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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-VCP
(Consolidated)

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[CORRECTED] APPELLANTS' OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Plaintiffs-Appellants appeal from the Court of Chancery's Memorandum Opinion, dated October 1, 2015 ("*Zale I*"),[1] dismissing with prejudice Counts I and II of the Verified Consolidated Second Amended Class Action Complaint (the "Complaint," A24-97), and from the Court of Chancery's Letter Opinion, dated October 29, 2015 ("*Zale II*"),[2] dismissing with prejudice Count III of the Complaint.[3]

In May 2014, Signet Jewelers Limited ("Signet") acquired Zale Corporation ("Zale") for $21 per share (the "Merger"). Plaintiffs allege that Zale's board of directors ("Board" or "Director Defendants") breached their obligations to pursue the maximum value for Zale's stockholders and breached their disclosure obligations. Zale's Chairman and its CEO pushed through the Merger in their own financial interests. Zale's largest stockholder, Golden Gate Capital ("Golden Gate"), which controlled two Board members, was also financially interested in reaching any deal with Signet rather than having Zale remain independent. It otherwise intended to sell its large stake in Zale through a public offering, which, inevitably, would fetch a lower price. The remaining Director Defendants merely followed along.

[1] *In re Zale Corp. Stockholders Litig.*, 2015 Del. Ch. LEXIS 249 (Del. Ch. Oct 1, 2015).

[2] *In re Zale Corp. Stockholders Litig.*, 2015 Del. Ch. LEXIS 274 (Del. Ch. Oct. 29, 2015).

[3] The Appendix to Appellant's Opening Brief is cited as "A__." *Zale I* is attached hereto as Exhibit A. *Zale II* is attached hereto as Exhibit B.

The Board's breaches were aided by its financial advisor, Bank of America Merrill Lynch ("BAML"), which sought to build a relationship with Signet and to solidify its relationship with Golden Gate. BAML had advised Zale in connection with an October 2, 2013, Registration Statement for Golden Gate's planned offering. Just five days later, BAML met with Signet to pitch the idea of acquiring Zale and opined that Zale was worth between $17 and $21 per share. Signet soon made its offer to acquire Zale. Yet, when Zale then retained BAML for the Merger negotiations, BAML failed to disclose the October Signet meeting *and* allowed one the senior bankers who pitched Signet to lead the team advising Zale. Not surprisingly, the final Merger price was $21. Signet, which was aware of, and took advantage of, BAML's conflict, also aided the Board's breaches.

On May 23, 2014, the trial court denied Plaintiffs' motion for preliminary injunction (the "PI Decision," A98-229). On May 29, 2014, only 53.1% of Zale's stockholders, which included Golden Gate's 23.2% stake, approved the Merger (the "Stockholder Vote"). (A77.)

On October 1, 2015, in *Zale I*, the trial court granted in part Defendants' motions to dismiss. It found that the Stockholder Vote ratified the Merger, and it held that the Board's conduct should be evaluated under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). (Ex. A 22-24, 26.) The court found that the Complaint stated an exculpated duty of care claim against the Board for relying upon a conflicted financial advisor. (*Id.* 48-54.) It sustained the aiding and abetting claim against BAML, *id.* 54-55, and dismissed the claim against Signet, *id.* 55-59.

On October 29, 2015, in *Zale II*, the trial court applied the rule just announced in *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. Oct. 2, 2015). Because the court had found that the Stockholder Vote ratified the Merger, it held that the business judgment standard, not *Revlon*, applied. (Ex. B 4-5.) The court rejected the duty of care claim and dismissed the claim against BAML. (*Id.* 16.)

The trial court's finding, in *Zale I*, that the Stockholder Vote ratified the Merger was error. Therefore, in *Zale II*, the court should not have applied the business judgment standard and dismissed the claims against BAML arising out of BAML's conflict. The Complaint raises a reasonable inference that the vote was not "fully informed" because the proxy omitted material information showing that the Merger price compared unfavorably to Zale's valuation. After filing the proxy, the Board made false and misleading statements in support of the Merger price. The Complaint also alleges that Golden Gate was not "disinterested in the Merger." Because Golden Gate had already decided to exit its Zale position through a public offering, Golden Gate was motivated to close *any* deal with Signet, even if Zale's maximum value lay in remaining a stand-alone company. Without Golden Gate's shares, the public stockholders *rejected* the Merger.

The court also erred by finding, in *Zale I*, that the Complaint did not state a claim against the Board for breach of its fiduciary duty of loyalty and bad faith and for dismissing the remainder of the Complaint's duty of care claims. The Complaint alleges that the Board acted in its own interests, deliberately issued false and misleading statements in support of the Merger, and failed to take reasonable steps to pursue the maximum value for Zale's shares. Zale's Chairman, its CEO and Golden Gate all obtained financial benefits through the Merger that were not available to the public stockholders.

The Board did not make any attempt to negotiate a better Merger price, even though BAML's valuations supported a much higher price. Although the Board had provided BAML with the Board-approved projections of Zale's future results, the Board also gave BAML a set of lower projections, which neither the Board nor BAML believed to accurately reflect Zale's prospects. The Board then presented to the stockholders BAML's lower valuations using the lower projections side-by-side with BAML's valuations using the Board-approved projections. Finally, although Golden Gate decided not to pursue a public sale of its shares after learning of Signet's interest in acquiring Zale, the Board did not insist on withdrawing the Registration Statement. Withdrawing the Registration Statement was an obvious step to remove the overhang on Zale's stock price, thereby putting pressure on Signet to increase its offer.

SUMMARY OF ARGUMENT

1. The trial court erred by dismissing Plaintiffs' claims against the Board for breach of its fiduciary duty of loyalty and bad faith. The Complaint pleads facts to raise a reasonable inference Zale's Chairman and its CEO orchestrated a transaction with Signet to obtain personal financial benefits, with the assistance of Golden Gate and BAML, each of which having its own motivation to favor Signet.

2. The trial court erred in finding that the Stockholder Vote ratified the Merger and, based on that incorrect finding, erred by evaluating the Board's conduct under business judgment. The Stockholder Vote was not fully informed because the Proxy was materially misleading and the Board made false and misleading statements during the proxy contest. Further, The Merger was not approved by a majority vote of disinterested stockholders because Golden Gate had interests in the Merger that were opposed to the public stockholders. Absent Golden Gate's vote, a majority of Zale's stockholders rejected the Merger.

3. The trial court erred, in *Zale II*, by dismissing the aiding and abetting claims against BAML under the business judgment rule. Because the Stockholder Vote did not ratify the Merger, the trial court correctly found, in *Zale I*, that the Complaint stated a *Revlon* claim against the Board for breach of the duty of care in retaining a conflicted BAML and that BAML aided and abetted the Board's breach. The trial court should have adhered to those findings.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. Parties and Relevant Non-Parties

Zale was a Delaware corporation with its principal executive office in Irving, Texas. (A37.) At all relevant times, the Director Defendants made up Zale's Board. (A36.) Zale was severely impacted by the 2008 financial crisis. (A40.) In 2010, Zale launched a turnaround program to regain profitability. (A40.) Signet is a Bermuda corporation, headquartered in Bermuda. (A36-37.) Signet was one of Zale's competitors. In 2006, with Defendant Terry Burman as its CEO, Signet considered acquiring Zale. (A45-46.)

Non-party Golden Gate loaned Zale $150 million as part of Zale's turnaround program. (A42.) In return, Zale provided Golden Gate with warrants for up to 23.2% of Zale's common stock at $2.00 per share and the right to appoint two Zale directors. (A42-43, 76-77.)

In November 2013, Zale retained Defendant BAML in connection with negotiating the Merger with Signet. (A27, 48-49.) Unbeknownst to Zale, BAML had met with Signet in October 2013 and proposed that Signet acquire Zale at a price between $17 and $21 per share. (A27, 49-50.) In fact, the same banker who met with Signet in October 2013 led the team advising Zale in the Merger negotiations, but failed to disclose his recent contacts with Signet. (A27, 49-50.)

B. Background to the Merger: A Series of Unexplained Coincidences

Burman and Killion were motivated to favor a merger with Signet at any price. Burman and Killion held RSAs and RSUs, which, upon the closing of the Merger, were accelerated and worth millions of dollars. (A51.) Zale's largest stockholder, Golden Gate, was also interested in achieving any deal with Signet. Golden Gate had already determined, for whatever reason, to sell its 23.2% Zale stake through a public offering. (A43.) Golden Gate thus preferred any deal with Signet that offered an immediate premium over selling in the market. Unlike the public stockholders, Golden Gate had no long-term interest in obtaining the maximum value for its stock. BAML, which advised Zale in the negotiations, was already pursuing a relationship with Signet, and had strong ties with Golden Gate. (A8, 48, 59.) Also, BAML's compensation structure motivated it to convince the Board to accept any deal, rather than remain a stand-alone entity.

By 2013, Zale had successfully implemented its 2010 turnaround plan and was poised for significant future growth. (A29.) From 2010 through October 2013, Zale's stock price increased more than 1,000%. (A29, 78.) In July 2013, Zale's Board approved a 3-year business plan (the "3-Year Plan"). (A40.) The Board approved a set of financial projections for the years 2014-2016 (the "Business Plan Projections"), which forecasted material growth. (A40.) In this action, Burman testified under oath that the Board believed that the Business Plan Projections "represented our thinking at the time about our estimates for the future of – for the future results of Zale." (A108 and A53, 68.) In August 2013, Zale announced that it had achieved profitability for the first time since 2008. (A41.) The market reacted favorably to the news, and Zale's share price rose steadily over the next six weeks from approximately $8.00 to over $15.00. (A43-44.)

In May 2013, Golden Gate, through its two board appointees, had successfully pressed Zale to appoint Burman (formerly CEO of Signet) as Zale's Chairman. (A45.) Soon after Zale's August announcement, in September 2013, Golden Gate, for reasons that remain unexplained, informed Zale that it wanted to sell its 23.2% block of shares through a public offering (the "Offering"). (A43.) Golden Gate knew that a public offering of its shares would depress Zale's stock price. (A45.)

On October 2, 2013, Zale's stock closed at $15.75 per share. (A43-44.) Zale filed a Form S-3 (the "Registration Statement") disclosing Golden Gate's intention to sell its 23.2% stake. (A43-44.) As expected, the Registration Statement immediately stopped the rise in Zale's stock price. (A43-44.) From October 2, 2013, through the announcement of the Merger in February 2014, Zale's stock traded sideways at an average of $15.16 per share – despite Zale's announcements in November 2013 and January 2014 of strong results. (A41-44.)

On October 6, 2013, just four days after Golden Gate stopped the upward movement in Zale's stock price by filing the Registration Statement, Signet's CEO contacted one of Golden Gate's representatives on Zale's board to express Signet's interest in acquiring Zale. (A46-47.) Golden Gate quickly decided not to pursue the Offering because it could get a better price through a negotiated transaction with Signet. (A45.) However, because Golden Gate did not want Zale's stock price to increase to a level that might foreclose a transaction with Signet, Golden Gate did not publicly withdraw the Registration Statement. (A45.)

BAML had been retained by Zale as lead underwriter for Golden Gate's Offering, and in connection with that engagement, Zale provided BAML with confidential information. (A31, 49-50.) However, on October 7, 2013, just five days after Zale filed the Registration Statement, BAML met with Signet's CEO and CFO to pitch the idea that Signet acquire Zale. (A49-50.) At that meeting, BAML told Signet that Zale was valued between $17 and $21 per share. (A50.)

On November 7, 2013, with Zale's stock price artificially capped by the Registration Statement, Signet made a formal offer to acquire all of Zale's outstanding common stock for $19 per share in cash. (A44, 47.) Signet's offer was conditioned upon Golden Gate agreeing to vote its shares in favor of the transaction. (A47.) On November 8, 2013, the Board formed a negotiation committee (the "Committee") consisting of Burman (Zale's Chairman and Signet's former CEO), Olshansky (a Golden Gate board representative), and two others. (A47-48.)

The Committee did not consider any financial advisor other than BAML. (A61.) On November 11, 2013, BAML made a "pitch" to the Committee. (A48-50.) BAML's "M&A Team Leader" was Jeffrey Rose, one of the bankers who had met with Signet on October 7, 2013. (A49-50.) The Committee asked BAML if it had any conflicts, and BAML responded that it "had limited prior relationships and no conflicts with Signet." (A49.) The Committee did not ask for any explanation or seek representations or warranties concerning BAML's conflicts. Neither BAML nor Rose disclosed the meeting with Signet or that Rose had, just weeks earlier, opined to Signet that Zale's value was between $17 and $21 per share. Nor did BAML disclose that it had earned $2 million in fees from Signet over the past two years. (A48.)

C. BAML's Valuation Analyses: Zale Provides an Arbitrary Set of Projections to Present a Negative Picture of Zale's Expected Growth

Zale provided BAML with two sets of projections. The first was the Business Plan Projections, approved by the Board in July 2013. (A40, 87-90.) The Board informed BAML that it believed the Business Plan Projections were the best estimates of Zale's future financial performance, and BAML's analyses all represented that BAML relied upon the Business Plan Projections. (A52, 68, 108.)

Zale also provided a second set of projections, labeled the "Alternative Case Projections." (A51-52.) These projections were the same as the Business Plan

Projections, but they assumed Zale failed to execute the plan and had lower future revenue – a possibility that was inherent in the Business Plan Projections. There is no explanation of when or why the Alternative Case Projections were prepared. Burman confirmed that they were not prepared in July 2013 in connection with the 3-Year Plan, and described them as a "stress test." (A79-80.)[4]

On November 18, 2013, BAML made a presentation to the Board (the "11/18 Presentation") which presented its analysis of six strategic alternatives, the "Summary Valuation of Strategic Alternatives" ("SVSA Valuation"). (A51-53.) BAML valued Zale, using the Business Plan Projections, at $19.55 to $25.25 if it continued as a stand-alone company pursuing the 3-Year Plan. (*Id.*) BAML valued a leveraged recapitalization at $20.00 to $25.60 per share. (*Id.*) The other stand-alone alternatives had valuation ranges with mid-points above $21 per share. (*Id.*)

D. The Board Made No Effort to Negotiate a Price at the High-End of BAML's Valuations

Signet's initial offer was $19 per share. (A47.) On November 22, 2013, the Board rejected that offer, but did not counter. On December 3, 2013, Signet increased its offer to $20.50, consisting of $19 cash and $1.50 stock. (A54.) The

[4] The PI Decision credited Zale management's post-hoc argument that the Alternative Case Projections were connected to the Company's long-term incentive plan. (*See, e.g.*, A222.) Although a court may weigh evidence in deciding a motion for preliminary injunction, it may not do so on a motion to dismiss. Further, the relevant allegation (which is supported by Burman's sworn testimony) is that the Board and BAML both believed that the Business Plan Projections were the best estimate of Zale's future financial performance.

Board rejected the new offer, but agreed to provide Signet with due diligence. (A54-55.) As part of the due diligence, the Board provided Signet with the Business Plan Projections. (A40.) Again, the Board made no counter. On February 10, 2014, Signet modified its offer to $20.50 in cash. (A56.) Immediately, the Board responded with its sole counteroffer: The Board asked for an increase of just $0.50, to $21 per share. (A56.) Signet agreed to $21 per share the next day. (A56.)

The Board did not attempt to negotiate a price near the high-end of BAML's valuations. BAML never advised the Board to seek more than $21 per share, despite its valuations supporting a much higher price. (A59.) Further, BAML advised the Board not to pursue a market check – advice on which the Board relied. (A53-54.) When one competitor demonstrated interest, the Board refused to provide due diligence unless the suitor indicated a price *and* that it had financing. (A55.)

E. The Merger Announcement and Stockholder Vote

On February 18, 2014, Zale and Signet entered into the Merger Agreement at $21 per share and issued a joint press release. (A56, 62.) Signet's share price jumped 18% on the news and its capitalization soared $1.4 billion. (A64-65.) Zale's share price increased as well, consistently trading *above* the $21 Merger price. (*Id.*)

In March 2014, as the parties were preparing the Proxy, BAML finally disclosed to the Board its October 7, 2013 meeting with Signet. (A59-60.) In response, the Board failed to conduct any investigation into whether BAML's conflict affected the Board's ability to negotiate a better price, failed to seek the advice of another financial advisor, and failed to seek legal advice as to its fiduciary obligations in light of BAML's conflict. (A50.)

On April 17, 2013, Zale scheduled a stockholder vote on the Merger for May 29, 2014. (A77.) Zale issued the Proxy on May 1, 2014. (A65.) The Proxy included BAML's DCF valuations under both the Business Plan Projections and the Alternative Case Projections. The Proxy failed to disclose that the Board and BAML believed the Business Plan Projections were the best estimate of Zale's future performance, thereby presenting BAML's valuations under the Alternative Case Projections as having equal weight as the Business Plan Projection valuations. (A88-89.) The Proxy presented the Merger price as falling within BAML's valuation range under the Business Plan Projections, which was not very compelling. However, the Proxy presented the Merger price as *higher* than BAML's valuations under the bogus Alternative Case Projections, which gave the false impression that the Merger price might have presented a premium. A stockholder could not know that the Board considered the Business Plan Projections as deserving more weight.

Although the stockholders were asked to choose between the Merger and continuing as a stand-alone company, the Proxy failed to disclose BAML's SVSA Valuation, which showed that Zale was likely more valuable as a stand-alone company. (A53-54.)

Soon after Zale issued the Proxy, several large stockholders came out aggressively against the Merger. (A65-67.) TIG advisors, LLC ("TIG"), which owned approximately 9.5% of Zale's common stock, commenced a proxy battle urging stockholders to vote against the Merger. (A64-67.) Other large Zale stockholders also objected to the Merger. (A68-69.)

TIG filed a presentation with the SEC arguing that the merger consideration materially undervalued Zale. (A65-67.) TIG noted the numerous conflicts in the Board's negotiations. (A65-66.) TIG argued that Zale was undergoing expansion and had compelling prospects as a standalone company – an accurate statement in light of BAML's SVSA Valuation. (A67) TIG also argued that the Board and BAML relied upon stale projections and that the Alternative Case Projections were created to justify the lower deal price. (A66.)

In response, the Board disseminated false and misleading statements in support of the Merger. Zale filed a presentation with the SEC in which the company claimed that achieving the 3-year plan would be "challenging" and entailed "significant risk." (A68.) The Board claimed that the 3-year plan was a "stretch" which "may be difficult to achieve." (A69.) The Board also stated that the 3-year plan "was designed to challenge management and was aligned accordingly with the Company's board-approved long-term incentive plan." (A67-68.) The Board repeated these false statements in a subsequent filing. (A68-69.) These statements stand in stark contrast with Burman's sworn testimony that the Business Plan Projections were the best estimate of Zale's future performance, and with the contemporaneous evidence of BAML's Board presentations, which also represented that BAML relied upon the Business Plan Projections as the best estimate of Zale's performance.

The Stockholder Vote was held on May 29, 2014. (A77.) Golden Gate had already agreed with Signet that it would vote in favor of the Merger. Thus, Zale needed approximately 27% of the shares to approve the Merger. (A77.) In fact, only 29.2% of the shares were voted in favor of the Merger, which, with Golden Gate's shares, was enough to approve the Merger by 53.1%. (A77-78.) Owners of nearly four million shares exercised appraisal rights. (A78.)

II. THE TRIAL COURT'S MAY 23, 2015 PI DECISION

On April 23, 2014, Plaintiffs filed their Verified Consolidated Amended Class Action Complaint and Motion for Preliminary Injunction. Zale produced certain documents and Plaintiffs conducted two depositions (Burman and Rose). On May 23, 2014, the court held argument on Plaintiffs' Motion for Preliminary Injunction and issued a bench ruling denying the motion. (A98-229.) In doing so the trial court weighed the evidence and competing inferences, and held Plaintiffs to the high threshold of "likelihood of success on the merits." (*See, e.g.*, A106, 203, 215-225.) With respect to Plaintiffs' disclosure claims, the court held that Plaintiffs "bear the burden of demonstrating materiality." (A214.) The court found that Plaintiffs did not demonstrate that the SVSA Valuation was "material," and that Plaintiffs "have not persuasively demonstrated that the [Business Plan Projections] actually represents the best estimate of Zale's future financial performance." (A219.)

III. THE TRIAL COURT'S OCTOBER 1, 2015 MEMORANDUM OPINION

On October 1, 2015, the trial court issued *Zale I*, granting in part and denying in part Defendants' motions to dismiss. The court found that the Stockholder Vote ratified the Merger through a fully informed vote of a disinterested majority of shares. (Ex. A 22-24.) In doing so, the trial court appears to have adopted wholesale its conclusions from the PI Decision, which were made under a strict standard inapplicable on a motion to dismiss. (*Id.*) Further, the trial court was under the mistaken belief that the Alternative Case Projections were based on *BAML's* own analysis of Zale's prospects. (*Id.* 8.) This clear error likely caused the court to believe those projections were legitimate.

The trial court also rejected Plaintiffs' allegations that Golden Gate was not "disinterested" because Golden Gate, having already determined to sell its shares at a price in the $15 range, was no longer motivated to obtain the maximum value for Zale's stockholders. The trial court failed to draw reasonable inferences in Plaintiffs favor and imposed incorrect pleading requirements, requiring Plaintiffs to have pleaded *why* Golden Gate *needed* to sell its Zale shares. (*Id.* 21-22, 45-48.)

The court evaluated the Board's conduct under *Revlon*, *id.* 26, and noted that Zale's Charter included an exculpation provision. The court found that the Complaint did not state an unexculpated claim for breach of the duty of loyalty or bad faith.[5] (*Id.* 28-30.) The Complaint did state an exculpated claim that the Board breached its duty of care by retaining a conflicted BAML. (*Id.* 49-50.) It then found that it was reasonably conceivable BAML's conflict prevented the Board from negotiating a higher price. (*Id.* 52.) The Court sustained the claim against BAML for aiding and abetting. (*Id.* 58-59.) It dismissed the claim against Signet. (*Id.* 56)

IV. THE TRIAL COURT'S OCTOBER 29, 2015 LETTER OPINION

BAML moved for reconsideration in light of this Court's opinion in *KKR*. On October 29, 2015, the trial court held that its prior finding that the stockholders ratified the Merger required the application of the business judgment standard, not *Revlon*. (Ex. B 5-6.) The court found the Complaint failed to state a claim against the Board arising out of the Board's retention of BAML and dismissed the claim against BAML.[6] (*Id.* 15.)

[5] The trial court did not address Plaintiffs argument that Killion, Zale's CEO, was not entitled to exculpation for conduct done in his capacity as an officer. (A376 n. 25.)

[6] The trial court incorrectly asserted that Plaintiffs, in opposition to BAML's Rule 59(f) Motion, failed to argue that the Board breached their duty of care under the gross negligence standard. (Ex. B 13.) In fact, Plaintiffs argued that even under the business judgment standard, "the Board's

ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING THAT THE COMPLAINT DID NOT STATE A CLAIM AGAINST THE BOARD FOR BREACH OF THE DUTY OF LOYALTY AND BAD FAITH

A. QUESTION PRESENTED

Did the trial court err when it found that the Complaint failed to raise a reasonable inference that the Director Defendants breached their duty of loyalty and acted in bad faith? (A81-90, 361-66, 370-74.)

B. STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss is subject to *de novo* review. *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011). The Court must accept all well-pleaded factual allegations as true, draw all reasonable inferences in favor of the non-moving party, and may not affirm dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances. *Id*. A trial court is "not free to disregard [a] reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn." *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2008).

failure to ask basic questions that would have uncovered [BAML's] conflict was not a *decision* of the Board that should be entitled to deference." (A 551.)

C. MERITS OF THE ARGUMENT

The Complaint alleges facts that raise a reasonable inference that the Board breached its duty of loyalty by orchestrating a transaction with Signet at the expense of the public stockholders. Burman and Killion each stood to earn millions by closing a quick transaction with Signet. (A51, 60-61.) Killion was also promised continued employment by Signet. (A32.) Golden Gate, which controlled two of the remaining seven directors, wanted a deal with Signet to avoid selling its 23.2% block through a public offering. (A45.) The remaining Board members simply followed their lead.

The Board's breach of loyalty is evidenced by their failure to take obvious steps to achieve the maximum value available for Zale's public stockholders. The Board failed even to demand a price from Signet at the high end of BAML's valuations. (A56.) The Board did not withdraw the Registration Statement, which would have allowed Zale's stock price to increase and put pressure on Signet to increase its offer. (A47.) The Board provided BAML with the Alternative Case Projections, which were created solely to justify a deal at an unreasonably low price (A66), failed to make reasonably inquiries to determine whether BAML was conflicted, Ex. A 49-53, and, most notably, issued a materially false Proxy and made false statements to support the Merger. (*See supra* Section II.)

These allegations are sufficient to defeat a motion to dismiss and obtain discovery. It is reasonably conceivable that, after discovery, Plaintiffs will be able to prove that the Board breached its duty of loyalty and acted in bad faith.

The trial court, in dismissing the loyalty/bad faith claims, failed to consider the totality of the allegations. Instead, it addressed allegations in isolation and did not draw reasonable inferences in Plaintiffs' favor. The court faulted Plaintiffs for not alleging that the millions of dollars Killion and Burman stood to make was material. (Ex. A 34.) At this stage, Plaintiffs are entitled to a reasonable inference that millions of dollars are material to an individual. In rejecting the inference that the Board undervalued Zale, the court noted merely that the Board made a single demand, for $0.50, and noted that the Merger price was within BAML's valuation ranges. (Ex. A 36, 41.) The trial court did not consider the Board's failure to make a demand at the high-end of BAML's valuation. Finally, as discussed further below (*supra* Section II.C.4), in rejecting the allegations that Golden Gate was conflicted, the trial court erroneously concluded that Plaintiffs failed to allege *why* Golden Gate had an exigent need for liquidity. Such allegations should not be necessary.

Finally, the trial court erred by rejecting the Complaint's disclosure allegations. (*See supra* Section II.C.1-3.) Allegations that the Board breached its disclosure obligations overwhelmingly support the inference that the Board was disloyal and acted in bad faith.

II. THE TRIAL COURT ERRED IN FINDING THAT THE STOCKHOLDER VOTE RATIFIED THE MERGER

A. QUESTIONS PRESENTED

Did the trial court err in finding that the Complaint failed to raise reasonable inferences that: (1) the Board breached its disclosure obligations (A53-54, 67-68, 76-77; 372-74); and (2) Golden Gate was not "disinterested" (A45, 57, 360-64)?

B. STANDARD OF REVIEW

See *supra* Section I.B.

C. MERITS OF THE ARGUMENT

The Complaint raises reasonable inferences that the Board issued a materially misleading Proxy, the Board made materially misleading statements during the proxy contest and that Golden Gate was not "disinterested." Any one of these inferences is sufficient to reverse the trial court's finding that the Stockholder Vote ratified the Merger. Because the Stockholder Vote did not ratify the Merger, the Board's conduct was properly evaluated, in *Zale I*, under *Revlon*.

1. The Complaint Raises a Reasonable Inference that the Proxy Was False and Misleading

A board's fiduciary duty of disclosure is "the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty." *RBC Capital Markets, LLC v. Jervis*, 2015 Del. LEXIS 629, at *100 (Del. Nov. 30, 2015). The question of materiality is fact-sensitive and not well suited for resolution on a motion to dismiss. *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001). The complaint need only raise an inference that a reasonable stockholder "would consider [the omitted] information important in deciding how to vote" on the Merger or that the omitted information "would have assumed actual significance in the deliberations of a reasonable shareholder." *RBC*, 2015 Del. LEXIS 629, at *101-02; *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1277 (Del. 1994). The Board's disclosure obligations attach to the proxy "and any other disclosures in contemplation of stockholder action." *Arnold*, 650 A.2d at 1277.

a. The Merger Price Was at the Low-End of Six Strategic Alternatives

The stockholders were asked to choose between the $21 Merger price and remaining a stand-alone company. Yet, the Proxy failed to disclose BAML's SVSA Valuations, which showed that the $21 Merger price offered stockholders a low value compared with BAML's valuation of Zale as a stand-alone company. (A51-54, 80-81, 88.) A reasonable stockholder would find this information valuable in deciding between the $21 Merger price and choosing to continue with Zale's successful 3-Year Plan. Indeed, it is not surprising that, excluding Golden Gate's block of shares, the public stockholders overwhelmingly rejected the $21 Merger price.

b. The Board and BAML Considered the Business Plan Projections to Be the Best Estimate of Zale's Future Financial Performance

The Proxy explained that Zale management provided BAML with the Business Plan Projections and the Alternative Case Projections, and it disclosed a summary of BAML's DCF valuations. However, the Proxy did not disclose that only the Business Plan Projections were approved by the Board or that the Board believed the Business Plan Projections to be the best estimate of Zale's future performance. (A88-90.) The Proxy falsely presented the Alternative Case Projections on equal footing with the Business Plan Projections. An honest presentation would have presented only the Business Plan Projections, which showed the $21 Merger price falling below the mid-range of the DCF Valuation. By including the Alternative Case Projections, the Proxy gave a false impression that the Board and BAML believed a lower valuation was as likely as the Business Plan Projections and that the $21 Merger price represented a premium above Zale's projected value.[7]

[7] Zale's use of the Alternative Case Projections was bad faith. The Business Plan Projections, like any projections, carry an inherent execution risk. (Ex. A 41.) A reasonable stockholder reviewing the Business Plan Projections would presume that Zale's value would be less if Zale failed to achieve the projections. The Alternative Case Projections, therefore, did not provide any meaningful information.

2. The Board Made False Statements in the Proxy Contest

The Board's false statements during the proxy contest further misled stockholders as to the relative weight to give the Business Plan Projections and the Alternative Case Projections. During the proxy contest, the Board criticized the Business Plan Projections, asserting, *inter alia*, that the projections were a "challenge" and a "stretch." (A67-68, 89-90.) These statements are contradicted by Burman's sworn testimony and contemporaneous documents. (*E.g.*, A53, 68, 80.) That Burman's sworn testimony contradicts the Board's statements is, by itself, sufficient to raise an inference that the Board's statements were materially misleading.

3. The Trial Court Erred By Applying the "Preliminary Injunction Standard" on a Motion to Dismiss

The trial court found that the Stockholder Vote was fully informed. (Ex. A 24.) The court failed to analyze the Complaint's allegations, but instead appears to have simply adopted the conclusions from its PI Decision. (*Id.*) This was error. As the trial court recognized, the standard for a preliminary injunction is much higher than that required to survive a motion to dismiss. (*Id.* 23-24.)

In deciding the preliminary injunction motion, the court acted as the fact-finder, weighed the evidence and arguments, and determined whether Plaintiffs had demonstrated a "likelihood of success on the merits." (A215-25.) For example, the trial court examined the SVSA Valuation and concluded: "I don't interpret the

[SVSA Valuation] as establishing that the value of the company as a stand-alone entity was higher than the Signet deal price."[8] (A216.) And, the court erroneously credited the Board's criticism of the Business Plan Projections, and concluded that "Plaintiffs have not persuasively demonstrated that the business plan forecast actually represents the best estimate of Zale's future financial performance."[9] (A221.) This weighing of evidence was improper on a motion to dismiss.

The court's finding, in *Zale I*, that "significant information was disclosed in the Proxy," is also erroneous. There is no information in the Proxy from which stockholders could value Zale's prospects under the SVSA Valuations. Nor did the Proxy disclose that the Board and BAML believed that the Business Plan Projections were the best estimate of Zale's future performance.

4. Golden Gate Was Not Motivated to Maximize Share Value

a. Because Golden Gate Had Already Decided To Sell Its Stock, It Was No Longer Motivated To Obtain the Maximum Value for Its Shares

The Complaint alleged: (a) In October 2013 Golden Gate filed the Registration Statement disclosing the Offering; (b) after learning of Signet's interest

[8] This finding applies an incorrect definition of "materiality." The question is not whether the SVSA Valuation established that Zale was more valuable as a standalone entity. But whether the SVSA Valuation would be important to a stockholder's vote.

[9] Again, this is not the proper inquiry for materiality. The question is whether a reasonable stockholder would find it important that the Board and BAML *believed* the Business Plan Projections to be more accurate.

in acquiring Zale, Golden Gate determined not to proceed with the Offering to obtain a better price through a negotiated transaction; and (c) Golden Gate did not publicly withdraw the Offering, thereby capping Zale's stock price.

It is reasonably conceivable that Plaintiffs, after discovery, will prove that Golden Gate had interests in supporting the Merger *other than* maximizing stockholder value. Once Golden Gate decided to sell its shares in an offering, it no longer had a long-term interest in Zale's stock price. Notably, Golden Gate's *motive* for exiting its position is irrelevant. Instead, Golden Gate was interested in obtaining a *better* price than it could get in the Offering, but not necessarily in pursuing the maximum value for Zale's stockholders.

Any alternative that left Zale as a stand-alone company – even if it provided the most value for stockholders – was contrary to Golden Gate's interests. If no Signet deal materialized, Golden Gate would be back to selling in the Offering. Thus, Golden Gate *did not* publicly withdraw the Offering, because an increase in Zale's stock price could have threatened the Merger – Signet might withdraw or the public stockholders would be more likely to reject Signet's offer.[10] Notably, neither Defendants nor the trial court offered any alternative explanation for Golden Gate's failure to publicly withdraw the offering. Indeed, once Golden Gate determined not

[10] For the same reasons, Golden Gate's representatives on the Board were not motivated to demand a higher price from Signet or to issue an accurate Proxy.

to go forward with the Offering, its failure to withdraw the Registration Statement may have violated federal securities laws – stockholders sold Zale shares under the false belief that Golden Gate was selling its 23.2% block into the market.[11]

Indeed, the Complaint contains numerous allegations warranting additional inquiry into Golden Gate's conduct: Golden Gate urged Zale, in May 2013, to appoint Signet's former CEO as Chairman; Golden Gate desired to sell its shares despite Zale's strong results, massive increase in stock price, and the adoption of the 3-Year Plan; Signet's CEO contacted Golden Gate's board representative to express interest in acquiring Zale just four days after the Registration Statement capping Zale's stock price was filed; and, the very next day, BAML met with Signet's CEO to pitch a transaction with Zale.

These events cannot be shrugged off as coincidences. If BAML *met* with Signet on October 7, 2013, it is reasonable to infer that BAML *spoke* with Signet before Signet expressed interest in acquiring Zale on October 6, 2013. If Golden Gate recruited Signet's former CEO to be Zale's Chairman, just five months earlier, it is reasonable to infer Golden Gate spoke with Signet as well. Plaintiffs are entitled to discovery on these and other issues.

[11] *See, e.g.*, *In re Facebook, Inc., IPO and Secs. & Derivative Litig.*, 986 F. Supp. 2d 428, 464 (S.D.N.Y. 2013) (a duty to update applies to a statement made misleading by intervening events, "even if the statement was true when made") (citations omitted).

b. The Trial Court Made Numerous Errors in Finding that Golden Gate Was not "Disinterested"

In rejecting the inference that Golden Gate was interested, the trial court applied improper pleading standards; ignored material allegations; rejected reasonable inferences; and simply misunderstood Plaintiffs' theories. First, the court refused to infer that Golden Gate was interested in the Merger because the court believed Plaintiffs had to allege *why* Golden Gate *needed* to liquidate its position in Zale's shares.[12] (Ex. A 22.) Plaintiffs did not plead or argue that Golden Gate *needed* to exit its position or that it had an "exigent need for liquidity." (*Id.* 22.) Plaintiffs alleged that Golden Gate *wanted* to exit its position and otherwise would have done so in the Offering. (A43, 343, 364.) Requiring Plaintiffs to plead Golden Gate's motivation, without the benefit of discovery, was unreasonable.[13] *See, e.g.*, *Branson v. Exide Electronics Corp.*, 1994 Del. LEXIS 129, at *8 (Del. Apr. 25, 1994) ("To withstand a 12(b)(6) motion to dismiss, the plaintiff is only required to state a claim, not to plead the evidence upon which the claim is based.").

[12] The trial court focused on Plaintiffs' citation to cases holding that a party's need for liquidity was sufficient to allege that the party's motivations diverged from the public stockholders'. (A22-23.) But those cases do not say that an exigent need for liquidity is required to plead that the party obtained a benefit not shared by the public stockholders.

[13] Indeed, such a pleading standard would mirror the exceedingly high standard of the Private Securities Litigation Reform Act. This Court has held that the Delaware pleading standard is less rigorous than even the federal standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 813 n.12 (Del. 2013).

The trial court's flawed logic is further illustrated by its finding that, if Golden Gate did need to exit its Zale position, it could have done so by going through with the Offering.[14] (Ex. A 47.) This further betrays the trial court's error. The question was not that Golden Gate *needed* to exit its position or whether it could have done so through the Offering. The important allegation is that once Golden Gate determined to exit its position, it was motivated quickly to obtain a better price than it could have gotten through the offering. (A45.)

The trial court extended its error by drawing the unsupported inference that, "if Golden Gate was seeking a higher price for its shares than it could attain through the Secondary Offering, then, *presumably, it would want the highest possible price*." (A47 (emphasis added).) On a motion to dismiss, a trial court is not permitted to weigh inferences and disregard one reasonable inference in favor of another. More importantly, the trial court's presumption does not follow. Golden Gate was interested only in quickly achieving a better price than it could get in the Offering, which was not necessarily the maximum value the stockholders could obtain – especially if obtaining the maximum value meant Zale remained independent.

Instead, with respect to the Offering's effect on Zale's stock price, the trial court, improperly, focused solely on the Complaint's allegation that the Registration

[14] Signet suggested below that the Registration Statement "in no way bound Golden Gate to sell its Zale shares." (A242.) If Golden Gate did not intend to sell its Zale shares, then one must ask, why did it file a Registration Statement?

Statement's "Proposed Maximum Offering Price Per Share" of $15.035. (*See* Ex. A 4 n.3, 47.) The trial court ignored Plaintiffs' argument that the existence of the Registration Statement, which disclosed that Zale's largest stockholder, a corporate insider, wanted to sell 23.2% of Zale's stock on the market, was sufficient to cap the stock price. (A29-30, 345, 364, 497-98.)

The court rejected the reasonable inference that Golden Gate and Signet colluded. (Ex. A 45-46.) It then misstated Plaintiffs' theory as alleging that "the purpose of the Secondary Offering was not to create an avenue by which Golden Gate could sell its 23.2% stake in Zale, but instead was to cap Zale's share price at an artificially low number." (*Id.* 46) The reasonable inference is more straightforward: Golden Gate wanted to exit its position, but it knew that a public offering of such a large block of shares would fetch a low price. It also knew that Signet had been interested in acquiring Zale. (A45-46). By encouraging the transaction with Signet, Golden Gate could exit its position at a higher price. The Offering was not a ruse – it was Golden Gate's fall-back position.

III. THE COURT ERRED IN FINDING THAT THE COMPLAINT DID NOT PLEAD CLAIMS AGAINST THE BOARD FOR BREACH OF THE DUTY OF CARE AND IN DISMISSING THE CLAIMS AGAINST BAML

A. QUESTION PRESENTED

Did the court err in applying the business judgment standard to determine that the Complaint failed to state a claim for breach of the duty of care arising out of the Board's retention of BAML? (A45, 53-54, 57, 67-68, 76-77, 90-91, 359 n.15, 362-64, 372-74, 377-79, 551-52.) Did the court err in finding that the Complaint failed to state a claim for breach of the duty of care arising out of the Board's failure to take reasonable steps to obtain the maximum value for Zale's shares? (A90-91, 356-71, 377-79.) Did the court err by dismissing the aiding and abetting claim against BAML? (A33, 39, 93-95, 379-81.)

B. STANDARD OF REVIEW

See *supra* Section I.B.

C. MERITS OF THE ARGUMENT

1. The Complaint States Claims Against the Board for Breach of the Duty of Care

a. The Board Breached Their Duty of Care By Retaining a Conflicted Financial Advisor

In *Zale I*, the trial court correctly applied *Revlon* and found that the Complaint pleaded a claim for breach of the duty of care against the Director Defendants based on their retention of a conflicted BAML. (Ex. A 49-54.) The court correctly found that the Board acted unreasonably when it accepted without question BAML's representation that it had no conflicts with Signet. (*Id.*) A reasonable Board would have probed BAML's response and negotiated for representations and warranties concerning BAML's conflicts. (*Id.*) In addition, the court correctly found that the Complaint raised an inference that BAML's conflict prevented the Board from negotiating a better price, thereby harming the stockholders. (*Id.*)

In *Zale II*, the trial court held that, because it had previously found that the Stockholder Vote ratified the Merger, under this Court's decision in *KKR* it was obligated to apply the "gross negligence" standard of the business judgment rule instead of the *Revlon* standard. (*Ex. B* 10-16.) Applying the business judgment rule, the court reached the opposite conclusion, and found that the Complaint did not state a duty of care claim against the Board. (*Id.* 15-16.) As explained above, however, the trial court's finding that the Stockholder Vote ratified the Merger was erroneous. (*Infra*, Section I.) Thus, the court erred by applying the business judgment rule, and should have adhered to its initial finding that the Complaint stated a claim for breach of the duty of care.

b. The Court Erred By Finding that the Complaint Did Not State a Duty of Care Claim with Respect to the Board's Other Conduct

The trial court summarily dismissed the remainder of Plaintiffs' duty of care claims. (Ex. A. 49.) In doing so, the trial court applied the incorrect business judgment standard – although it represented that it was applying *Revlon*. Under *Revlon*, "[i]n the sale of control context, the directors must focus on one primary objective – to secure the transaction offering the best value reasonably available for the stockholders – and they must exercise their fiduciary duties to further that end." *RBC*, 2015 Del. LEXIS 629, at *76 (citation omitted). A 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." *Id.* The business judgment rule looks to whether the Complaint raises an inference of "gross negligence." As the court recognized, business judgment asks only "whether there was a real effort to be informed and exercise judgment" and whether the decision was "so grossly off-the-mark as to amount to reckless indifference." (Ex. A 51 n. 106.)

Although the trial court asserted that its analysis "focuse[d] on whether the Director Defendants' actions [fell] within the range of reasonableness with the ultimate goal of maximizing the Company's sale price in mind," in fact it applied the more deferential business judgment standard. (*Id.* 48-49.) This was error.[15] The trial court found that "for the most part, the Board has satisfied its duty of care *by*

[15] In *Zale I*, the trial court found that "[a]rguably, the Board's actions as to BAML in this case constitute a breach of the duty of care under a gross negligence standard." (Ex. A 51 n.106.) Thus, there is a reasonable inference that Board was grossly negligent by failing to make a "real effort" to inform itself as to BAML's conflict. The court's findings support such a claim: "it is reasonably conceivable that the Director Defendants *did not act in an informed manner*." (*Id.* 49-51.)

acting in an informed manner and reasonably exercising its business judgment." (*Id.* 49 (emphasis added.) It noted that the Board "met frequently" and reviewed management's projections and BAML's SVSA Valuations and negotiated reasonable deal protections. (*Id.*) It found that the $21 Merger price "cannot be said to be so grossly off-the-mark as to amount to reckless indifference" in light of the support from Golden Gate and one proxy service and that the Merger price fell "within the valuation ranges relied on by Plaintiffs." (*Id.*)

The court did not determine whether the Board's actions fell within the range of reasonableness of a board acting to maximize the Company's sale price. The Board's conduct fell far short of that standard. The Board did not make any attempt to negotiate a price at or above the valuations supported by BAML's analyses. Instead, the Board made a single demand for a price that fell in the mid-range of BAML's valuations. Further, the Board did not publicly announce the withdrawal of the Offering, which would have removed the overhang on Zale's stock price.

2. The Complaint Adequately Alleges that BAML Aided and Abetted the Board's Breaches of Fiduciary Duty of Care

The trial court found that the Complaint raised a reasonable inference that BAML's undisclosed conflict "hampered the ability of [BAML] and, consequently, the Board to seek a higher price for Zale's stockholders."[16] (A52.)

[16] The trial court also erred by dismissing the claims against Signet. Signet was aware of BAML's conflict, and one could reasonably infer that Signet acted to further the Board's breaches. (A31,

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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49-50.) The trial court improperly rejected this inference, based on its presumption that Signet would have believed BAML had disclosed its conflict to Zale. (Ex. A 56.) There is no such allegation in the Complaint.