IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLENN J. KREVLIN, Plaintiff Below, Appellant, v. ARES CORPORATE OPPORTUNITIES FUND III, L.P., ARES CORPORATE OPPORTUNITIES FUND IV, L.P., DAVID G. HIRZ, LELAND P. SMITH, RICHARD N. PHEGLEY, CITIGROUP GLOBAL MARKETS, INC. and JEFFERIES, LLC, Defendants Below, Appellees.	No. 94, 2025 Court Below: Court of Chancery of the State of Delaware C.A. No. 2022-0336-KSJM

APPELLANT'S OPENING BRIEF

Dated: April 15, 2025

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NATURE OF PROCEEDINGS

Lead plaintiff-appellant Glenn J. Krevlin ("Plaintiff") submits this Opening Brief in Support of his Appeal from the Court of Chancery's February 3, 2025 Memorandum Opinion (the "Opinion").

On April 14, 2022, Plaintiff initiated a verified consolidated class action pursuant to Delaware Court of Chancery Rule 23 on behalf of himself and other similarly situated former stockholders of Smart & Final Stores, Inc. ("Smart & Final" or "Company"). The Complaint alleges breaches of fiduciary duty against Ares Corporate Opportunities Fund III ("Fund III") and IV ("Fund IV", collectively, the "Funds" or "Ares"); Smart & Final's CEO David G. Hirz, Vice President Leland P. Smith, and CFO Richard N. Phegley (the "Individual Defendants"); as well as aiding and abetting a breach of fiduciary duty against the financial advisors Citigroup Global Markets ("Citi"), and Jefferies, LLC ("Jeffries") (collectively with the Funds and the Individual Defendants, the "Defendants"). On March 31, 2023, Plaintiff filed the Second Amended Complaint (the "Complaint"). Chancellor McCormick heard arguments on the Defendants' motions to dismiss on October 15, 2024. Judgement was entered on February 3, 2025.

Plaintiff appeals the Opinion granting Ares's motion to dismiss and holding that the transaction is entitled to business judgement review.

SUMMARY OF ARGUMENT

1. The court below erred in determining at the pleadings stage that Ares was not a conflicted controller and, thus, entire fairness should not apply. The Complaint sufficiently alleges that Ares signaled its desire to exit via a cash-out merger, that the Funds were in the late stages of liquidation, and that the Schedule 14D-9 ("Proxy") favoring the sale was misleading, allowing the court to infer that Ares prioritized monetizing its equity positions over achieving value for disinterested shareholders. The standard of review, therefore, should be entire fairness.

2. The court below erred in finding that the Complaint did not adequately allege a disclosure violation that would have rendered the stockholder tender uninformed. The Complaint alleges particularized facts establishing, *inter alia*, that the Proxy omitted management's observations that food inflation had inflected, resulting in increased revenues and margins that outpaced projections on which bids were being solicited, and, thus, *Corwin* cleansing is unavailable.

STATEMENT OF FACTS

After completing an Initial Public Offering in 2014, Smart & Final, a conventional grocery store chain and B2B food service provider, embarked on an aggressive expansion plan of its core conventional supermarket chain ("S&F"), and made significant investments in its retail B2B food service, Smart Foodservice Warehouse ("SFW"). A36, ¶2. Between 2014 and 2019, the Company tapped over $575M of profits for capital investment. *Id.*, ¶3. Sales increased from $3.5B to $4.9B, despite the depressing effect these expenditures had on the Company's profits. *Id.*

On June 29, 2018, Smart & Final presented a rosy picture of "historically strong margin/EBITDA growth" and "strong opportunity for future EBITDA leverage" with "inflation returning to [a] normal 2% level". *Id.*, ¶4. That same year, Fund III, that together with Fund IV, were Smart & Final's majority shareholder, was at its liquidation target date. *Id.*, ¶5.

In January of 2018, Apollo Global Management, LLC ("Apollo") had made a proposal to Smart & Final's CEO, Hirz, for a $400,000,000 investment to fund a tender offer to Smart & Final shareholders. Apollo would purchase $200,000,000 of outstanding shares pro rata at $9.00 and commit $200,000,000 to debt service. Hirz informed the Board that Ares was not interested, leading to its rejection in February. In both Ares and the Board's view, the price was too low. A37, ¶6.

The same day, the Board formed the Committee "to evaluate a broad range of potential strategic alternatives that might be available to the Company…" presumably because as the Proxy described "meaningful challenges and headwinds that the Company faced, including, among other things, difficulties enhancing stockholder value." *Id*. Hirz repeatedly invited Ares and the Board to participate in the process. *Id*.

The Committee, advised by Hirz and his management team with assistance from the financial advisors, locked the Company into an exclusive agreement with Apollo to consummate a cash-out merger (the "Merger") and, subsequently, a merger agreement (the "Merger Agreement") with a non-solicitation clause that disabled the Committee from considering a $7.00 per share offer. A38, ¶9.

The Proxy, drafted with management's help and signed by Smith, repeated Ares's insistence that it did not *need* to sell. It did not, however, disclose that the Funds had been winding down since 2016. Shortly after the Merger, Ares announced that Fund III stopped paying management fees in Q4 2019. As of May 2020, Fund III was gone from Ares's investor presentations. A39, ¶12.

At the same time, Hirz and Phegley told shareholders that the Company was exceeding the projections in Q1 guidance provided to prospective bidders and that the only obstacle to increasing share price—stagnant food inflation—had turned the corner. None of that appeared in the Proxy.

Ares was a conflicted controller that steered the Committee to a cash-out merger to satisfy their liquidity interest. The Individual Defendants breached their duties of loyalty by withholding material information while negotiating and accepting accelerated equity awards treated as merger consideration. The financial advisors aided and abetted the Individual Defendants' breaches and collected compensation contingent upon closing a cash-out merger.

THE PARTIES

Plaintiff, initially through Glenhill Capital, became a Smart & Final shareholder in the Company's IPO on September 23, 2014. At the time of the Merger, Plaintiff, individually, owned 781,643 shares of outstanding common stock. A39, ¶14. The Funds were Smart & Final's majority shareholder, holding 44,218,762 of the Company's then 76,489,536 issued and outstanding stock. *Id*., ¶15.

Apollo Management IX, L.P. ("AMIX"), a Delaware Limited Partnership and Apollo subsidiary, managed two investment funds and took Smart & Final private through the Merger. A40, ¶16.

Smart & Final's management team consisted of: (i) Hirz (CEO before and after and director before the Merger); (ii) Smith (Vice President of Real Estate, General Counsel, and Secretary who executed the Proxy); and (iii) Phegley (CFO).

A40, ¶¶17-19. Ares's appointed directors include Dennis T. Gies and Kaplan, both Ares principals; Kaplan, an Ares co-founder. *Id*., ¶¶20-21.

Smart & Final director Kenneth I. Tuchman chaired the Committee whose members were fellow directors Paul N. Hopkins and Joseph S. Tesoriero. A41,¶¶22-24. The Company's remaining board member was Norman H. Axelrod. *Id*. ¶25. The Committee's financial advisors included Citi and Jefferies ("Professionals") along with Centerview Partners, LLC ("Centerview"). A41-42, ¶¶26-28.

FACTUAL BACKGROUND

Smart & Final comprises two segments (i) S&F, composed of conventional supermarket stores, including chains of stores adopting its legacy supermarket format as well as the expanded Smart & Final Extra! format ("Extra!"), and (ii) SFW, a retail concept catering to business customers. A42,¶ 29. In 2007, Apollo acquired Smart & Final and, in 2012, sold it to Ares for roughly $975,000,000. *Id*. ¶30. In September of 2014, Ares launched an IPO of Smart & Final at $12.00 per share. *Id*., ¶31. Shortly thereafter, Ares monetized a substantial amount of its investment, selling some 10,900,000 secondary shares at $18.50 per share, totaling $201,650,000. *Id*., ¶32. The Funds remained the majority shareholder. *Id*. Thereafter, Smart & Final invested more than $500,000,000 in capital improvements to its S&F and SFW segments. *Id*., ¶33.

I. Smart & Final implemented a capital intensive, long-term business plan.

After the IPO, the Company pursued an aggressive capital expansion, opening 61 new S&F stores and 15 SFW stores. A43, ¶34. This investment had a negative short-term effect on the Company's profits and balance sheet. *Id*. In 2017, management pursued a business strategy of targeting e-commerce infrastructure that similarly adversely affected the Company's profit and loss statement ($10,000,000) and burdened its balance sheet ($15,000,000 in capital spending) with large one-time expenditures to retool key IT systems. *Id*., ¶35. As projected, the negative short-term effect on cash flow adversely impacted trading price. *Id*. Nevertheless, management repeatedly expressed its confidence in these investments paying off over time. *Id*.

In December of 2017, Plaintiff discussed with Hirz and Phegley, Smart & Final's business plan, including the value of spinning off SFW. *Id*., ¶¶36-38. They also discussed the impact of Aldi and Amazon's entry into the industry and the latter's effect on the e-commerce sector. A44, ¶40. Hirz insisted that he was not concerned about competition from Amazon because of SFW's small business niche. *Id*. Hirz didn't list Amazon's entry among his top concerns, focusing instead on the cyclical nature of food inflation and its analog, retail grocery profit margins. *Id*.

On the Q3 2018 earnings call, Phegley explained the strategy: "Really the heavy blocking and tackling and the build-out of the infrastructure, a lot of that was—is being completed in 2018, and it should be lower in future years." *Id*., ¶41. On December 4, 2018, Hirz trumpeted these investments, leveraging "major name technologies like SAP [financial systems integrating register software and online sales] and JDA [inventory and category management], Symphony EYC [a warehousing system] at a foundational level so that we can have the maximum flexibility down the road…through 2018." A45, ¶42. According to Hirz, the

Company would introduce Scan and Go checkout and a loyalty program in the coming year. *Id*.

II. Ares and the Board reject Apollo's $9.00 per share offer.

On December 17, 2017, Apollo requested a meeting with Hirz and expressed interest in investing in Smart & Final because, in Apollo's view, the public markets were not appreciating the Company's value (as reflected by the Company's trading price). A45, ¶43. On January 8, 2018, Apollo made a proposal to Hirz for a $400,000,000 investment in Smart & Final that would be used to make a tender offer to Smart & Final shareholders to purchase $200,000,000 of outstanding shares pro rata at $9.00 per share and $200,000,000 to repay debt. A45, ¶44.

The Board specifically inquired with Ares as to its interest in the proposal. *Id*., ¶45. Hirz discussed the offer with the Board on February 7, 2018, noting that Ares was not interested in selling their shares *as contemplated by the proposal*. A46, ¶46. The Board rejected the proposal, which, in its view, undervalued Smart & Final and, in contrast to the rationale ultimately expressed in the Proxy, was overly reflective of the negative impact that the announcement of Amazon's acquisition of Whole Foods had on the Company's trading price. *Id*.

The proposed transaction would have left Fund III holding over 35,000,000 shares. *Id*., ¶47. Ares told the Individual Defendants and the Board that it was only interested in a pro rata deal with all other stockholders. *Id*. The Apollo offer was pro rata, so the implication is that Ares was only interested in a pro rata cash-out deal.

III. Ares management touted the long-term plan's success.

In a June 29, 2018 investor presentation by Phegley, management stood by the return expectations laid out in the company's S-1, announcing targets of approximately 20-25% pre-tax cash-on-cash returns on a $3.1M investment in new Extra! stores. A46, ¶48. Expansions of legacy stores to the Extra! model, requiring a cash investment of $3M, would yield pre-tax cash-on-cash returns of 20%. *Id*. And for investments of $2M, new SFW stores would yield pre-tax cash-on-cash returns of 20-25%. *Id*. The expected return on capital remained unchanged since 2014 (the time of Smart & Final's IPO), indicating the continued success of management's business plan in achieving their projected return on capital. *Id*.

The presentation charted increasing sales growth and EBITDA year over year through Q1 2018, noting a strong opportunity for future leverage in expectations of food inflation returning to a "normal 2% level". A47, ¶49. Net sales growth was projected at 4-5% for 2018. *Id*., ¶50. Adjusted EBITDA was projected to be between $180-190M, only $3M short of Smart & Final's 2015 record-high EBITDA, just before industry-wide deflation set in from 2016-2017. *Id*.

IV. The Committee.

At the same time, contrary to management's statements, the Board, in a June 29, 2018 meeting, "discussed its desire to evaluate a broad range of potential strategic alternatives…." *Id.*, ¶51. Its stated motivation was the "meaningful challenges and headwinds that the Company faced, including, among other things, difficulties enhancing stockholder value (as reflected by the Company's trading price)…." *Id.* The Board appointed Tuchman, Hopkins, and Tesoriero to the Committee. *Id.*, ¶52.

Initially, Gies indicated that the Funds "did not need to liquidate their positions in the Company and did not currently intend to participate in any strategic transaction involving the Company in any capacity other than on a pro rata basis together with all other stockholders of the Company." A48, ¶54. Despite his interest in Ares, on July 13, 2018, Gies along with Hirz and other Ares representatives met with the Committee, Proskauer, and Gibson Dunn to engage a financial advisor. *Id.*, ¶55. Jefferies and Citi, both of whom had experience working for Smart & Final, were present to be interviewed. *Id.* These conflicts were disclosed and purportedly waived. *Id.*

On July 18, 2018, the Board conducted a meeting attended by the Committee and the Individual Defendants. *Id.*, ¶57. Hirz updated the attendees on the Company's "business results and highlights for the second quarter of 2018 and [provided] an update on the Company's 2018 strategic priorities." *Id*. Presumably, Hirz's recounting of Q2 highlights would have tracked management's public statements in Phegley's June 29, 2018 investor presentation in which Phegley extolled Safe & Final's target-beating performance. A46-47, ¶¶48-50.

On July 20, 2018, the Committee convened telephonically resulting in the Professionals' engagements, and, because of the material investment banking relationships with certain Ares affiliates, it would engage an additional advisor. A49, ¶58. According to the Proxy and contrary to the Committee's mandate, the Professionals' remuneration was contingent upon consummation of the "Offer"[1]. *Id*., ¶59-60.

On July 22, 2018, Tuchman advised the Committee that Centerview did not have material conflicts. *Id*., ¶61. On July 25, 2018, the Committee also engaged Centerview. *Id*. Centerview was paid $1,500,000 for its fairness opinion and the same amount contingent primarily upon consummation of the Offer. A50, ¶62.

In August 2018, the Committee instructed and provided guidance to management for preparing financial projections for the five-year period from fiscal years 2019-2023 (the "Five-year Plan"), which were assembled by the Individual Defendants. A50, ¶63. A draft of the Five-year Plan was discussed in a telephonic

[1] The Offer to Purchase, dated May 14, 2019 and the related Letter of Transmittal and any amendments thereto (done in accordance with the Merger Agreement) constitute the "Offer". A49, n.2.

Committee meeting attended by Gibson Dunn and management, including the Individual Defendants, on September 12, 2018. A50, ¶64. Underlying inputs and assumptions were discussed, and the Committee provided input on the draft, which management revised. *Id*.

On September 17, 2018, the Board convened telephonically with management, Proskauer, and Ares representatives at which time management, including the Individual Defendants, presented the revised Five-year Plan. A50, ¶65. The Board authorized the distribution of Five-year Plan summaries to "interested parties in the process at the appropriate time." *Id*., ¶66. These projections showed EBITDA growth from $188-$273M through 2023. *Id*.

On September 24, 2018 after meeting with Gibson Dunn, the Professionals, and Centerview representatives, but specifically on the recommendation of the conflicted Professionals, the Committee determined "to proceed with a structured process to identify, solicit and evaluate potential third party interest in the Company." A51, ¶67. With the long-term capital investment plan largely behind it and a glowing review of the Company's recent performance, based on nothing more than a review of the Five-year Plan the path to a cash-out merger was set in stone.

V. Smart & Final outperforms expectations.

On the November 14, 2018 Q3 earnings call, Hirz gushed about the Company's performance. A51-52, ¶71. The Company opened "eleven new warehouse stores in the last 36 months. And on average, they are at or above pro forma expectations…even in new markets, they're ramping sales and EBITDA in line with expectations." *Id*. Hirz thought that the Company had "seen faster growth in [SFW] this year, and we'll see it again next year." A52, ¶72. Hirz announced, "the economics are actually pretty strong," adding Extra! growth would outpace Smart & Final growth in 2018 and 2019. Hirz foreshadowed Smart & Final's outperforming the Five-year Plan's baseline. Phegley indicated,

> We ended the quarter with cash generated from operations of $109.5 million, and we remain in a strong liquidity position. As a result, we expect that our 2019 capital spending commitments will remain relatively modest which provides the opportunity to continue to deploy our free cash flow to reduce financial leverage. A52, ¶73.

Phegley signaled to shareholders that any significant capital expense required under the business plan was behind them and cash flows would allow Smart & Final to accelerate debt service, thereby cleaning up its balance sheet—i.e., Smart & Final was set to be awash in cash.

Phegley then offered his opinion on the inflationary outlook.

> I think, No. 1, would be we do believe that we'll see some spring back in inflation to a more normalized level. This is a very sustained period of deflationary activity over the

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> last few years, really unusual. And ***many of the underlying statistics, including most recent PPI statistics, would point to a more normal level of inflation*** on a go-forward basis or at least less deflationary, which will help leverage costs. A52 ¶74 (emphasis added).

In management's view, rising PPI meant climbing food inflation. And so, management signaled to shareholders that, in addition to improved EBITDA and cash flows they had already seen, stockholders could now expect profits to soar because food inflation was at an inflection point. According to management, by December of 2018, there were no "headwinds" on the horizon. A53, ¶75.

Irrespective of the fruits of management's steady hand on the tiller and inoculated against self-reflection by Ares's less than compelling vow that it was not legally bound to sell, the Committee and its Professionals, redoubled their efforts to identify potential buyers in a cash-out deal. *Id*., ¶¶76-78.

Management, specifically Hirz and Phegley, was openly enthusiastic in Q4 2018 and Q1 2019 about its SFW plans, touting 25% return on capital over a three to four-year maturity period. A53, ¶79. Over the four quarters ending in Q1 2019, comparable sales were ahead of competitors by an average of 3.76%. *Id*.

As management predicted, by Q1 2019, Smart & Final's operating margins had declined by one-third (from 3% to 2%). A54, ¶80. The entire industry felt the effects of food stagnation, an inflationary environment that depressed the Company's operating earnings results by $50,000,000. *Id*. Now, packaged food earnings releases indicated an inability to identify further cost savings reflected in increased prices to companies like Smart & Final, yielding higher sales revenues across the industry. *Id*. Food inflation and corollary profits had arrived.

Management, specifically Hirz and Phegley, presented Company financials over the preceding quarters that indicated an inflection in traffic and inflation. A54, ¶81. Without any additional investment, just recapturing 1% of lost operating margin due to inflation would equate to $50,000,000 of incremental profits, which would have increased EBITDA by 25% over the Q4 2018 projection of $185,000,000. *Id*.

At the same time, SFW's competitors, like Chef's Warehouse, were trading at 14.2x EBITDA while conventional supermarkets were yielding only six times EBITDA. A54, ¶82. The Proxy includes those comparables. *Id*. Management, including the Individual Defendants, repeatedly advised stockholders that the market's obsession with ecommerce and increased competition in that sector had little impact on Smart & Final's performance. A54, ¶83. What distinguished Smart & Final from the rest of the field was that 28% of its sales were generated by business customers through SFW. *Id*. The Company wasn't another traditional supermarket chain, and in December of 2018, management said the Company was "well positioned for growth in e-commerce." *Id*.

VI. The Board Fixates on a Sale.

Despite management's public observations, on January 3, 2019, "[t]he Committee discussed the possibility of expanding the process to invite proposals from prospective parties interested in acquiring either of the Company's two business divisions on a standalone basis." A55, ¶84. "On March 13, 2019, the Company announced its fourth quarter and full-year 2018 financial results." *Id*., ¶86. Referring to SFW, Hirz considered the Company's sales to business customers as remaining "strong, representing more than 29% of total banner sales." *Id*. Hirz labeled this customer base a "key differentiator," which was doubling the overall banner growth rate such that management had "confidence in our ability to continue to accelerate this highly profitable segment." *Id*.

On March 15, "proposals were received for each of the Company's business divisions from (i) Party J to acquire only [S&F] for $400[M] . . . and (iii) Party D to acquire only [SFW] for $700[M]." A55-56, ¶87. But, according to the Proxy, "[w]ith respect to Party D's proposal to acquire [SFW]," the Committee was concerned "that such acquisition might entail complexities relating to regulatory filings and clearances required for such a transaction." A56, ¶88. The Proxy never revealed the reasoning for that pivot. *Id*.

On March 26, 2019, the Committee "held a telephonic meeting with… Gibson Dunn and Hirz to discuss recent developments with respect to [AMIX's] revised proposal and to consider strategies for maximizing stockholder value." A56, ¶89. The Proxy indicates that the Committee assessed AMIX's "revised proposal versus the value to stockholders implied by pursuing two complementary transactions with [Parties J and D], including an assessment of the relative risk of completing two separate transactions compared to the risk of completing a single transaction with [AMIX]." *Id*.

Three days later, Tuchman discussed AMIX's latest offer and Parties J and D's proposals with Gies and the Professionals. A56-57 ¶90. Tuchman later updated the Committee about his conversation with Gies, in which Gies advised that the Funds had rejected AMIX's latest demand that they enter into a support agreement that would survive even if the Board were to change its recommendation to Smart & Final shareholders that they tender their shares in any transaction. *Id*. The Committee's consultation with Gies, Hirz, and Ares was a constant. A57, ¶94.

The Committee requested that Parties J and D "promptly submit an updated joint proposal and provide additional details…" (A57, ¶91) and insisted that Party J submit an updated joint proposal with Party D before allowing its financing source to begin due diligence "at this late stage." *Id*., ¶92.

On April 5, 2019, Gibson Dunn and the Committee reviewed a revised draft of the Merger Agreement that Kirkland & Ellis LLP ("K&E") (substituting for Proskauer) had prepared for the Board the previous day. A57, ¶93. This version was drafted in response to AMIX's March 15, 2019 draft. *Id*. Later that day, "Gies reiterated to the Board that [Ares] did not need to liquidate their positions in the Company…." A58, ¶95.

By this time, Smart & Final had deleveraged its balance sheet and was generating free cash flow projected to reach around $60,000,000 by year-end, at a time when the stock's trading price was at a historic low. *Id*., ¶96. Management had projected only $48M in free cash flow by the end of 2019. *Id*., ¶97.

On April 11, 2019, Parties D and J submitted a joint proposal with a $6.50 per share purchase price and indicated that they would need four weeks to execute a definitive agreement. A58, ¶98. Later that day, at Citi's urging, Parties D and J signaled that they would strive to submit a joint proposal of $7.00 per share. *Id*.

The next day, the Committee telephoned Gies, Hirz, Gibson Dunn, and K&E to discuss AMIX's threat to withdraw its proposal if the Company didn't enter into another exclusivity agreement. A58, ¶99. "Based on the meaningful risk in refusing [AMIX's] demand for short-term exclusivity," the Committee unanimously agreed with that condition provided, *inter alia*, the accompanying Ares support agreement would terminate upon a Board change of recommendation. *Id*. This support agreement prevented Ares from promoting or pursuing a sale of a single business segment by defining "Superior Offer" as a transaction involving 80% or more of the Company's shares or outstanding shares. A59, ¶100.

Moreover, any such offer would require a three-month outside termination date, which was aimed at foreclosing the sale of any one segment or both segments separately. *Id*. This effectively ended Parties D and J's attempt to reach a combined $7.00 per share purchase price. A59, ¶101. The Committee rationalized the finality by ruminating aloud on the prospect of delay and complication occasioned by demanding a joint transaction and "the relative speed and certainty involved with a potential transaction with [Apollo]." *Id*. The disclosures contain no further detail on delay and complication theoretically occasioned by the joint transaction and no explanation of why speed was essential at a time when all indicators of future value were positive. *Id*.

Nevertheless, Gies announced that Ares would support a short-term exclusivity agreement with Apollo to work toward a definitive agreement at $6.50 per share "within the next few days." A59-60, ¶102. With that, the Committee resolved to recommend to the Board that it proceed with the revised short-term exclusivity agreement with Apollo that would expire on April 15, 2019. *Id*. After speaking with K&E, Gibson Dunn, Gies, and Hirz, Tuchman informed the Board of that resolution. *Id*. The Committee concluded it could resume discussions with Parties D and J after exclusivity had expired or during the "no shop" period, but the Merger Agreement's no solicitation provision made this impossible. *Id*. That evening, Parties D and J submitted a joint proposal at $7.00 per share. A60, ¶103.

Regardless, management and the advisors negotiated, and the Board executed, an exclusivity agreement with Apollo after receiving Parties D and J's $7.00 offer. *Id*.

According to the Proxy, the Committee asked Hirz to express his concern to Apollo about "employee retention if outstanding employee equity awards were not accelerated and paid" as part of the Merger. A60, ¶105. Apollo agreed to permit outstanding employee equity awards to be converted into payments under the Merger Agreement. *Id*., ¶104. The Individual Defendants were beneficiaries of these awards. *Id*. And so, the Merger Agreement accelerated vesting and cash-out of director and executive-owned options, converted restricted stock into the right to receive cash payments, accelerated cash awards to directors and officers, secured severance payments and benefits to the same, and paid transaction bonuses to Smart & Final's C-suite officers. *Id*., ¶106. Among management, Hirz and Phegley were the Merger's largest beneficiaries, receiving in excess of $12M and $5.5M, respectively, and Smith receiving more than $1.4M. A61, ¶107.

Consistent with Hirz's employment agreement, he received 24 months of base salary, two times his largest annual bonus, a prorated share of his annual bonus for the merger year, and an accelerated vesting of restricted stock. A61, ¶108. Some of these benefits are triggered by his termination without cause under his employment agreement; others, by the change in control under a separate arrangement—Hirz's Company Cash Award. *Id*. This Merger was treated as a change in control and, thus, termination without cause under Hirz's employment agreement and a qualifying change in control under his Company Cash Award arrangement, acted as a "double trigger." *Id*. Change in control benefits payable to Hirz resulting from the Merger total $10,209,995. *Id*. Hirz's discussion with the Committee about Apollo retaining him and his management team by honoring and even accelerating outstanding employee equity awards implies that those arrangements were negotiated at the Committee level on management's behalf. A60, ¶104.

VII. The Committee and Board recommended that shareholders accept the Apollo offer.

Based on the information provided to the Professionals, each could render a fairness opinion, "from a financial point of view, of the consideration to be paid in the currently proposed transaction with [AMIX]." A62, ¶110. In an April 16, 2019 Board meeting with management, the Individual Defendants, the attorneys, and the financial advisors, Gies, this time parroted by Kaplan, again stated that Ares did not need to liquidate its position in Smart & Final. A62, ¶111.

Acknowledging Ares and its Board representatives' involvement in the process, the Board unanimously agreed to a medium-form merger. A62-63, ¶114. The Board and the Committee disclosed, as its leading rationale for recommending the Merger, the increasing operating costs associated with being a public company; Ares's support; the $6.50 offer price being more favorable to stockholders than any alternative including “remaining a standalone company” (presumably meaning not engaging in a merger); the offer price’s 25% premium over the average closing share price over the preceding 24 trading days (near a historical low) that was, in the Board’s view, unlikely to improve in the foreseeable future (without reference to management’s contemporaneous publicly-expressed view on food inflation and its upward effect on the company’s EBITDA projections); and enterprise value (which assumes increased cash flow would not have been applied to debt, leaving it available for dividends) which, the Board concluded, had to take into account “that prolonging the sale process could have resulted in the loss of an opportunity to enter into the Merger Agreement…if [AMIX] wasn’t granted exclusivity, and [most curious of all] would further distract senior management from implementing [Smart & Final’s] business plan, [conceding that the current business plan was succeeding].” A63, ¶115.

For nearly the entire period spanning Smart & Final’s IPO until March 2018, the Company’s publicly-traded share price was above $6.50. A63-64, ¶116. That spring, Ares and the Board considered and rejected a pro-rata offer of $9.00 per share for some 22,000,000 shares on the view that it undervalued Smart & Final. *Id*. Between 2018 and 2019, approximately 20% of Smart & Final’s sales came from SFW, which was insulated from ecommerce competition according to Hirz and Phegley. *Id*. Jeffries’s fairness opinion was limited to a financial point of view of the per share cash consideration to shareholders. A64, ¶118. Centerview's opinion expressed no view as to the Company's underlying business decision to proceed with or the relative merits of the merger as compared to any alternative business strategies or transactions that might be available, including the sale of one or more business units of the Company. A64-65, ¶119.

As Phegley predicted, by mid-2019, when the Merger was announced, Smart & Final had deleveraged to three times EBITDA, which would have generated $50-60M in free cash flow. A65, ¶120. Once normalized (by excluding the $10,000,000 in one-time technology investments), free cash flow would have been $70-80M or a 14% free cash flow yield. *Id*.

Yet, the Proxy indicates no analysis of the effect of paying dividends from excess free cash flow on share value. A65, ¶121. Smart & Final was outperforming the Five-year Plan such that between 2019 and 2023, sales were expected to rise annually from $4.924M to $6.603M. *Id*. EBITDA margins were predicted to grow from 3.8% to 4.5% in the same period. *Id*. And the extant business plan would produce increasing free cash flow every year starting in 2019 at 9.6% yield based on equity value, leaving $48M free to pay dividends on Safe & Final's $500M public market value (calculated at $6.50 per share). *Id*. By 2023, the Five-year Plan would have generated free cash flows sufficient to allow a 19% yield on equity value, ignoring the expected upward effect on share price that these dividends would have had. A65-66, ¶122. A 9.6% dividend yield in 2019 was well above then-current market yields in Smart & Final's sector. *Id*. If the Board had decided to stand on the current business plan, projected free cash flows were expected to enable dividends of $333M over five years. That is 70% of the value achieved through the sale to AMIX. A66, ¶123.

According to the Proxy, AMIX intended to capitalize the Company with an additional $400,000,000 in debt, indicating not only a strong Company balance sheet, but also an anticipated free cash flow near $100,000,000 annually in a normal inflationary environment. A66, ¶124. The only conclusions the Board could have drawn from AMIX's public strategy were that Apollo shared management's view that inflation had normalized and Smart & Final could incur debt that would increase value far beyond the tender price. *Id*., ¶125.

Two weeks later, on the Q1 earnings call, Hirz heralded:

> a strong start to the year. Total company sales in the first quarter grew by 2.8% year-over-year and a 2.2% comparable store sales growth rate….[C]omparable store sales exceeded our [Q1] guidance range of 1.75% to 2% and represents our highest comp store sales rate since the [Q4] of fiscal 2017. Adjusted EBITDA of $29.6[M] was also higher than our Q1 guidance range of $25[M] to $28[M] and grew by approximately 4% year-over-year. A66, ¶126.

Management projected Adjusted EBITDA for the second half of 2019 at $94M, $188M by year-end. A67, ¶127. Just days after the rush to sell, management publicly gloated over performance exceeding its own projections, projections on which fairness had been based. *Id*., ¶¶127-128.

Unfortunately for shareholders, the Merger Agreement had no go-shop provision. A67, ¶129. Instead, the Company was bound by a draconian non-solicitation requirement that forbade management, the Board, and the Professionals from inquiring into the competing joint bid and gave Apollo four days to outbid any bona fide offer that might be brought to Smart & Final's attention. *Id*. The break-up fee was $15,000,000. *Id*.

Hirz remained the Company's CEO until his February 2022 retirement, and Phegley continued as its CFO. *Id*., ¶¶130-131.

VIII. Apollo Cashes Out, the Funds are in "Harvesting Mode", and Fund III Stops Paying Management Fees.

Fund III launched in 2008; Fund IV, 2012. A67, ¶132. Ares's 2018 Form 10-K filing acknowledged that "[r]ealized net performance income and net realized investment income for 2017 were primarily attributable to…monetizations of multiple investments held within [*inter alia*, the Funds]. A68, ¶134. Ares noted realized net performance and investment income "for 2016 were primarily attributable to realizations from monetizations of multiple investments held within [Fund III]." *Id*. The Funds began winding down years before the Merger. *Id*. In the same filing, Ares disclosed that "monetizations and distributions of portfolio holdings of [*inter alia*, Fund III] during 2018 resulted in a $12.7[M] decrease in management fees compared to 2017." *Id*., ¶133.

Ares's 2019 Form 10-K filing proffered that net income for 2018 was "primarily attributable to realizations from the partial monetization of multiple investments held within [Fund III], including partial sale of its position in Floor & Décor." A68, ¶135. Fund IV was "in harvest mode, meaning [it was] not seeking to deploy capital into new investment opportunities, while [other funds, not the Funds] are in deployment mode." A69, ¶136. According to Ares, "[Fund III was] no longer considered a significant fund as it stopped paying management fees in 2019." *Id*.

In its December 2019 investor presentation, Ares revealed that it had $25.5B in private equity investments. A69, ¶137. The Funds, each primarily invested in corporate private equity, had an $18B combined value annualized as of September 30, 2019, which included realized proceeds from private equity transactions like the Merger. *Id*. Unrealized proceeds were tied up in investments that were downgraded and headed for bankruptcy like 99 Cents Only Stores, Guitar Center, and Neiman Marcus, companies for which Kaplan served as board chairman. A624, A648. Ares's inability to liquidate these investments when harvesting funds to flip investors into new vehicles heightened its compulsion to liquidate other investments. Ares's May 2020 investor presentation contained no reference to Fund III. A69, ¶139.

The Committee was formed ten years after Fund III's launch. *Id*., ¶140. Ares's 2020 Form 10-K filing indicates that Fund III stopped paying management fees in Q4 2019 and "continue[d] to monetize its investments…during the year ended December 31, 2019." *Id*., ¶141. And through 2019, Fund IV "continue[d] to reduce its fee basis through the monetization of investments."A70, ¶142. "Realized net performance income and realized net investment income for the year ended December 31, 2020 were primarily attributable to realizations from the sales of [Fund IV's] investments in NVA, Valet Living and a healthcare services company, from the partial sale of [Fund IV's] position in AZEK and from the sale of [Fund III's] remaining position in FND." *Id*.

Ares added that realized net performance and investment income for the year ended December 31, 2019 "were primarily attributable to realizations from the monetization of multiple investments within [Fund III], including…sales of its positions in a real estate development portfolio company and a professional services portfolio company." *Id*. The entirety of the Funds's then three-year history of harvesting was described to Company shareholders only in Gies, Hirz, and Kaplan's repeated pronouncements that Ares didn't *need* to liquidate its position. A70, ¶144.

On March 6, 2020, Apollo sold SFW to US Foods for $970,000,000, dispelling the notion of complexity preventing a bifurcated deal. A69, ¶138. On May 17, 2021, Apollo sold Smart & Final to Bodega Latina for $620,000,000 and the assumption of Smart & Final's remaining debt. A70, ¶143.

ARGUMENT

I. The court below erred in finding that the Complaint doesn't allege particularized facts that Ares pursued liquidity and supported a transaction that harmed minority shareholders.

A. Question Presented.

Did the lower court err in determining that Ares was not a conflicted controller and entire fairness should not apply? Op., 14-17.

B. Scope of Review.

"When examining the [lower court's] decision to grant a motion to dismiss…[the court] undertake[s] a de novo review to determine whether the [lower court] erred as a matter of…." *Shea v. Delcollo & Werb, P.A.*, 977 A.2d 899 (Del. 2009) (citations omitted). The Court is "required to view the [c]omplaint in the light most favorable to the Plaintiff, accepting as true the well pleaded allegations of the [c]omplaint and drawing all reasonable inferences that logically flow from those allegations." *Id*. (quoting *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009)).

C. Merits of Argument.

When a majority shareholder prioritizes liquidity, it chases a non-ratable benefit, risking an interested transaction. *See Manti Holdings, LLC v. Carlyle Grp. Inc*., 2022 Del. Ch. LEXIS 128, at *9 (Del. Ch. June 3, 2022); *Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, 258 (Del. Ch. 2021) (The normal cycle *is* evidence of a predilection that, by itself, doesn't overcome the rational shareholder presumption); *In re Mindbody, Inc.*, 2023 Del. Ch. LEXIS 65, at *11 (Del. Ch. Mar. 15, 2023) (controller indicating his desire to cash out demonstrated a divergent liquidity interest). The Complaint sufficiently alleges that Ares supported the Merger to achieve its liquidity goal. "There is no dispute that Ares controlled the Company." Op., 14. Accordingly, Ares owed the minority shareholders fiduciary duties, including a duty of loyalty and candor. *See New Enter. Assocs. 14 L.P. v. Rich*, 295 A.3d 520, 570 (Del. Ch. 2023). It cannot use its voting power to approve terms that are harmful to the minority. *See In re First Boston, Inc. S'holders Litig.*, 1990 WL 78836, at *7 (Del. Ch. June 7, 1990).

The Complaint satisfies Rule 23.1 and supports a reasonable inference that the Funds had been harvesting since 2016. A39, ¶12.

- Fund III's 2016 realized net performance and investment income came from realizations. A68, ¶134.

- Fund III was monetizing and distributing proceeds to its investors in 2018, not seeking new investments. Its management fees reduced proportionately. A68, ¶133.

- In 2019, Fund III sold its position in Floor & Décor. Fund IV was in harvest mode. A68, ¶135.

- By 2019, the bulk of the Funds's holdings were monetized or were liquidating. A624[2]; A68, ¶135.
- Fund III stopped paying management fees by 2019 and closed months after the transaction. A39, ¶12; A69, ¶¶136, 141.

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[2] *See Darby Emerging Mkts. Fund, L.P. v. Ryan*, 2013 Del. Ch. LEXIS 287, at *38-39, n.54 (Del. Ch. Nov. 27, 2013) (taking judicial notice of a complaint filed by a defendant without converting a motion to dismiss into one for summary judgment).

- Fund IV was winding down, liquidating its equity positions, harvesting, not deploying. A68-69, ¶133, ¶136.

The cyclic nature of private equity alone, however, is not enough to overcome the presumption that a rational shareholder would not leave money on the table. *Presidio, Inc.*, 251 A.3d at 256 (citing *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012)). A private equity controller's portfolio maturity along that continuum deserves some color at the pleadings stage. It is evidence of that divergent interest, but, without more, cannot overcome the presumption that when a large blockholder receives pro rata consideration, its interests are aligned with the disinterested shareholders' interests. *Presidio, Inc.*, A.3d at 251; *In re Synthes, Inc. S'holder Litig.*, 50 A.3d at 1035. Delaware courts presume that such shareholders will seek the highest price and are personally incentivized to think about the tradeoff between selling now and the risks of not doing so. *Presidio, Inc.*, 251 A.3d at 255 (citing *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 600 (Del. Ch. 2010)).

The search for the distinction between the cyclical and the idiosyncratic motivation is primarily a fact-intensive inquiry. *See Manti Hldgs., LLC*, 2022 Del. Ch. LEXIS 128 at *25; *In re Trados, Inc. S'holder Litig.*, 73 A.3d 17, 38 (Del. Ch. 2013). The *Manti* Court observed that "it was time for [defendant] to monetize and close that fund so that the money could be returned to investors." 2022 Del. Ch.

LEXIS 128 at *22-23. Further, the *Manti* Court found it significant that the private equity fund's officer expressed the fund's need to exit the investment because the fund was closing. *Id*.

Ares told Hirz and the Board to inform Apollo it was only interested in a pro-rata cash-out merger (A48, ¶54), which triggers the presumption that an economic actor wouldn't choose to short-change itself. *Larkin v. Shah*, 2016 WL 4485447, at *15 (Del. Ch. Aug. 25, 2016) (quoting *In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 666-67 (Del. Ch. 2013) ("[T]he presumption is that a large blockholder, who decides to take the same price as everyone else, believes that the sale is attractive, and thus is a strong indication of fairness and that judicial deference is due.")). That same response, however, signaled Ares's willingness to back a cash-out merger thereby soliciting a cash-out offer. Private equity funds's modus operandi *is* idiosyncratic when compared to typical (equally rational) investors because private equity funds prioritize cyclical exits—cash-out mergers—to fund distributions that satisfy internal rate of return ("IRR") expectations on a cyclical portfolio basis, not focused on any individual investment.

For instance, in 2025, McKinsey & Company observed

> [T]he backlog of assets that are in their divestment period is growing globally. Average buyout hold times remain above the long-term average (6.7 years versus the average of 5.7 years over the past 20 years).…[T]he exit backlog

> is bigger now than at any point since 2005. There are more PE-backed companies (comprising a greater share of total GP portfolios) awaiting exit than ever before.[3]

Moreover, "[e]xtended holding periods due to a lack of suitable exit options can still jeopardize returns. As deals increase in size…the number of potential exit routes narrows—sponsors must plan even further ahead in thinking about the 'right exit.'" *Id*. Ares began its search for the right exit from Smart & Final when it signaled to Apollo its willingness to do a cash-out merger.

In 2024, private equity exits increased "to $902[B] compared to $754[B] in 2023, although still well below pandemic-era highs."[4] Industry experts predict that "[a]s more and larger funds approach the end of their life, financial sponsors [will] face increasing pressure to return money to their limited partners." *Id*. Indeed, "[t]raditional exits such as IPOs slowed over the past few years, and sponsors increasingly utilized alternative exits such as sponsor-to-sponsor sales" like Ares's sale of Smart & Final to AMIX. *Id*. "A closer look at the buyout industry's liquidity quandary goes a long way in explaining the growing pressure GPs are

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[3] Alexander Edlich, Christopher Croke, Fredrik Dahlqvist, and Warren Teichner, *Global Private Markets Report 2025: Private equity emerging from the fog*, February 13, 2025, https://www.mckinsey.com/industries/private-capital/our-insights/global-private-markets-report#/.

[4] Andrew J. Nussbaum, Steven A. Cohen, and Igor Kirman, Wachtell, Lipton, Rosen & Katz, *Private Equity—2024 Review and 2025 Outlook*, Harvard Law School Forum on Corporate Governance, January 24, 2025, https://corpgov.law.harvard.edu/2025/01/24/private-equity-2024-review-and-2025-outlook/.

feeling to monetize assets.…With the exception of a spike in 2021, the amount of capital returned to investors is not keeping pace with the industry's increasing scale."[5]

And so, the rational blockholder presumption ignores control private equity's atypical portfolio investment playbook. Private equity controllers deep into harvesting mode, like the Funds, focus on maximizing IRR over an entire portfolio through liquidity events. Unlike the typical investor, the incentives to consider "the tradeoff between selling now and the risks of not doing so" are inherently time constrained and *not* myopically focused on a single investment's return. *Presidio, Inc.*, 251 A.3d at 255 (citing *In re Dollar Thrifty S'holder Litig.*, 14 A.3d at 600). "[T]he reality is that rational economic actors sometimes do place greater value on being able to access their wealth than on accumulating their wealth." *Manti Hldgs., LLC*, 2022 Del. Ch. LEXIS 128 at *24 (citing *In re Mindbody, Inc.*, 2020 WL 5870084, at *18 (Del. Ch. Oct. 2, 2020)). Control private equity categorically approaches access and accumulation differently than the typical investor. Nonetheless, like the controller in *Manti*, Ares's own SEC

[5] Hugh MacArthur, Rebecca Burack, Graham Rose, Alexander Schmitz, Kiki Yang, and Sebastien Lamy, *Private Equity Outlook 2025: Is a Recovery Starting to Take Shape?*, Bain & Company Report, March 03, 2025, https://www.bain.com/insights/outlook-is-a-recovery-starting-to-take-shape-global-private-equity-report-2025/; *see also id*. ("While global buyout AUM has tripled over the past decade, distributions as a percentage of NAV have fallen from an average of 29% from 2014 to 2017 to 11% today.").

filings demonstrate an access over accumulation priority contemporaneous with the Merger. A67-69, ¶¶132-139.

Despite its mandate to explore all strategic options to enhance share value, the Committee engaged two, then three, financial advisors to build the Five-year plan as a marketing tool to identify buyers. A48, ¶55. The financial advisors immediately identified buyers and shared the Five-year Plan with those candidates in "fireside chats." A37-38, ¶8, A50-51, ¶¶66-70. At the same time, management told shareholders that the Company was outperforming the Five-year Plan's projections, management insisted that there was one headwind standing in the way of enhancing share value: stagnant food inflation. And then, food inflation spiked such that results (sales revenues and margins) were observable and announced in Q4 2018 and Q1 2019 (before the pandemic). None of this data led to revised projections or were disclosed in the Proxy. A54, ¶81.

The court below tacitly rejected this well-plead allegation, concluding instead that Management had only ***predicted*** an increase in food inflation on the horizon. *Compare id*. ("[M]anagement, specially Hirz and Phegley presented Smart & Final financials over the preceding quarters that indicated an ***inflection in*** traffic and ***inflation***) (emphasis added) *with* Op., 6 ("Phegley…***predicted*** that inflation would normalize") (emphasis added).

Ares reacted by executing a support agreement to avoid losing AMIX's bid "by lengthening the process" and threw its weight behind a medium form (two-step) merger. A37, ¶7; 8 *Del. C.* § 251(h). That is further evidence of Ares's motivation to forego profit for liquidity consistent with its larger portfolio strategy.

The Proxy repeatedly reminded shareholders that Ares wasn't required to sell its interest—a message conveyed by Ares in answer to the Committee's inquiry. At the same time, the few remaining unrealized investments in the Funds were tied up in companies headed towards bankruptcy like 99 Cents Only Stores, Guitar Center, and Neiman Marcus, companies for which David Kaplan served as board chairman. A624.[6] Axelrod, Smart & Final's chairman, was a director of 99 Cents Only Stores, Guitar Center, Neiman Marcus, and Floor and Décor, all Fund III or IV investments. A648. Neiman Marcus filed for bankruptcy in May 2020, Guitar Center in November of 2020, and the 99 Cents Only stores faced similar challenges. *Id.* Ares was well-advised to say it did not "need" to sell even though it was broadly exiting investments to close the Funds.

A historically low stock (A58-59, ¶¶96-102; A63, ¶115) price augurs a delay in the sale process unless projections were pessimistic. They were not. *See, e.g.*, A66-67, ¶¶126-128. A typically "rational" (informed and uncoerced) shareholder would *not* favor an immediate cash-out merger to free management from the

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[6] *See* n.2 *supra*.

distraction occasioned by prolonging a sale process that robbed shareholders of the fruits of an extant business plan that was outperforming the data room projections. If the goal was to avoid distracting management from implementing the plan, the plan must have been working and, thus, would have enhanced share value.

Ares, however, signed a support agreement, presumably, because:

> The risk that prolonging the sale process could have resulted in the loss of an opportunity to enter in to the Merger Agreement … when Purchaser indicated that its offer would decrease … each day … and/or that its proposal would ultimately be rescinded if it were not granted exclusivity, and would further distract senior management from implementing S&F's business plan. A204.

There is more here to support a divergent liquidity interest than a naked hypothesis that the Funds were at a certain point in the continuum of private equity investment. The Complaint alleges particularized facts that Ares signaled its desire to exit via a cash-out merger in February of 2018, the Funds were in the late stages of liquidation, and Ares's support and exclusivity grant favored speed over value. Given the industry-specific liquidity objective—a probative albeit not conclusive fact supporting a finding of a non-ratable benefit—the Complaint sufficiently alleges particularized facts from which the court can infer that Ares prioritized monetizing its equity positions over achieving value for disinterested shareholders. The standard of review, therefore, should be entire fairness, and Defendants cannot find refuge in the safe harbor. *See generally In re MFW S'holders Litig.*, 67 A.3d

496 (Del. Ch. 2013); *see also* § II *infra* (discussing the effect of an uninformed disinterested shareholder tender in the context of *Corwin* cleansing).

II. The court below erred in finding that Defendants could avail themselves of *Corwin* cleansing.

A. Question Presented.

Did the court below err in finding that the Complaint did not adequately allege a disclosure violation that would render the stockholder tender uninformed such that *Corwin* cleansing was unavailable and an enhanced scrutiny standard would apply? Op., 17-23.

B. Scope of Review.

See p. 30 *supra*.

C. Merits of Argument.

Enhanced scrutiny applies in a sale posture because conflicts of interest "can subtly undermine the decisions of even independent and disinterested directors." *In re Trados Inc. S'holder Litig.*, 73 A.3d at 43 (discussing *Revlon, Inc. v. Macandrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986)). The Complaint adequately alleges particularized facts to infer that the Board did not act reasonably to obtain the best value.

The Committee's ambit included investigating any strategic option to enhance share value, including staying the course with the business plan. A37, ¶7. Management's business plan was tangibly increasing cashflow for debt service and dividends, but the Proxy never mentioned the Company's cashflow and margins qua performance against projections. Instead, it proffered pretextual rationale in favor of a third-party, go private transaction:

> the substantial and increasing cost of remaining a public company … as well as significant time/attention from…management and impact of such costs on potential future trading price of Shares. A203.

Operating margins were improving, however, and projected to take off now that food inflation had inflected. A54, ¶80. Management was achieving exactly what it set out to do without any evidence of compliance-related impediments.

> The Board and the Committee believed that the Offer Price in cash was more favorable to S&F's stockholders than the likely value that would result from other potential transactions or from remaining a standalone company…based on…information concerning S&F's business, operations and management and its historical, current and projected financial performance, results of operations and financial condition, ***including the fact that S&F had not achieved its performance goals in the immediately preceding few years***. A203 (emphasis added).

Paradoxically, management publicly announced that the Company was outperforming its goals. A67, ¶127.

A sale process in which the bidders were *not* bidding on projections that were realigned with actual performance cannot be presumed to have been reasonably staged to exact the best price. *See, e.g.*, *Chester Cty. Emples. Ret. Fund v. KCG Hldgs., Inc.*, 2019 Del. Ch. LEXIS 233, at *32-35 (Del. Ch. June 21, 2019) ("earlier, more optimistic projections" were material and, thus, defendants were not entitled to *Corwin* cleaning at the pleadings stage). Moreover, a process that foreclosed a better offer for the sake of a majority's expedience indicates an improper objective, not a reasonable effort to secure the best price.

Never mind that this Board charged the Committee with evaluating "a broad range of potential strategic alternatives that might be available to the Company…." A37, ¶7. That resolution reframes the question: If the Company were exceeding the projections on which prospective buyers were bidding, why sell at all?

The conclusion that a $6.50 offer price was more favorable to stockholders than any alternative including "remaining a standalone company" wasn't based on any analysis from the Professionals. They expressly disclaimed any such analysis in their fairness opinions. That finding runs counter to management's public assessments and the $7.00 proposal from Parties J and D. A63, ¶115. It ignores free cash flow projections and the availability of such to issue dividends and pay down debt, increasing stockholder value. Management discussed those material facts, while the Proxy remained silent. A65, ¶121.

The notion that share value was unlikely to improve in the foreseeable future is at odds with Hirz and Phegley's assessment of food inflation and the effect of its long-awaited inflection on value. A54, ¶81, A63, ¶115. Because enterprise value is discounted by the amount of cash on hand, rising enterprise value and free cash flow would have had an upward effect on share value. And, in the face of rising food inflation (and corresponding improvements to margins and cash flow), enterprise value would only decrease if free cash flow were hoarded as opposed to paying down debt or issuing dividends—obvious methods of increasing share value.

Instead, the Board posited "that prolonging the sale process could have resulted in the loss of an opportunity to enter into the Merger Agreement…if [Apollo] wasn't granted exclusivity, and [most curious of all] would further distract senior management from implementing [Smart & Final's] business plan, [conceding that the current business plan was succeeding]." A63, ¶115. All pretext to exit as Ares had told the Board and Hirz had conveyed to Apollo in February of 2018.

Despite a majority of disinterested shareholders having tendered, Defendants cannot avail themselves of a *Corwin* defense because the shareholders were not fully informed. *See In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727, 738 (Del. Ch. 2016). To properly invoke *Corwin* cleansing at the pleading stage, a defendant must demonstrate that stockholders possessed all material information before casting the votes that provide the basis for cleansing. *See Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). A single well-pled disclosure claim defeats *Corwin* cleansing at the pleadings stage. *See In re Mindbody, Inc.*, 2023 Del. Ch. LEXIS 65 at *32 (citing *In re Solera Holdings, Inc. S'holder Litig.*, 2017

Del. Ch. LEXIS 1, at *7-8 (Del. Ch. Jan. 5, 2017)). "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding [whether to approve the challenged transaction.]" *In re Volcano Corp. S'holder Litig.*, 143 A.3d at 748 (quoting *Rosenblatt v. Getty Oil Co*., 493 A.2d 929, 944 (Del. 1985)). The test is objective, not subjective, and Defendants cannot meet it.

The Proxy omitted management's observations of Smart & Final's favorable performance against projections and, ultimately, the Five-year Plan as well as mounting food inflation and its upward effect on profits and cash flow. *See, e.g*., A51-52, ¶71. Again, contrary to the standard of review at the pleading stage, the court below ignored the well-pled allegation that food inflation had turned the corner, and revenues along with it, as early as Q4 of 2018, opting instead to conclude that food inflation was merely a prediction. *See* Argument § I(C) *supra*. The scope of Jeffries's (and Centerviews's) fairness opinion avoided analysis of alternative options that would have necessitated a discussion of management's take on these issues and a possible two-part sale.

The Proxy repeatedly reminded shareholders that Ares wasn't required to sell its interest. "Corporate fiduciaries can breach their duty of disclosure by making a materially false statement, by omitting a material fact, ***or by making a partial disclosure that is materially misleading***." *In re Pattern Energy Group, Inc.*

Stockholder Litigation, 2021 Del. Ch. LEXIS 90, at *181 (Del. Ch. May 6, 2021) (citations omitted) (emphasis added). Even a partial disclosure that is materially misleading establishes a disclosure claim. *Id*.

The Proxy implies that Ares's involvement in the process was unadulterated by any divergent interest vis-à-vis the minority. Omitting Ares's motivation to trade value for liquidity (e.g., the Funds were harvesting and not paying management fees) is material because it would have been "viewed by a reasonable investor as significantly altering the 'total mix' of information available." *Rosenblatt*, 493 A.2d at 944 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 46 U.S. 438, 449 (1976)). A reasonable investor may have withheld her tender, appreciating that the controller's support (as communicated by the Proxy) rested on portfolio-based grounds far different from her own company-specific, value-driven objective. Indeed, an investor who is aware that the private equity controller has announced an interest in cashing out, is searching for an exit for its portfolio investors, and is no longer paid for managing the portfolio would assume that staying the course to maximize value is not the controller's primary motivation. That investor is *less* likely to tender. Kaplan and Axelrod's knowledge that the Funds were harvesting and management fees trending to zero would be imputed to the Board. A40, ¶¶ 20-21; A624, A648. Ares's SEC filings were clear: the Funds were harvesting. Fund III was about to close. A67-69, ¶¶132-139. If Ares's "need" to sell is material, then Ares's active harvesting is equally important, and the Board demonstrably knew this. Reiterating that Ares doesn't *need* to sell and nothing more is misleading, not, as the trial court observed, "innocuous." Op., 19. The Complaint alleges sufficient particularized facts to conclude that the fiduciaries misled the shareholders.

Plaintiff "bears the initial burden of identifying alleged disclosure problems, but the defendants bear the burden of proving at trial that the stockholder vote was fully informed." *In re Mindbody, Inc.*, 2023 Del. Ch. LEXIS 65 at *80 (citations omitted). This burden may require a subjective showing, but at the pleadings stage the court must accept as true that Ares was liquidating the Funds and desired to sell its positions in Smart & Final to achieve that objective, but told the Board—which parroted the half-truth to its shareholders—Ares didn't *need* to sell.

The same is true of the Proxy's avowal that management didn't negotiate its continued employment directly with Apollo when, at the Committee's direction, Hirz expressed his concern to AMIX representatives regarding employee retention if outstanding employee equity awards were not accelerated and paid out to employees as part of the proposed transaction. And so, they were.

But the Proxy indicates that no terms of any post-closing employment or post-closing equity participation in the surviving company were discussed by Hirz, or other management, with Apollo at any time prior to signing the Merger

Agreement. The proposition that Hirz discussed continued management employment post-closing with Apollo but did *not* discuss post-closing employment terms is inferentially dubious and misleading.

Obtaining favorable pre-closing remuneration to ensure continued employment signals post-closing retention. Rather than admit that, the Proxy muddles the information by affirmatively denying any post-closing employment terms were discussed. Nonetheless, employment itself was negotiated and achieved pre-closing. *See In re Topps Co. S'holders Litig.*, 926 A.2d 58, 74 (Del. Ch. 2007). Consequently, Defendants should be denied business judgment deference.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the ruling below be reversed.

Dated: April 15, 2025

GORDON, FOURNARIS & MAMMARELLA, P.A.

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Case No. 2022-0336-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GLENN J. KREVLIN, Plaintiff, v. ARES CORPORATE OPPORTUNITIES FUND III, L.P., ARES CORPORATE OPPORTUNITIES FUND IV, L.P., DAVID G. HIRZ, LELAND P. SMITH, RICHARD N. PHEGLEY, CITIGROUP GLOBAL MARKETS, INC., and JEFFERIES, LLC, Defendants.	)	C.A. No. 2022-0336-KSJM

MEMORANDUM OPINION

Date Submitted: October 15, 2024
Date Decided: February 3, 2025

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In April 2019, Smart & Final Stores, Inc. (the "Company") announced that its Board of Directors (the "Board") had approved a merger agreement under which affiliates of Apollo Management IX, L.P. ("Apollo") would acquire the Company's outstanding shares (the "Merger"). The plaintiff owned Company stock. He brought this lawsuit challenging the Merger. He alleges that the Merger was a conflicted-controller transaction because the Company's controller, a private equity firm, was in "harvest mode" and harbored undisclosed, liquidity-driven conflicts that tainted the sale process. He also contends that Company management, who stood to gain change-of-control payments, pushed the Company toward the Merger. According to the plaintiff, these facts and other material information were not disclosed to stockholders. The plaintiff sued the Board and the controller for breach of fiduciary duty. He also sued two of the Company's financial advisors for aiding and abetting. The defendants moved to dismiss the complaint under Rule 12(b)(6). They argue that the Merger was not a conflicted-controller transaction and that the uncoerced, fully informed vote of the stockholders warrants business judgment review under *Corwin v. KKR Financial Holdings LLC*.[1] They further argue that the plaintiff has not stated a claim under the business judgment standard. This decision grants the motions to dismiss.

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

I. FACTUAL BACKGROUND

These facts are drawn from the Second Amended Verified Stockholder Class Action Complaint (the "Second Amended Complaint") and the documents it incorporates by reference.[2]

A. The Company

The Company is a Delaware corporation headquartered in California. The Company has two lines of business: a traditional grocery store chain ("S&F") and a business-to-business food service provider ("SFW"). Apollo sold the Company to Ares in 2012, and the Company went public in 2014 through an IPO.

After the IPO, the Company pursued an aggressive expansion, opening 61 new S&F stores and 15 new SFW stores. The expansion had a negative short-term effect on the Company's profit and loss statements and balance sheets. In 2017, management began targeting e-commerce infrastructure as a business strategy. This also adversely affected the Company's profit and loss statements and burdened its balance sheet with several large one-time technology initiatives aimed at retooling key IT systems. The negative short-term effect on cash flow adversely affected the trading price of Company stock. Management, however, repeatedly and publicly expressed its confidence that these investments would ultimately benefit stockholders.

[2] C.A. 2022-0336-KSJM, Docket ("Dkt.") 42 ("Sec. Am. Compl.").

The plaintiff and his business partner routinely met with the Company's management team to discuss the Company's performance, projections, and strategy.[3] Around December 2017, the plaintiff had dinner with Company CEO David Hirz and Company CFO Richard N. Phegley. They discussed the infeasibility of separating the Company's two lines of business, the need to find a capital partner, and Hirz's belief that competition from Amazon, which had acquired Whole Foods, and Aldi would not affect the Company's business.[4]

B. Ares

Ares Corporate Opportunities Fund III, L.P. ("Fund III") and Ares Corporate Opportunities Fund IV, L.P. ("Fund IV" and, together with Fund III, "Ares") collectively controlled about 57% of the Company's voting power. They also appointed two of the Board's nine members. Dennis Gies and David Kaplan served as Ares's Board members.

Ares launched Fund III in 2008 and Fund IV in 2012. By 2018, Ares had begun liquidating its holdings and significantly reducing its management fees in these two funds. In its 2018 10-K filing, Ares stated that Funds III and IV were in "harvest mode" and were "generally not seeking to deploy capital into new investment opportunities."[5] In its 2019 10-K filing, Ares noted that it had been realizing gains through monetizing investments held in Fund III and reiterated that Fund III was

[3] *Id.* ¶ 37.

[4] *Id.* ¶¶ 38–40.

[5] *Id.* ¶ 133.

in "harvest mode."[6] In its 2020 10-K filing, Ares noted that it had stopped paying management fees on Fund III.

C. The Company Looks For A Strategic Partner.

On December 17, 2017, Apollo requested a meeting with Hirz to discuss investing one or more of its funds in the Company. Apollo stated its belief that the market was undervaluing the Company. On January 8, 2018, Apollo proposed a $400 million investment to repay debt and fund a $200 million tender offer at $9 a share. The Board rejected the proposal because it felt that the price was too low.

During a June 29, 2018 Board meeting, the Board formed a committee (the "Committee") to evaluate potential strategic alternatives. The minutes state that the Board was concerned by the "meaningful challenges and headwinds" the Company faced, including "difficulties enhancing stockholder value."[7] During the meeting, Ares's Gies told the Board that Ares "did not need to liquidate their positions in the Company and did not currently intend to participate in any strategic transaction involving the Company in any capacity other than on the pro rata basis together with stockholders of the Company."[8]

The Committee comprised Kenneth Tuchman, Paul Hopkins, and Joseph Tesoriero. The plaintiff does not challenge the Committee members' disinterest or independence with respect to the Merger. The Committee retained Proskauer Rose,

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[6] *Id.* ¶ 136.

[7] *Id.* ¶ 7.

[8] *Id.* ¶ 54.

L.L.P. and Gibson, Dunn & Crutcher LLP as legal advisors. These firms also advised Ares and the Board. These relationships were disclosed to the Board.

In July 2018, Gies and Hirz met with the Committee and its legal advisors to select financial advisers. The Committee ultimately retained Jefferies, LLC and Citigroup Global Market, Inc. Both financial advisors had previously worked with the Company and had material relationships with Ares affiliates. Due to these relationships, the Committee engaged a third financial advisor, Centerview Partners, to render a fairness opinion. All of the financial advisers were renumerated on a contingent basis.

With help from the advisors, the Committee developed a plan for identifying, soliciting, and evaluating third-party interest, which included categorizing targets into two tiers that distinguished between financial and strategic partners. On October 28, 2018, Jefferies and Citigroup began contacting potential partners: three Tier 1 strategic partners, ten Tier 2 strategic partners, and 15 Tier 1 financial sponsors, including Apollo. By the time the Board voted to consummate the Merger, the Committee had contacted 74 parties. Of the contacted parties, 38 executed confidentiality agreements, eight attended in-person fireside chats, seven attended a management presentation and submitted preliminary proposals, and four submitted final proposals.

D. The Five-Year Plan

During the strategic-partner search, the Committee instructed management to prepare financial projections for the five-year period from fiscal years 2019 to 2023 (the "Five-Year Plan"). Hirz, Phegley, and the Company's General Counsel Leland Smith prepared the Five-Year Plan. The Committee provided guidance during the drafting process. On September 12, 2018, the Committee, management, and Gibson Dunn attorneys met to discuss the underlying inputs and assumptions of the Five-Year Plan. The Committee provided comments, which management incorporated.

On September 17, Hirz, Phegley, and Smith presented a revised Five-Year Plan to Board members, Proskauer attorneys, and Ares representatives. The projections in the revised plan showed EBITDA growth from $188 to $273 million through 2023. At that meeting, the Board authorized the distribution of summaries to "interested parties in the process at the appropriate time."[9]

E. The Merger Transaction

During a November 14, 2018 third quarter earnings call, management was positive about the Company's economic performance. Hirz said that management was "bullish" on the capital investments into their grocery stores and thought growth in that line of business could "outpace [the Company's] growth certainly this year and in 2019."[10] Phegley noted that the Company would slow its capital investments, freeing up cash to reduce the Company's financial leverage, and predicted that inflation would normalize. That December, management told investors that recent food deflation was a "historical anomaly."[11]

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[9] *Id.* ¶ 66.

[10] *Id.* ¶ 72.

[11] *Id.* ¶ 75.

In January 2019, the Committee began exploring the possibility of expanding the process to invite parties to buy one of the Company's two divisions on a standalone basis. As of March 1, 2019, the Committee directed Jefferies and Citigroup to send final bid process letters to nine remaining parties of interest, including Apollo. The process letters instructed the interested parties to improve their proposed purchase prices and submit a final proposal by March 15, 2019. Two days before the deadline, the Company announced positive fourth quarter results.

On March 15, 2019, Apollo submitted a non-binding proposal to acquire all of the Company's outstanding equity at a purchase price of $6.50 per share in cash. The price was conditioned on, among other things, the Company executing a 15-day exclusivity agreement by the evening of March 17, 2019. Also on March 15, 2019, the Company received proposals from: (i) Party J to acquire only S&F for $400 million; (ii) Party B to acquire only SFW for $600 million; and (iii) Party D to acquire only SFW for $700 million.

The Committee met on March 16 and 17, 2019, to discuss the proposals. During the meetings, Committee members expressed concern that Party D's proposed acquisition of SFW "might entail complexities relating to regulatory filings and clearances required for such a transaction."[12] The Committee decided that it would not recommend entering into an exclusivity agreement with Apollo until the Board had a chance to review and discuss all the proposals.

[12] *Id.* ¶ 88.

The Board met on March 18, 2019, to receive an update on the strategic review process and further discuss the four proposals received by the Committee. Based on this discussion, the Board directed Jefferies and Citigroup to seek increased price indications from the parties that had submitted proposals. Later that day, Jefferies and Citigroup engaged in further negotiations with Apollo. Apollo increased its proposed purchase price from $6.50 to $6.75 per share, subject to the Company agreeing to exclusivity.

The Board met the next day. Based on the Committee's recommendation, the Board determined to enter into a 15-day exclusivity period with Apollo, through April 3, 2019.

Apollo engaged in confirmatory due diligence and, on March 25, lowered its offer to $6.30 per share. Apollo also conditioned the lowered offer on exclusivity, which the Committee declined to recommend in order to allow other interested parties to resume diligence.

The Committee evaluated various proposals over the ensuing weeks. The Committee was concerned about pursuing two complementary transactions that split the Company's businesses, as opposed to a single transaction that sold both business lines. For this reason, the Committee requested that Party J submit a joint proposal with Party D, which they submitted on April 11. They offered $6.50 per share.

In response to the combined April 11 offer, the Committee asked Parties D and J and Apollo to improve their respective bids. Apollo rejected this request and stated that it would withdraw its offer unless the Company agreed to enter into another exclusivity agreement.

The Committee met again the next day, on April 12, 2019. Before the April 12 meeting, Parties D and J had reaffirmed their intent to submit a revised joint proposal with a purchase price of $7.00 per share. During the meeting, however, the Board's financial advisors stated that Parties D and J indicated their equity financing remained uncertain. Jefferies further advised that Parties D and J would likely require four weeks of diligence before executing a definitive agreement. Based on these considerations and "the meaningful risk in refusing [Apollo's] demand for short-term exclusivity," the Committee determined to recommend that the Board enter into a new, short-term exclusivity agreement with Apollo that would expire on April 15, 2019.[13] The Committee further recommended conditioning exclusivity on Apollo's agreement to try to finalize a deal with a price of $6.50 per share over the next several days.

The Board adopted the Committee's recommendation on April 15, deciding to provide Apollo with an additional twenty-four hours of exclusivity. Later that evening, Parties D and J formally submitted their $7.00 per share bid.

Also on April 15, at the Committee's direction, Hirz expressed to Apollo that the Company would have difficulty retaining employees if the outstanding employee equity awards were not accelerated and paid as part of the Merger. In response, Apollo agreed to allow outstanding employee equity awards to convert into payments,

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[13] *Id.* ¶¶ 99–102.

accelerate the vesting and cashing-out of director and executive-owned options, convert restricted stock into the right to receive cash payments, accelerate cash awards to directors and officers, secure severance payments and benefits, and pay transaction bonuses to C-suite officers.

Of the Company's executives, Hirz and Phegley stood to gain the most from these terms, with shares worth $8,646,814 and $5,045,086 respectively.[14]

On April 16, 2019, the Board held a telephonic meeting to consider the proposals from Parties D and J ($7.00 per share) and Apollo ($6.50 per share). Centerview advised the Committee that the $6.50 purchase price was fair. The Committee determined that the proposed transaction was in the best interests of the Company and its stockholders.

Subsequently, the entire Board unanimously determined that it was in the best interest of the Company to enter into the Merger with Apollo and resolved to recommend that the stockholders accept Apollo's offer of $6.50 per share.

F. The Proxy Statement

The Company filed its Schedule 14D-9 on May 14, 2019 (the "Proxy Statement"), recommending the transaction.[15]

The Proxy Statement disclosed the financial advisors' conflicts.[16] It further disclosed the change-in-control payments that management would receive.[17]

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[14] *Id.* ¶¶ 106–107, 165.

[15] Dkt. 44., Ex. A, May 14, 2019 Schedule 14D-9 (the "Proxy Statement") at 31.

[16] *Id.* at 26.

[17] *Id.* at 10.

The Proxy Statement also provided a thorough description of the sale process, including the higher value of the joint proposal from Parties D and J, and the Board's rationale for approving the Apollo offer. Among other things, the Proxy Statement disclosed:

- The Company had experienced increased operational costs associated with being a public company;
- The $6.50 price was more favorable to stockholders than any other alternative;
- The price represented a 25% premium over the average closing price, which the Board felt was unlikely to improve in the near future;
- Prolonging the deal would further distract senior management from implementing the Company's business plan; and
- The $7 per share joint proposal had material risks and uncertainties, would require significant legal and business diligence, and Party J still needed to secure additional equity financing to complete the proposed deal.[18]

On June 20, 2019, holders of 87% of the Company's outstanding stock tendered their shares, including 78% of the outstanding shares not held by Ares. The Merger closed that day. Nearly two years later, on May 17, 2021, Apollo sold the Company.

G. This Litigation

Plaintiff Glenn J. Krevlin ("Plaintiff") owned Company stock at the time of the Merger. He filed this action on April 14, 2022, nearly three years after the Company announced the transaction. He named Ares, Hirz, Smith, Phegley, Citigroup, and Jefferies as defendants (collectively, "Defendants"). He amended his complaint on July 15, 2022, and again on March 31, 2023.

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[18] Sec. Am. Compl. ¶¶ 115–117.

The Second Amended Complaint contains four Counts. In Count I, Plaintiff claims that Ares breached its fiduciary duties as a controller. In Count II, Plaintiff claims that Hirz, Phegley, and Smith (the "Individual Defendants") breached their fiduciary duties as directors and officers. In Count III, Plaintiff claims that Citigroup and Jefferies (the "Financial Advisors") aided and abetted the other Defendants' breaches of fiduciary duties. In Count IV, Plaintiff claims that the Individual Defendants committed waste, but Plaintiff later dropped the waste claim.[19]

Defendants moved to dismiss the Second Amended Complaint on April 28, 2023.[20] The parties completed briefing on July 23, 2023,[21] and the court heard oral argument on October 15, 2024.[22]

II. LEGAL ANALYSIS

Defendants have moved to dismiss the Second Amended Complaint under Court of Chancery Rule 12(b)(6). "[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[23] When considering a motion to dismiss under Rule 12(b)(6), the court must "accept all well-pleaded factual allegations in the [c]omplaint as true . . . , draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any

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[19] Plaintiff abandoned the waste claim by failing to brief it. *See Emerald P'rs v. Berlin,* 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

[20] Dkts. 44–48, 51.

[21] Dkts. 60–65.

[22] Dkt. 76.

[23] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

reasonably conceivable set of circumstances susceptible of proof."[24] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[25]

Defendants submitted five sets of briefs, each containing arguments unique to the claims against them. They join in a common argument that resolves all issues. Namely, Defendants argue that the Merger is not subject to the entire fairness standard and a majority of fully informed, uncoerced and disinterested stockholders tendered their shares. Under *Corwin*, "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies."[26] Defendants further contend that Plaintiff has not stated a claim under the business judgment rule.

Plaintiff argues that the Merger is subject to the entire fairness standard because Ares's need for liquidity caused it to favor a deal, even at a suboptimal price, over no deal at all. Alternatively, Plaintiff contends that *Corwin* does not restore the business judgment standard because the stockholder vote was not fully informed.

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[24] *Id.* at 536 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

[25] *Price v. E.I. du Pont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

[26] *Firefighters' Pension Sys. Of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 354 (Del. Ch. 2021) (quoting *Corwin*, 125 A.3d at 309); *see also In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 738 (Del. Ch. 2016) (noting that in mergers consummated under Section 251(h), stockholder approval "by accepting a tender offer has the same cleansing effect as a vote in favor of that merger").

A. Entire Fairness Does Not Apply.

"To determine whether directors have complied with the fiduciary standard of conduct, Delaware courts evaluate their actions through the lens of a standard of review."[27] The most deferential standard is the business judgment rule. The most onerous standard is the entire fairness test. Enhanced scrutiny falls in between and supplies the presumptive standard in a third-party, cash-out merger.[28]

Plaintiff seeks to ratchet-up to entire fairness by arguing that the Merger was a conflicted-controller transaction. There is no dispute that Ares controlled the Company. But that alone will not trigger entire fairness review of a third-party deal.[29] Rather, the controller must have divergent interests with respect to the transaction that gives rise to a legally cognizable conflict. Plaintiff argues that Ares's need for liquidity rendered Ares conflicted with respect to the Merger.

"Delaware courts have been reluctant to find that a liquidity-based conflict rises to the level of a disabling conflict of interest when a large blockholder receives pro rata consideration."[30] In those circumstances, this court views the controller's

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[27] *Frederick Hsu Living Tr. v. ODN Hldg. Corp.,* 2017 WL 1437308, at *25 (Del. Ch. Apr. 14, 2017).

[28] *See In re Mindbody, Inc., S'holder Litig.*, 2023 WL 2518149, at *32 (Del. Ch. Mar. 15, 2023), *aff'd in part and rev'd in part,* ---A.3d---, 2024 WL 4926910 (Del. 2024).

[29] *In re Crimson Exploration Inc. S'holder Litig.*, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014) (noting "a large blockholder will not be considered a controlling stockholder unless they actually control the board's decisions about the challenged transaction").

[30] *Presidio*, 251 A.3d at 256; *see also Larkin v. Shah*, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016) (rejecting a liquidity driven conflict theory); *In re Morton's Rest. Gp., Inc.,*

interests as "presumptively aligned with those of the unaffiliated holders of the Company's common stock."[31] That is because Delaware law ascribes to the belief that "when a fiduciary owns a material amount of common stock, that interest gives the fiduciary a 'motivation to seek the highest price' and a 'personal incentive . . . to think about the trade off between selling now and the risks of not doing so.'"[32] Liquidity-driven conflicts can be difficult to plead,[33] precisely because they ask the Court to infer that "rational economic actors have chosen to short-change themselves."[34]

Delaware courts are particularly chary to infer liquidity-based conflicts arising from the lifecycle of a private equity fund. The leading case on this issue is *Firefighters' Pension Systems of the City of Kansas City, Missouri Trust v. Presidio, Inc.* There, Vice Chancellor Laster surveyed the decisions of this court finding that complaints adequately alleged that a need for liquidity gave rise to a disabling conflict. None of the successful allegations rested on the lifecycle of a private equity fund. As the Vice Chancellor observed, "the desire to wrap up an existing fund . . .

S'holders Litig., 74 A.3d 656 (Del. Ch. 2013) (same); *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012) (same).

[31] *Presidio*, 251 A.3d at 255; *see also Synthes,* 50 A.3d at 1035 ("[W]hen a stockholder who is also a fiduciary receives the same consideration for her shares as the rest of the shareholders, their interests are aligned.").

[32] *Presidio*, 251 A.3d at 255 (*quoting In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 600 (Del. Ch. 2010)).

[33] *In re Mindbody, Inc.*, 2020 WL 5870084, at *33 (Del. Ch. Oct. 2, 2020).

[34] *Larkin*, 2016 WL 4485447, at *16 (*citing In re Morton's,* 74 A.3d at 666–67); *see also Presidio*, 251 A.3d at 260 (noting plaintiffs need to plead that the controller's "desire for liquidity was so strong that [the controller] would choose to leave money on the table").

can affect a fund manager's approach to achieving liquidity for an investment."[35] That cyclical process, however, "is not so formulaic and structured that the cycle itself would support an inference of a liquidity-based conflict."[36] Without more, therefore, the lifecycle of a fund "does not necessarily create a problematic interest."[37]

Here, Plaintiff rests his entire liquidity-driven conflict theory on the fact that Fund III and Fund IV were in "harvest mode." This, alone, is insufficient to render Ares conflicted.

In an effort to demonstrate something more than the mere lifecycle of a fund to support his conflict theory, Plaintiff makes a fleeting suggestion that the Funds' harvest-mode posture was at odds with circumstances that favored the Company continuing on as a standalone entity. These circumstances included: the Company's outperformance of management's projections; a likely normalization in food inflation; success on its long-term investment strategy; and buyers' willingness to offer to purchase segments of the Company at prices that were higher, in the aggregate, than the deal price.[38] But these factors point to valid business determinations by the Board, determinations to which Ares is not alleged to have contributed.[39] These allegations do not give rise to an inference that Ares faced unique external pressures

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[35] *Presidio*, 251 A.3d at 258.

[36] *Id.* (citing *Frederick Hsu Living Tr. v. Oak Hill Cap. P'rs III, L.P.*, 2020 WL 2111476, at *8–17 (Del. Ch. May 4. 2020) and *In re Trados Inc. S'holder Litig.*, 2009 WL 2225958, at *2 & n.2, *7 (Del. Ch. July 24, 2009)).

[37] *Presidio,* 251 A.3d at *258 (citing *Larkin*, 2016 WL 4485447, at *15–16).

[38] Dkt. 56 ("Pl.'s Answering Br.") at 43.

[39] *See, e.g.*, Sec. Am. Compl. ¶ 173.

that would put its interest in gaining liquidity at odds with the Company's best interests.

Because the Merger was not a conflicted-controller transaction, enhanced scrutiny presumptively applies.

B. The Business Judgment Standard Applies Under *Corwin*.

Defendants seek to ratchet-down the standard of review to business judgment. Invoking *Corwin*, Defendants argue that the Merger was "approved by a fully informed, uncoerced majority of the disinterested stockholders."[40] Plaintiff responds by challenging the sufficiency of the disclosures in the Proxy Statement.

A plaintiff challenging the sufficiency of disclosures for *Corwin* purposes bears the burden of pleading a disclosure deficiency.[41] When assessing disclosure deficiencies at the pleading stage, the court must determine "whether Plaintiff's complaint, when fairly read, supports a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading."[42] The inquiry is fact-intensive, and the court should deny a motion to dismiss when developing the factual record may be necessary to make a materiality

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[40] 125 A.3d at 306.

[41] *Morrison v. Berry*, 191 A.3d 268, 282 & n.60 (Del. 2018), *as revised* (July 27, 2018).

[42] *Id.*; *see also Malpiede v. Townson*, 780 A.2d 1074, 1086–87 (Del. 2001).

determination as a matter of law.[43] One well-pled disclosure deficiency is sufficient to defeat a *Corwin* defense.[44]

"An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[45] Stated differently, "an omitted fact is material if there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[46]

"Just as disclosures cannot omit material information, disclosures cannot be materially misleading."[47] "[O]nce defendants travel[] down the road of partial disclosure of the history leading up to the Merger . . . they ha[ve] an obligation to provide the stockholders with an accurate, full, and fair characterization of those

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[43] *See, e.g.*, *McMullin v. Beran*, 765 A.2d 910, 926 (Del. 2000) (reversing order granting defendants' motion to dismiss where "answer[ing] the complaint, discovery and a trial may all be necessary to develop a complete factual record before deciding whether, as a matter of law, the . . . [d]irectors breached their [disclosure] duty"); *Branson v. Exide Elecs. Corp.*, 1994 WL 164084, at *3 (Del. Apr. 25, 1994) (TABLE) ("Whether or not a statement or omission in an offering prospectus was material is a question of fact that generally cannot be resolved on a motion to dismiss, but rather it must be determined after the development of an evidentiary record."); *Wells Fargo & Co. v. First Interstate Bancorp.*, 1996 WL 32169, at *10 (Del. Ch. Jan. 18, 1996) (declining to rule that an omission was immaterial as a matter of law and noting that "[a] question of materiality is difficult to treat as a question of law on a motion to dismiss").

[44] *Kihm v. Mott,* 2021 WL 3883875, at *12 (Del. Ch. Aug. 32, 2021), *aff'd* 276 A.3d 462 (Del. 2022) (citing *In re Mindbody, Inc.*, 2020 WL 5870085, at *26).

[45] *Morrison*, 191 A.3d at 282 (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

[46] *Id.* at 283 (quoting *Rosenblatt*, 493 A.2d at 944).

[47] *Id.*

historic events."[48] A "[p]artial disclosure, in which some material facts are not disclosed or are presented in an ambiguous, incomplete, or misleading manner, is not sufficient to meet a fiduciary's disclosure obligations."[49]

Plaintiff argues that the Proxy Statement was materially deficient in three ways.

First, Plaintiff repackages his liquidity-driven conflict theory, arguing that the Proxy Statement was misleading because it failed to adequately disclose that Ares "steered this process" while its funds were "in a harvesting posture."[50] This decision has already found that Plaintiff failed to adequately allege a misalignment of interests arising from the lifecycle of the Ares funds. The allegations fare no better in the disclosure context. The posture of Ares's funds was both innocuous and

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[48] *Id.* (citing *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1280 (Del. 1994)); *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018) ("Under Delaware law, when a board chooses to disclose a course of events or to discuss a specific subject, it has long been understood that it cannot do so in a materially misleading way, by disclosing only part of the story, and leaving the reader with a distorted impression."); *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 448 (Del. Ch. 2002) ("When a document ventures into certain subjects, it must do so in a manner that is materially complete and unbiased by the omission of material facts."); 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 17.2[B][3][a], at 17-15 (4th ed. 2021) ("Although the board generally is not required to disclose all of the 'bends and turns in the road' in summarizing a proposed transaction, the Delaware Supreme Court has suggested that, once a board travels down the path of describing its process, it has a duty to provide a full and fair characterization of events."); 2 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 212.04[C], at 7-77 (7th ed. 2024) ("[I]f corporate fiduciaries volunteer information, even where there is no duty to disclose, they must do so truthfully and candidly.").

[49] *City of Sarasota Firefighters' Pension Fund v. Inovalon Hldgs., Inc.*, 319 A.3d 271, 304 (Del. 2024) (citing *Appel,* 180 A.3d at 1064).

[50] Pl.'s Answering Br. at 46.

immaterial. This additional information would not have substantially altered the total mix of information available to stockholders. Plaintiff's first disclosure theory does not work.

Second, Plaintiff takes issue with the Proxy Statement's "avowal that management did not negotiate its continued employment directly with Apollo."[51] Plaintiff contends that Hirz "used the Committee as management's liaison with Apollo to ensure management continuity—essential to the business plan's ongoing success—by bargaining for accelerated employee equity awards."[52] Plaintiff did not plead this deficiency, which is a sufficient basis to reject it.

Also, it is unclear what more Plaintiff thinks should have been disclosed. The Proxy Statement contains disclosures concerning accelerated management awards in connection with the Merger.[53] The Proxy Statement discloses that the Committee asked Apollo to agree to accelerate awards for the purpose of employee retention.[54] The Proxy Statement further discloses that "Apollo Management IX agreed to permit the outstanding employee equity awards to be cancelled and converted into the right

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[51] *Id.* at 47.

[52] *Id.*

[53] *See, e.g.*, Proxy Statement at 9 (disclosing that the "interests of executive officers and directors of S&F include . . . the accelerated vesting and cash-out of Company Options" and "the partial accelerated payment of Company Cash Awards"); *id.* at 11–12 (detailed disclosures, including names and dollar amounts, of accelerated awards).

[54] *Id.* at 38 (disclosing that, on April 15, 2019, "at the direction of the Committee, Mr. Hirz expressed his concern to representatives of Apollo Management IX regarding employee retention if outstanding employee equity awards were not accelerated and paid out to employees as part of the proposed transaction").

to receive payment on the terms set forth in Item 3 under the heading 'Treatment of Equity and Cash Awards in the Transactions.'"[55] Plaintiff does not contend that any of those disclosures were inaccurate or misleading.

What Plaintiff really wants, it seems, is for the court to infer that Hirz or management generally somehow controlled the Committee's discussions with Apollo on this point, but Plaintiff provides no basis for that inference.[56] Plaintiff's second disclosure theory fails.

Third, Plaintiff attacks a collection of disclosures concerning S&F's projections as a standalone entity and the business reasons for the Merger.[57] Plaintiff claims that the Proxy Statement was misleading when it "characterized food inflation and e-commerce as 'headwinds'" although management allegedly admitted "that inflation was anomalous and at an inflection point[.]"[58] In Plaintiff's view, "e-commerce would inure to [the Company's] benefit as a result of the business plan."[59] Plaintiff also takes issue with the Board's assessment that the following factors weigh in favor of

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[55] *Id.* at 38.

[56] *See Teamsters Local 677 Health Servs. & Ins. Plan v. Martell*, 2023 WL 1370852, at *19 (Del. Ch. Jan. 31, 2023) (requiring "something more than speculation—communications, testimony—that employment discussions occurred between management and the acquiror during the sale process" to support a disclosure claim); *English v. Narang*, 2019 WL 1300855, at *12 (Del. Ch. Mar. 20, 2019), *aff'd*, 222 A.3d 581 (Del. 2019) (requiring that plaintiff "allege facts from which it reasonably can be inferred that such discussions occurred during the sale process" to support a disclosure deficiency based on process flaws).

[57] Pl.'s Answering Br. at 48–49.

[58] Sec. Am. Compl. ¶ 170.

[59] *Id.*

a Merger: "uncertainty around retailer valuations"; "the potential for increased competition from companies with greater scale and financial resources"; the Company's recent performance and business plan; the Merger consideration's certainty of value; and the cost of remaining a publicly traded company.[60] Plaintiff further disputes that the disclosure that "Amazon's entry [into the retail grocery business] was disruptive to e-commerce," and the Board's determination that prolonging the sale process was not in the Company's best interest.[61]

Nothing in this grab-bag of issues constitutes a disclosure deficiency. What Plaintiff presents as disclosure issues are no more than disagreements with the Board's decision. Substantive disagreements with a board's decision-making do not amount to disclosure violations.[62] Generally speaking, management's speculation of events to come concerning inflation and the state of the industry in the future are "not an appropriate subject for a proxy disclosure."[63] Plaintiff's third theory of disclosures, therefore, too misses the mark.

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[60] *Id.* ¶ 173.

[61] *Id.*

[62] *See, e.g.*, *In re JCC Hldg. Co., Inc. S'holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003) (dismissing disclosure claim where "[t]he plaintiffs' only beef" was alleged "mistakes in subjective judgment, even though those judgments were disclosed"); *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. 2009) ("There are limitless opportunities for disagreement on the appropriate valuation methodologies to employ, as well as the appropriate inputs to deploy within those methodologies. Considering this reality, quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.").

[63] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 145 (Del. 1997).

For these reasons, Plaintiff has failed to identify any disclosure deficiency sufficient to render the stockholder vote uninformed. Because this was the only attack on the *Corwin* defense, Defendants are entitled to review under the business judgment standard. Plaintiff fails to state a claim under that standard.

III. CONCLUSION

Because Defendants' *Corwin* argument is successful, the court need not reach Defendants' other arguments for dismissal. Defendants' motions to dismiss are granted.

CERTIFICATE OF SERVICE

I, Neil R. Lapinski, Esq., hereby certify that on Aril 15, 2025, a true and correct copy of the foregoing *Appellant's Opening Brief* was served upon the following counsel of record via File & ServeXpress: mail:

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