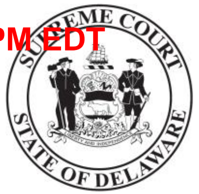
EFiled: Mar 16 2016 05:19PM EDT
Filing ID 58731382
Case Number 645,2015 D



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 Cons. C.A No. 9388-VCP

PUBLIC VERSION OF APPELLANTS' REPLY BRIEF

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Dated: March 16, 2016

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PRELIMINARY STATEMENT

Plaintiffs' Opening Brief[1] demonstrated that the trial court erred by finding that the Stockholder Vote ratified the Merger. Contrary to the trial court's decisions, the Complaint raises a reasonable inference both that the vote was not fully informed and also that a majority of the disinterested shares did not, in fact, approve the Merger. In rejecting Plaintiffs' disclosure allegations, the trial court failed to draw the reasonable inference that Zale's Chairman testified truthfully in this matter. Instead, the trial court adopted its findings of fact from the PI Decision, in which it weighed competing allegations and came to its own conclusions as to what Plaintiffs would likely be able to prove. With respect to the reasonable inference that Golden Gate, which had decided to exit its large investment in Zale, was not aligned with the stockholders, the trial court made improper and unwarranted assumptions concerning investor motivations and imposed incorrect pleading requirements.

The trial court should not have shifted the standard of review from *Revlon* to business judgment, and it should have maintained its holding that the Complaint pleaded an exculpated duty of care claim against the Board and a claim against BAML for aiding and abetting. Further, because the Complaint alleges a reasonable

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[1] All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in Plaintiff's Opening Brief ("OB"). Signet and Zale are referred to collectively as "Zale," and their Answering Brief is cited as "Zale AB." BAML's Answering Brief is cited as "BAML AB." Appellee's Appendix is cited as "B__."

inference that the Board's disclosure violations were knowing and intentional, it necessarily follows that the Complaint raises a reasonable inference of *unexculpated* claims for breach of loyalty and bad faith.

Plaintiffs also demonstrated that the trial court erroneously applied the business judgment standard when it dismissed the claims arising out of the Board's wholesale neglect of its duties when negotiating the Merger. Although the trial court was purportedly applying *Revlon*, its findings applied the much stricter business judgment standard. Because the Complaint, in its entirety, demonstrates the Board's wholesale failure to negotiate for the maximum value available, the Complaint states duty of care claims, which (applying the trial court's findings) were aided and abetted by BAML.[2] Indeed, the allegations are sufficiently egregious to raise a reasonable inference that the Board acted in bad faith – regardless of which standard of review applies.

Defendants ask this Court to repeat the errors below. As to the disclosure violations, they propose alternative explanations for the Board's actions which – even if reasonable (and they are not) – do not meet their burden. As to Golden Gate, Defendants repeat the trial court's illogical presumption that the only reason an

[2] The Complaint also raises a reasonable inference that Signet aided and abetted the Board's breaches by creating and/or exploiting the Board's conflicts.

investor might not seek maximum value in a merger is that the investor is strapped for cash.[3]

Defendants do not negate the inference that the Board intentionally disregarded its duties. Tellingly, Defendants fail to identify any Board action that reasonably could be interpreted as an effort to obtain maximum value for the stockholders. In light of BAML's opinion that Zale's value was as high as $27 per share, the Board's one counter-offer, seeking a $0.50 price increase from $20.50 to $21, cannot, under any standard, be interpreted as performing its fiduciary duty in service of the specific objective of *maximizing* the sale price.[4]

Indeed, neither BAML nor Signet can escape the fact that the Board's sole demand for $21 per share is almost 25% lower than the $27 top end of BAML's DCF valuation, but coincides precisely with the $21 valuation BAML proposed to Signet in their October meeting.

Finally, Zale concedes that it created the Alternative Case Projections *after* Signet made its offer, which makes the inference of the Board's bad faith not just reasonable, but almost inevitable. (Zale AB 10.) Zale does not suggest that, after Signet made its offer, the Board, *coincidentally*, revised downward its opinion as to

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[3] *See, e.g.*, *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 255-56 (Del. Ch. 2014), *aff'd sub nom*, *RBC Capital Markets, LLC, v. Jervis*, 2015 Del. LEXIS 629 (Del. Nov. 30, 2015) (hedge fund's business plan to exit its positions after a certain period of time motivated fund to seek quick merger rather than maximum stockholder value).

[4] *Jervis*, 2015 Del. LEXIS 629, at *75-76.

Zale's future performance. That would conflict both with Burman's testimony *and* Zale's representations to BAML that the Business Plan Projections remained the Board's best estimate of Zale's future results. Instead, this admission confirms Burman's testimony that the Alternate Case Projections merely "discounted" the Business Plan Projections – not based on any actual results or changes in the market – but as a "stress test." (OB 11; A345.)

Zale does not explain why a Board would create, during merger negotiations, pessimistic financial projections, which merely "discounted" the projections that the Board believed were accurate. Such an analysis could not assist the Board in seeking the maximum value for stockholders. Zale fails to offer any justification for including arbitrarily negative, "stress test" projections in the Proxy, without a full explanation, including that they do not reflect the Board's opinion.[5] The reasonable inference is that the Board wanted to give a false, pessimistic view of Zale's prospects against which to evaluate the Merger price.

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[5] Defendants try to explain the Alternative Case Projections by asserting that in connection with a potential sale transaction, the Board should take a "hard look" at its current plans and projections. (Zale AB 23.) Perhaps, but so what? Defendants do not and cannot suggest that after the "hard look," the Board changed its opinion that the Business Plan Projections remained the best estimate of Zale's future financial performance.

COUNTERSTATEMENT OF FACTS

Defendants' briefs repeatedly rely upon hearsay from the Proxy and the trial court's findings of fact in the PI Decision. This is improper on a motion to dismiss. *See, e.g.*, *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995); *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009).

Defendants assert that BAML's October meeting with Signet was "in the ordinary course of business" and its presentation to Signet was "based solely upon public information." (BAML AB 8; Zale AB 11.) BAML asserts that its bankers were unaware that Zale had retained BAML as lead underwriter for the secondary offering or that, the day before the meeting, Signet had approached Zale about a transaction. (BAML AB 8-9.) The Proxy cannot establish any facts, and on a motion to dismiss, Plaintiffs are entitled to the reasonable inference to the contrary.

BAML also purports to identify the basis for the Board's decision to go forward with the Merger despite BAML's conflict. (*Id.* 12.) These factors do not appear in the Complaint (or anywhere else). [redacted] The banker's self-serving assertion should be subject to discovery.

ARGUMENT

Under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), the Court must "examine whether a board's overall course of action was *reasonable* under the circumstances as a good faith attempt to secure the highest value reasonably attainable." *Jervis*, 2015 Del. LEXIS 629, at *76 (emphasis added). The maximum value may require the Board to reject a transaction and remain independent. *Chen v. Howard-Anderson*, 87 A.3d 648, 672-73 (Del. Ch. 2014). If the transaction is approved by a fully informed vote of a disinterested stockholder majority, the Board's actions are reviewed under the business judgment standard. *Corwin v. KKR Fin. Holdings LLC*, 2015 Del. LEXIS 473, at *20, 22-23 (Del. Oct. 2, 2015). However, it is not "easy for a board of directors to obtain 'ratification effect' from a stockholder vote. The burden of proof that the vote was fair, uncoerced, and fully informed falls squarely on the board." *Id.* at *22 n.27 (citing *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 898-99 (Del. Ch. 1999)). "[I]f troubling facts regarding director behavior were not disclosed . . . the business judgment rule is not invoked." *Id.* at *22.

I. DEFENDANTS BREACHED THEIR DUTY OF DISCLOSURE

It is reasonably conceivable that Plaintiffs will prove one or more of the following: (1) the failure to inform stockholders that the Board and BAML believed the Business Plan Projections to be the "best estimate of Zale's future financial performance" was a material omission; (2) the inclusion of the Alternative Case Projections in the Proxy's description of Prospective Financial Information and BAML's Financial Analyses, without fully explaining that these projections did not reflect the Board's opinion (and were just a "stress test"), was deliberately and materially misleading; and (3) the Board's statements during the proxy contest disparaging the Business Plan Projections were deliberately and materially misleading. (B45-46, 50-52.)

The Complaint's factual allegations are sufficient to raise a reasonable inference that the Stockholder Vote was *not* fully informed and, therefore, *Revlon* applies. The trial court correctly found, under *Revlon*, that the Complaint stated a duty of care claim against the Board and an aiding and abetting claim against BAML. In addition, under *Revlon*, the alleged facts also raise a reasonable inference that the Board breached its duty of loyalty by deliberately misleading the stockholders.[6]

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[6] Allegations that a board knowingly breached its disclosure obligations is sufficient to raise an inference of breach of loyalty. *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 987 (Del. Ch. 2000) (allegations that false disclosures were made "in bad faith, knowingly or intentionally" allege violations of duty of loyalty); *Chen*, 87 A.3d at 692 (denying summary judgment based on evidence of directors' knowing disclosure violations).

The trial court rejected Plaintiffs' disclosure allegations by adopting its findings from the PI Decision. (OB 24-25.) Such findings of fact are not permissible on a motion to dismiss. Zale does not deny that the trial court, in fact, adopted its findings under the incorrect standard. (Zale AB 27 n.91.)[7]

The Business Plan Projections. Zale failed to demonstrate that Plaintiffs are not entitled to a reasonable inference that the Board knowingly breached its disclosure obligations because the Proxy did not explain that the Business Plan Projections represented the Board's best estimate of Zale's future prospects. (*Id.* 27-29.) There is a reasonable inference that a stockholder's decision on the Merger, when comparing the $21 merger price to a Business Plan Projection DCF valuation range of $16.25 to $27.25 and an Alternative Case Projection DCF valuation range of $11.50 to $20.75, would be impacted by information that the Board and BAML each considered the Business Plan Projections to be the best estimate of Zale's future performance and that the Alternative Case Projections were nothing but a "stress test."[8]

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[7] Although the trial court asserted that "significant information was disclosed in the Proxy," it did not identify any information in the Proxy that cured the Board's omissions, and there was none. (OB Ex. A 24.)

[8] The Board's failure to explain the dramatic difference between the two sets of projections strongly indicates bad faith. The $21 Merger price compares unfavorably to the Business Plan Projections DCF valuation range of $16.25 to $27.25. It is reasonable to infer that the Board added the bogus Alternative Plan Projections so that the stockholders would see a second valuation range of just $11.50 to $20.75 – against which the Merger price looks more attractive.

Zale relies upon demonstrably false factual assertions. Plaintiffs did plead facts showing that the Board believed the Business Plan Projection to be superior and that it did not believe the projections to be "aggressive" and a "stretch." (Zale AB 29.) Burman testified to this fact and the Board represented the same to BAML. In addition, the Proxy does not disclose "how and why" the Alternative Case Projections were created. (*Id.* 10.) It says only that the Alternative Case Projections discounted future revenue and savings. It does not disclose (1) that the projections were created after Signet made its offer; (2) how Zale decided upon the discounted revenue and savings; (3) that the projections were only a "stress test," not based on actual data; or (4) that the projections were not the Board's opinion as to Zale's future prospects.

Zale's claim that the "best estimate" statement must be put into "context" makes no sense at all. The context was that the Proxy stated that the Business Plan Projections were based on the 3-Year Plan and that the Alternative Case Projections were "premised" on the Company generating less revenue growth and savings. (*Id.* 28.) This does not tell stockholders that the Board and BAML believed the Business Plan Projections to be the best estimate of Zale's future results. "Shareholders are entitled to honest communication from directors, *given with complete candor and in good faith*." *In re Citigroup S'holder Deriv. Litig.*, 964 A.2d 106, 132 (Del. Ch. 2009) (citation omitted) (emphasis added). Where a Board presents two sets of

valuations, it is reasonable to infer that a stockholder would afford equal weight to each. Indeed, Zale does not explain why the Board warned BAML that the Business Plan Projections were its "best estimate," but did not provide that same information to the stockholders. (A53.)

Zale also ignores that the Board subsequently magnified the Proxy's disclosure violations by making intentionally false statements during the proxy contest. There, the Board falsely told stockholders that the Business Plan Projections were a "stretch" and were only "designed to challenge management."[9] (*See, e.g.*, A67-68.) Further, the fact that two sets of valuations were debated during the proxy contest is irrelevant. (Zale AB 29.) Surely, a board's intentional misstatements are not excused because they are challenged – especially where the board responds by reaffirming and, indeed, adding to the falsehood.

Finally, Defendants point to the Proxy's disclosure that BAML's fairness opinion relied upon the Business Plan Projections, and they assert that "if the deal were fair on that basis, then it clearly [would be] fair based on the alternative projections." (Zale AB 23; BAML AB 17.) This, too, is irrelevant. The fact that

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[9] It is logically inconsistent to suggest that the Board could believe the Business Plan Projections are the "best estimate" of what the Company would achieve and, at the same time, believe that the projections were a "stretch." Further, Zale's claim that the Business Plan Projections correspond to 200% bonuses is irrelevant on a motion to dismiss – the incentive plan is not in the record. (Zale AB 29.) The Board could have approved 200% bonuses for successfully turning around the Company, or it could have shifted compensation from base salary to bonus. Zale's claim does not render Plaintiffs' inference "unreasonable."

the Merger price fell within BAML's range of "fairness" is not relevant to whether the omitted information was material or whether Alternative Case Projections were created to push through a deal with Signet. Of course, when BAML opined that the Merger price was "fair," it did not purport to opine that the Board's conduct satisfied *Revlon* or any other standard.

The SVSA Valuations. Defendants offer no substantive arguments that the Board's failure to disclose the SVSA Valuations was not a material omission. Zale engages in misdirection by pointing to the trial court's finding that the Merger price fell within the valuation ranges for each of the six options in the SVSA Valuations (using the Business Plan Projections). (Zale AB 27 (citing OB Ex. A 41).) But the trial court's finding was only that the Merger price was not unreasonable. (OB Ex. A 41.) The fact that the Merger price fell within the (low end) of the SVSA Valuations does not imply that the SVSA Valuations were not, themselves, material information that should have been disclosed.

BAML asserts that the Proxy described "the Board's consideration of strategic alternatives." (BAML AB 17-18.) That description, too, is misleading. The Proxy represents that BAML:

> [E]xpressed their view [1] that ***certain strategic alternatives were reasonably likely to be dilutive . . . compared to the Company executing its three-year plan on a standalone basis*** and [2] . . . the potential incremental ***value created by a leveraged recapitalization of the Company was unlikely to be meaningful*** . . . .

(B37.) The first statement is misleading: The stockholders were not choosing between the 3-Year Plan and any strategic alternative; they were choosing between strategic alternatives and the Merger price. The Proxy does not disclose that none of the strategic alternatives were dilutive in comparison to the Merger. The second statement is simply false. The SVSA Valuations show that, under the Business Plan Projections, a leveraged recapitalization resulted in a valuation range from $20.00 to $25.60 – which is certainly meaningful in comparison to a $21 Merger price. (A52.)

The Proxy also represents that the Board considered a "review of strategic and other alternatives [and determined] that none of these alternatives was reasonably likely to . . . create greater value for the Company's stockholders than, the merger." (B42.) In fact, the SVSA Valuation showed that *all* of the strategic alternatives were likely to create greater value for the stockholders. (A51-52.)

II. GOLDEN GATE WAS NOT DISINTERESTED

The Complaint raises a reasonable inference that Golden Gate was interested in the Merger. Absent Golden Gate's 23.2% vote, the disinterested stockholders overwhelmingly rejected the Merger by a vote of 61% against.

Plaintiffs need only allege that Golden Gate obtained a unique benefit in the Merger. *See, e.g.*, *In re Answers Corp. S'holders Litig.*, 2012 Del. Ch. LEXIS 76, at *23-24 (Del. Ch. Apr. 11, 2012). Because Golden Gate decided to sell its shares in a secondary offering, the Merger provided the unique benefit of a premium over the price Zale could have obtained in the offering. (OB 25-28.)

The opinion in *Answers*, on which Zale relies, is almost directly on point. A 30% stockholder "wanted" to sell its entire position, but could not do so because the stock traded thinly. *Answers*, 2012 Del. Ch. LEXIS 76, at *4. There was no allegation that the stockholder needed to sell. The stockholder obtained the unique benefit of being able to liquidate its position by pushing through a quick merger and, thus, was conflicted. *Id.* at *23, 25; *see also In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 255-56 (Del. Ch. 2014), *aff'd sub nom, RBC Capital Markets v. Jervis*, 2015 Del. LEXIS 629 (Del. Nov. 30, 2015) ("Shackelton and his fund had unique reasons to favor a near-term transaction that caused their interests to diverge from those of the Rural's equity as a whole.").

Zale's brief repeats the trial court's erroneous presumption that unless Golden Gate was strapped for cash, it must have desired the maximum value for its shares in the Merger.[10] (Zale AB 15-16.) This argument is logically and legally incorrect. Zale ignores that investors might decide to exit an investment for reasons other than a need for cash. *See, e.g.*, *Rural/Metro Corp.*, 102 A.3d at 255-57. It is, therefore, irrelevant that Golden Gate could have sold in a secondary; or that the Registration Statement was the "first step in making its shares marketable" and did not "obligate" Golden Gate to sell any shares. (Zale AB 15-16.) It is sufficient that Golden Gate decided to sell its shares in a secondary. (B35.)

Zale, therefore, ignores that Golden Gate was conflicted not only as to the price obtained in the Merger but with the decision merge at all. Zale's maximum value may have been to remain independent, which would have conflicted with Golden Gate's desire for a premium over selling its shares in the market. *See, e.g.*, *Chen*, 87 A.3d at 672-73 ("best value . . . could be remaining independent and not engaging in any transaction at all"). Zale does not dispute that Golden Gate preferred the Merger to remaining independent.

No court has required allegations of a cash crunch to raise an inference that a stockholder had different interests in a merger. (Zale AB 16-17.) In *Answers*, the

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[10] As noted in the Opening Brief, Plaintiffs did not allege or argue that Golden Gate was desperate for cash. (OB 28.)

stockholder only "wanted" to sell. 2012 Del. Ch. LEXIS 76, at *4. In *Rural/Metro*, the stockholder's business plan was sufficient to allege an interest. 102 A.3d at 255-57. Zale's authority holds only that a need for cash is sufficient; not that it is necessary. *McMullin v. Beran*, 765 A.2d 910, 921-22 (Del. 2000); *NJ Carpenters Pension Fund v. InfoGroup, Inc.*, 2011 Del Ch. LEXIS 147, at *27 (Del. Ch. Sept. 30, 2011).

Finally, Defendants have not explained Golden Gate's (and Zale's) failure to withdraw the Registration Statement or publicly disclose that it was not pursuing a secondary offering. Whether or not Golden Gate was obligated to do so is irrelevant. (Zale AB 23.) It is reasonable to infer that withdrawing the Registration Statement would cause Zale's stock price to increase, thereby pressing Signet to increase its offer. Golden Gate's (and Zale's) failure to take this action is further evidence in support of the inference that Golden Gate did not share the common stockholders' interest in obtaining the maximum value. *See Answers*, 2012 Del. Ch. LEXIS 76, at *24 n.46 (interested stockholder feared that an increase in the stock price could scuttle transaction); *C&J Energy Servs. v. City of Miami Gen. Employees' & Sanitation Employees' Ret. Trust.*, 107 A.3d 1049, 1066 (Del. 2014) (in a change of control transaction, a board "must not take actions inconsistent with achieving the highest immediate value reasonably attainable.").

III. THE COMPLAINT STATES DUTY OF LOYALTY AND DUTY OF CARE CLAIMS AGAINST THE BOARD

Because the Complaint raises a reasonable inference that the Merger was not approved by a fully informed, disinterested majority, there was no ratification and the Board's conduct must satisfy *Revlon*.[11] The trial court correctly found that, under *Revlon*, the Complaint states an exculpated duty of care claim against the Board arising out of its retention of a conflicted financial advisor. (OB Ex. A 49-50.) Defendants did not challenge this finding, and it is amply supported by the record. Further, although the trial court purported to apply *Revlon* in dismissing the remainder of the Complaint's duty of care claims, it in fact applied the incorrect business judgment standard. (OB 32-34; OB Ex. A 49.) This Court reviews a trial court's actual findings, regardless of the label used. *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989) (trial court "attempted" to apply business judgment, but actually applied *Revlon*).

The Complaint alleges Board actions that are inconsistent with a good faith attempt to secure the maximum value reasonably attainable for Zale's stockholders. *See C&J Energy*, 107 A.3d at 1066. The Board: (1) failed to withdraw the

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[11] BAML incorrectly argues that because the Proxy disclosed its October 2013 meeting with Signet, "the Board's decision to retain Merrill Lynch and to proceed with the Merger" is reviewed under the business judgment rule – even if *Revlon* applied to the remaining allegations. (BAML AB 16-17.) BAML does not cite any authority for the proposition that courts apply different standards, piecemeal, to different allegations of a complaint, and there is none. The stockholders were not asked to and did not vote on the Board's decision to retain BAML. *See, e.g.*, *Santa Fe Pac. Corp.*, 669 A.2d at 68.

Registration Statement; (2) failed adequately to explore BAML's conflicts; (3) created a bogus set of pessimistic projections; (4) failed even to try to obtain a price at the high end of BAML's valuations; (5) requested only a single $0.50 price increase, and not until *after* it began negotiating the merger agreement; (6) deliberately issued a false and misleading Proxy; and (7) deliberately misled the stockholders during the Proxy contest.[12]

Tellingly, Defendants do not identify any Board actions consistent with an attempt to maximize stockholder value. Zale argues only that the Board rejected two offers, obtained a fiduciary out and, after the parties had begun negotiating the merger agreement, requested a $0.50 price increase to $21 per share. (Zale AB 22.) BAML, however, opined that the Business Plan Projections supported valuations as high as $27.25. (B52.) These facts do not negate the reasonable inference that the Board acted in bad faith.

The allegations that the Board deliberately misled the stockholders in the proxy contest are alone sufficient to state claims against the Board for breach of loyalty, bad faith and breach of the duty of care. *See Crescent/Mach I Partners, L.P.*

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[12] In addition, two Directors were controlled by Golden Gate – one of whom sat on the negotiating committee. Two other directors, Zale's CEO and its Chairman, obtained significant financial benefits from the Merger and it is reasonable to infer that they were responsible for the bogus projections. The Board agreed to pay BAML a $1 million fee if BAML issued a fairness opinion in support of a merger and an additional $11 million if a merger was consummated. BAML would earn only $2 million if the Board did not approve a transaction.

v. Turner, 846 A.2d 963, 987 (Del. Ch. 2000) (allegations that false disclosures were made "in bad faith, knowingly or intentionally" allege violations of duty of loyalty).

The additional allegations of the Board's wholesale failure to take actions to obtain the highest value, especially when viewed in connection with the disclosure violations, are also sufficient to raise a reasonable inference under *Revlon* that the Board breached its duties of loyalty and care. *See, e.g.*, *Koehler v. NetSpend Holdings, Inc.*, 2013 Del. Ch. LEXIS 131, at *72-73 (Del. Ch. May 21, 2013) ("Though several of these facts, alone, are not outside the range of reasonable actions the Board could take, in their aggregate, these facts indicate a process that is unreasonable.").

Finally, even if the business judgment standard applies, the Complaint states duty of care claims. The trial court found, "[a]rguably, the Board's actions as to Merrill Lynch in this case constitute a breach of the duty of care under a gross negligence standard as well." (OB Ex. A 51 n.106.) It necessarily follows that there is a reasonable inference of gross negligence. The trial court further noted that it could not determine on a motion to dismiss whether BAML's conflict was "nonconsentable." (OB Ex. A 52-53; *see also Jervis*, 2015 Del. LEXIS 629, at *92 (recognizing that boards "may be free to consent to certain conflicts . . . .").) Therefore, there is a reasonable inference that the Board's consent to BAML's conflict was grossly negligent.

IV. BAML AND SIGNET AIDED AND ABETTED THE BOARD

BAML. The trial court found a reasonable inference that, by failing to disclose its conflict, BAML knowingly participated in the Board's failure to make an informed decision before retaining BAML. (OB Ex. A 57-58.) Plaintiffs' claim is against BAML, not Mr. Rose. BAML was obligated to disclose its conflict to the Board. *See also Jervis*, 2015 Del. LEXIS 629, at *108-09 (third party liable for misleading the board or creating the informational vacuum). BAML asks this Court to weigh the allegations and conclude that *Rose* did not act with scienter. (BAML AB 20-22.) Plaintiff need only allege facts from which it is "reasonably conceivable" that it can prevail against BAML. *Jervis*, 2015 Del. LEXIS 629, at *111 (scienter is a question of fact). It is reasonably inferable that BAML's conflict infected the Board's entire process. (OB Ex. A 58 (noting that the Board sole counter offer was $21).)

Signet. Signet may be liable if it "attempts to create or exploit conflicts of interest in the board." *Jervis*, 2015 Del. LEXIS 629, at *109. Signet and BAML met in October 2013, the day after Signet approached Golden Gate about a potential transaction, and Signet knew the Board's $21 demand comported with BAML's valuation from that meeting. This raises a reasonable inference that Signet exploited BAML's conflict and the Board's breach. (OB 34 n.16.) In rejecting this inference, the trial court found, without any basis, that Signet would have assumed BAML

disclosed to Zale its meeting, and faulted Plaintiffs for not alleging otherwise. (OB Ex. A 56.) This was error. *See Gantler*, 965 A.2d at 709 (on motion to dismiss, trial court may not disregard a reasonable inference by "weighing it against other, perhaps contrary, inferences that might be drawn.").

CONCLUSION

For the reasons set forth above, the Court should reverse the trial court's dismissal of the Complaint and remand this matter to the trial court with instructions to reinstate the claims: (1) against BAML for aiding and abetting the Board's breaches of the duty of care; and (2) against the Board for breach of the duty of loyalty and bad faith in connection with the Proxy and the proxy contest.

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Dated: March 16, 2016