882, at *35 n.191. Such a concept "would inappropriately . . . suggest[] that any failure by a financial advisor to prevent directors from breaching their duty of care gives rise to an aiding and abetting claim against the advisor." *Id*. Ultimately, "it is for the board, in managing the business and affairs of the corporation, to determine what services, and on what terms, it will hire a financial advisor to perform in assisting the board in carrying out its oversight function." *Id.*

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

GREENBERG TRAURIG LLP

/s/ Gregory E. Stuhlman
Gregory E. Stuhlman (No. 4765)
The Nemours Building
1007 North Orange Street
Suite 1200
Wilmington, Delaware 19801
Tel.: (302) 661-7000

Attorneys for Defendant Merrill Lynch, Pierce, Fenner & Smith Incorporated

Dated: February 15, 2016

CERTIFICATE OF SERVICE

I, Gregory E. Stuhlman, Esquire, do hereby certify that on the 1st day of March, 2016, I caused copies of the foregoing to be served on all counsel of record via File & ServeXpress:

/s/ Gregory E. Stuhlman
Gregory E. Stuhlman (No. 4765)