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 On Appeal from the Court of Chancery: C.A. No. 2022-0336-KSJM

ANSWERING BRIEF OF APPELLEES
ARES CORPORATE OPPORTUNITIES FUND III, L.P. AND
ARES CORPORATE OPPORTUNITIES FUND IV, L.P.

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Dated: May 15, 2025

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NATURE OF THE PROCEEDINGS

In April 2019, Smart & Final Stores, Inc. ("Smart & Final" or the "Company") announced that it executed an agreement by which affiliates of Apollo Management IX, L.P. ("Apollo"), a third-party buyer, would purchase the Company's outstanding shares in a tender offer at a 25% premium for $6.50 per share (the "Merger"). Op. at 10-11.[1] An undisputedly independent and disinterested strategic review committee (the "Committee") negotiated the terms of the Merger with Apollo, and those terms were approved by the Company's majority-independent board of directors (the "Board"). Holders of more than 90% of the Company's outstanding shares, including Plaintiff, committed to tender. *See id.* at 11; A287. The Company's alleged controlling stockholders, Ares Corporate Opportunity Fund III, L.P. and Ares Corporate Opportunity Fund IV, L.P. (collectively, "Ares"), participated in the Merger pro rata. A135.

The Merger closed nearly six years ago, on June 20, 2019. Op. at 11. Plaintiff did not demand to inspect the Company's books and records, nor did he seek appraisal. Plaintiff did not file this lawsuit until April 14, 2022—nearly three years after the Merger's announcement. *Id.* at 11; A69-70. Plaintiff took another year to pursue amendments to his complaint. Op. at 11. After briefing and argument on

[1] "Op." or "Opinion" refers to the Court of Chancery's Memorandum Opinion dated February 3, 2025.

Defendants' motions to dismiss, the Court of Chancery issued its February 3, 2025 Memorandum Opinion (OB Ex. A)[2] dismissing the operative complaint (the "Complaint"), from which Plaintiff appeals.

Applying well-settled Delaware law, the Court of Chancery found that the Merger was subject to business judgment review under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015) because it was approved by the fully informed, uncoerced majority of the Company's disinterested stockholders. Op. at 17. Plaintiff attempted to avoid application of *Corwin* by arguing that: (1) the Merger was subject to entire fairness review because Ares was a conflicted controller due to a purported need for immediate liquidity (Op. at 14-17); and (2) the May 14, 2024 Schedule 14D-9 issued in connection with the Merger (the "Proxy," A158) omitted and misdescribed various matters (*id.* at 17-23). In the thorough and well-reasoned Opinion, the Court of Chancery evaluated and rejected both arguments. Op. at 14-23.

As explained by Defendants and the trial court in response to the motions to dismiss, Plaintiff's two attempts to evade application of *Corwin* lack merit.

First, the Court of Chancery correctly found that Plaintiff has not adequately alleged a controller conflict. Plaintiff's theory hinges entirely on his allegation that

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[2] OB [•] citations refer to Appellant's Opening Brief filed in support of this appeal (the "Opening Brief").

Ares was in "harvest mode" at the time of the Merger and therefore caused the Board to sell at a depressed price to satisfy Ares's alleged liquidity need. Op. at 16. But Delaware courts have repeatedly held that fund lifecycles and allegations that a fund is in "harvest mode" are insufficient to allege a liquidity-driven conflict. *See Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 257-58 & n.10 (Del. Ch. 2021) (collecting authority). As Delaware courts have long recognized, that is so because large stockholders are incentivized to maximize the value of their holdings and generally do not abandon valuable consideration simply because they are in "harvest mode." *Id.* at 255.

Ares's investment was sold for nearly $300 million in the Merger. It held 44,218,762 shares in the Company as of May 10, 2019. A165. Every dollar of consideration was therefore worth more than $44 million to Ares. Plaintiff has pleaded nothing to suggest that Ares needed liquidity so badly that it would irrationally sacrifice its own consideration. Nor has Plaintiff alleged, as required, that Ares actually used its position of control to manipulate the Committee's process and depress the price. To the contrary, Plaintiff does not dispute that the Committee ran its own process. Significantly, Plaintiff also acknowledges (as he must) that Ares repeatedly told the Board that its 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; A58; A62 (emphasis added). Plaintiff thus fails to allege that Ares was a conflicted controller.

Plaintiff's three disclosure claims fare no better. As the trial court found, Plaintiff's assertion that the Proxy failed to disclose that Ares "steered" the Committee's process toward a depressed liquidity event because Ares was "in a harvesting posture" merely repackages Plaintiff's meritless liquidity-conflict theory and is contradicted by the well-pleaded allegations and the Proxy. Op. at 19-20. Plaintiff's contention that the Proxy falsely stated "that management did not negotiate its continued employment directly with Apollo" is based on pure speculation resulting from a misreading of the Proxy and, in any event, was not pleaded and therefore waived. *Id.* at 20-21. And Plaintiff's miscellaneous quibbles with disclosures concerning the state of the industry and the Company's future prospects amount to nothing more than a disagreement with the Board's business judgment, which cannot support a disclosure claim. *Id.* at 21-22.

The Court of Chancery's Opinion is an uncontroversial application of long-established Delaware law. This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Plaintiff failed to allege that Ares, which participated in the Merger on a pro rata basis, caused the Company to pursue the Merger at a depressed price due to an imminent liquidity need. Plaintiff has failed to allege non-conclusory facts that would warrant departure from Delaware decisions holding that a private equity fund is not conflicted merely because it is in "harvest mode" or nearing the end of its lifecycle. Nor has Plaintiff alleged that Ares actually acted on any supposed liquidity need to undermine the independent Committee's process. To the contrary, it is undisputed that Ares reaffirmed throughout the negotiation process that it did not need to liquidate its position in the Company.

2. Denied. The Court of Chancery did not err in holding that Plaintiff failed to plead a disclosure claim that would render stockholder approval uninformed. Plaintiff's three alleged disclosure deficiencies are all meritless. The Board was not required to disclose an alleged liquidity-based conflict that did not exist. The Proxy included the facts upon which Plaintiff premises his quibbles about management's supposed employment discussions—and this purported disclosure claim was not pleaded and therefore waived. Plaintiff's quibbles with the sale process and disagreement with the Board's business decision to approve the Merger rather than continue as a stand-alone entity similarly fail to state a disclosure claim.

The Court of Chancery therefore correctly held the transaction is subject to the business judgment standard of review and that Plaintiff did not state a claim under that standard.

COUNTERSTATEMENT OF FACTS[3]

A. The Parties

The Company, Smart and Final Stores, Inc., was a Delaware corporation based in Commerce, California. A39. The Company had two primary lines of business: a grocery store chain and a business-to-business food provider. Op. at 2.

The Ares funds that are parties to this dispute are Delaware partnerships that were launched in 2008 and 2012. Op. at 3. In 2012, Ares purchased the Company from Apollo. Op. at 2. The Company underwent an initial public offering in 2014. Op. at 2. Ares began monetizing investments in 2016 and continued through at least 2020. A39. By 2018, Ares had begun significantly reducing its management fees in these two funds. Op. at 3. "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.'" Op. at 3.

[3] This Counterstatement of Facts is drawn from the allegations in the Complaint and the documents incorporated by reference therein. Solely for the purposes of Defendants' motions to dismiss and this appeal, Defendants take as true any well-pleaded factual allegations except where the documents upon which the claims are based contradict the Complaint's allegations. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006). Moreover, because the Proxy is the sole source of merger-related factual allegations in the Complaint, it is proper to consider its contents on a motion to dismiss except where Plaintiff makes well-pleaded, non-conclusory contrary allegations. *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013) ("Having premised his factual allegations squarely on the Proxy Statement, Allen cannot fairly, even at the pleading stage, ask a court to draw inferences contradicting the Proxy Statement unless he pleads nonconclusory contradictory facts.").

During the relevant period, Ares held approximately 57% of the Company's voting power. Op. at 3. At the time of the Merger, the Company had nine directors, two of which (Messrs. Gies and Kaplan) were appointed by Ares. Op. at 3. No other directors are alleged to have any relationship with Ares.

According to the Complaint, Plaintiff owned 781,643 shares of Company common stock at the time of the Merger. A39.

B. Apollo Makes an Offer to Invest in the Company, Which the Board Rejects

On December 17, 2017, Apollo, which had previously sold the Company to Ares in 2012, asked to meet with David Hirz, the Company's CEO and a director, to discuss making a new investment in the Company. Op. at 4. On January 8, 2018, Apollo proposed investing $400 million, half of which the Company could use to repay debt and the other half for a $200 million tender offer at a price of $9.00 per share. Op. at 4.

The Board solicited Ares's view on the proposal. A45. Ares responded that it was only interested in participating in an exit transaction pro rata with the Company's other stockholders. A46.

The Board considered Apollo's offer at a February 7, 2018 meeting. Op. at 4. The Board felt that Apollo's offer was overly reflective of then-recent market news that had diminished the Company's stock price and rejected the offer. A46; Op. at 4.

C. Facing Headwinds, the Company Forms the Committee to Search for a Strategic Partner

On June 29, 2018, the Board met to "evaluate potential strategic alternatives" in light of "meaningful challenges and headwinds" the Company faced, including "difficulties enhancing stockholder value." Op. at 4. During the meeting, Gies informed the Board that Ares "did not need to liquidate their positions in the Company. Mr. Gies also told the Board that Ares did not intend to participate in any strategic transaction involving the Company in any capacity other than on a pro rata basis together with other stockholders of the Company." *Id*. Following the discussion, the Board determined that it was in the best interest of stockholders to form the Strategic Review Committee to identify, explore, and review potential strategic alternatives. Op. at 4; A187. The Committee was authorized and empowered to, among other things, make recommendations to the Board and stockholders regarding any strategic alternatives, as well as retain its own legal and financial advisors. A187. The Board appointed Messrs. Tuchman, Hopkins, and Tesoriero to the Committee. Op. at 4. Plaintiff makes no allegations challenging the disinterestedness or independence of any Committee members, nor does he assert any claims against them. Op. at 4; OB 4.

The Committee selected Gibson, Dunn & Crutcher LLP as its legal counsel. Op. at 4-5.[4] Gibson Dunn informed the Committee that it had from time to time represented affiliates of Ares and Apollo with regard to matters unrelated to the Company and the Committee. Op. at 5. That information was also disclosed in the Proxy. A187-88.

The Committee selected Citigroup Global Markets, Inc. and Jefferies, LLC as financial advisers. Op. at 5. The Committee was informed in advance that Citigroup and Jefferies both had material relationships with affiliates of Ares. *Id*. These facts were disclosed in the Proxy. A187. In light of the relationships, however, the Committee also determined to retain Centerview Partners, after confirming that Centerview had no material relationships with Ares or its affiliates. Op. at 5; A228.

D. The Committee Runs a Thorough and Competitive Sale Process

With assistance from its advisors, the Committee developed a plan for identifying, soliciting, and evaluating third-party interest. Op. at 5; A51. The Committee and its advisors generated a lengthy list of prospective purchasers, organized into tiers based on, among other things, "'the nature of [potential

[4] Plaintiff made the incorrect allegation below that the Committee also retained Proskauer Rose LLP. A53; *see also* Op. at 4-5 (repeating Plaintiff's counterfactual suggestion that the Committee retained Proskauer). As is clear from the documents incorporated by reference in the Complaint, Proskauer was counsel to the Board, not the Committee. A186-87.

partners'] business and profile, historical acquisitions in the Company's industry, and likelihood and ability to complete a transaction with the Company.'" A51.

As explained further below, "[b]y 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***." Op. at 5 (emphasis added).

In connection with the search process, the Committee instructed management to prepare a "Five Year Plan" with projections for 2019 through 2023. Op. at 5-6. The Committee provided guidance during the drafting process and met multiple times to assess the Five Year Plan that management prepared, and management incorporated feedback provided by the Committee. Op. at 6; A50. In September 2018, the Board authorized distribution of summaries of the plan to "interested parties in the process at the appropriate time." Op. at 6.

On October 22, 2018, after the Committee spent over a month developing the plan with the advisors, Citigroup and Jefferies began contacting third parties, reaching out to a total of twenty-eight potential bidders at that time: three Tier 1 strategic partners, ten Tier 2 strategic partners, and fifteen Tier 1 financial sponsors, including Apollo. Op. at 5. On November 9, 2018, the Committee resolved to contact another twenty-one potential third-party partners: eighteen Tier 2 financial partners and three Tier 2 strategic partners. A190.

From late-November to mid-December, management led "fireside chat" meetings with eight interested parties, including Apollo. Op. at 5; A38; A190; A200. Each of the Committee's three financial advisors attended these meetings. A190.

During a November 14, 2018 third quarter earnings call, management made certain positive comments about the Company's economic performance, including that (i) 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," (ii) the Company would slow its capital investments, freeing up cash to reduce the Company's financial leverage, and (iii) management "predicted that inflation would normalize." Op. at 6. In December, "management told investors that recent food deflation was a 'historical anomaly.'" Op. at 6.

Between December 20, 2018 and January 2, 2019, Apollo and Parties A, B, and D submitted non-binding preliminary proposals to acquire all of the Company's outstanding shares. A191. Apollo's preliminary proposal had the highest price range at $7.00 to $8.00 per share. *Id.*

On January 3, 2019, the Committee reviewed the preliminary proposals. A55; A191. During that meeting, the Committee discussed the possibility of contacting parties that might have an interest in making a standalone acquisition of either of the

Company's two business divisions, hoping to spur competition. Op. at 7; A55. The Committee then decided to invite Apollo and Parties A, D, and I to the next round of the strategic review process. A191. The Committee also decided to invite Party B to advance to the next bidding stage if it could improve its proposal. *Id.* Between January 17 and 28, 2019, management gave presentations to the remaining active bidders—Apollo and Parties A, B, D, and I. *Id.*

By January 22, 2019, the Committee had contacted forty-nine potentially interested parties. A192. Twenty-six of those parties executed confidentiality agreements, and five submitted preliminary proposals. *Id.* In early February 2019, the Committee received additional preliminary proposals from parties it had not yet heard from, including Party E on February 2 and Party F on February 6. A192. Party F ultimately declined to submit a final proposal. A193.

In March 2019, the Committee worked toward definitive agreements with the interested parties, directing that final bid process letters be sent to the nine remaining interested parties, including Apollo. Op. at 7; A193.[5] The process letters instructed the parties to improve their proposed prices and submit a final proposal by March 15, 2019. *Id.* "Two days before the deadline, the Company announced positive fourth quarter results." Op. at 7.

[5] Parties A and I dropped out of the process in late February/early March. A193.

On March 15, 2019, Apollo submitted a non-binding proposal, offering to acquire all of the Company's outstanding equity at a purchase price of $6.50 per share in cash. Op. at 7; A193. Apollo conditioned its offer on the Company executing a fifteen-day exclusivity agreement by March 17, 2019. Op. at 7. Also on March 15, the Company received standalone offers for each of its business divisions: Party J offered $400 million for the grocery store division; Party B offered $600 million for the business-to-business food provider division; and Party D offered to acquire the business-to-business food provider division for $700 million. *Id.*

During meetings on March 16 and 17, 2019, the Committee determined not to recommend entering into an exclusivity agreement with Apollo until the Board could review and discuss all proposals. Op. at 7; A193-94. On March 18, 2019, the Board received an update on the strategic review process and directed the financial advisors to seek increased price indications from the parties that had submitted proposals. Op. at 7; A194. Soon after, Apollo increased its proposed purchase price to $6.75 per share, subject to an exclusivity period. *Id*.

On March 19, 2019, the Board met to discuss developments and learned that Parties D and J had indicated they would need more time and due diligence before potentially increasing their bids. A195. Based on its evaluation of the proposals to date, the Committee unanimously recommended that the Company enter a fifteen-day exclusivity period with Apollo (through April 3, 2019). Op. at 8; A195.

On March 25, 2019, after confirmatory due diligence, Apollo submitted a revised proposal with a reduced purchase price of $6.30 per share. Op. at 8; A195. As a result, the Committee caused the Company ***to terminate the exclusivity agreement with Apollo*** and allow other interested parties to continue due diligence. *Id*. (emphasis added).

On March 28, 2019, Apollo submitted a revised proposal—its "absolute final offer"—of $6.50 per share, set to expire the next day unless the Company re-entered exclusivity with Apollo. Compl. ¶ 90; A196. Apollo also conditioned its offer on Ares entering a support agreement pledging to tender their shares into the offer. *Id.* On March 29, 2019, Gies told Committee Chair Tuchman, as well as Jefferies and Citigroup, ***that Ares was unwilling to execute a support agreement unless that agreement would terminate in the event the Board changed its recommendation in favor of Apollo's offer***. A56-57; A196 (emphasis added).

Later that day***, the Committee determined not to accept Apollo's request for exclusivity*** and instructed that Jefferies and Citigroup request an updated joint proposal from parties D and J. A23; A196-97. "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." Op. at 8.

During an April 5, 2019 Board meeting, Gies reiterated to the Board that Ares did not need to liquidate its position in the Company. A58; A196-97.

On April 11, 2019, Parties D and J submitted an updated joint proposal of $6.50 per share but indicated they would need four weeks to execute definitive agreements. A58; A197. The Committee determined to ask Apollo and Parties D and J to improve their respective offers. Op. at 8; A58; A196. Apollo rejected the request and stated that it would withdraw its offer unless the Company agreed to another exclusivity period. Op. at 8-9; A197. Parties D and J indicated that they would strive to submit a joint proposal of $7.00 per share but indicated that they had not secured debt and equity financing commitments for that price and could not improve their offer until financing was secured. A197-98.

The Committee met again on April 12, 2019 to discuss Apollo's threat to withdraw its offer, as well as the delay and uncertainty inherent in a joint transaction with Parties D and J. Op. at 9; A58-59; A197-98. The Committee agreed to provide Apollo with exclusivity through April 15, "[b]ased on the meaningful risk in refusing [Apollo's] demand for short-term exclusivity." Op. at 9; A59-60; A197-98. However, the Committee conditioned that agreement on a requirement that "the accompanying support agreement with Ares would terminate upon a Board change of recommendation." *Id.* "The Board adopted the Committee's recommendation on

April 15, deciding to provide Apollo with an additional twenty-four hours of exclusivity." Op. at 9.

Later that day, Parties D and J submitted an updated joint proposal for $7.00 per share. Op. at 9; A60; A200. At an April 15, 2019 meeting, Jefferies provided a preliminary financial analysis of the proposed transaction with Apollo and informed the Board that the financial advisor for Parties D and J said their "equity financing remained uncertain." Op. at 9. The Board was also informed that Parties D and J would require another four weeks for due diligence. A60; A200. With these considerations in mind, the Committee recommended, and the Board determined, to extend Apollo's exclusivity period for another twenty-four hours. Op. at 9; A200-01.

"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." Op. at 9-10. "In response, Apollo agreed to allow outstanding employee equity awards to convert into payments, 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." *Id*.

On April 16, 2019, the Board met to discuss Apollo's offer and Party D and J's offer. Op. at 10. At that meeting, Centerview opined that Apollo's offer of $6.50

per share was fair to the Company. Op. at 10.[6] The Committee determined that the proposed transaction was in the best interests of the Company and its stockholders. Op. at 10. The entire Board later unanimously voted to approve the proposed transaction with Apollo. *Id*.

* * *

All told, the Committee's process entailed:

- Meeting sixteen times over a nine-month period;
- Contacting seventy-four potential bidders;
- Executing non-disclosure agreements with thirty-eight potential bidders;
- Holding "fireside chats" with eight potential bidders and management presentations with seven potential bidders;
- Entertaining seven preliminary proposals; and
- Entertaining four submitted final proposals.

A37-38.

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[6] Plaintiff's Opening Brief incorrectly states that "each" of the Company's financial advisors indicated that they were prepared to provide a fairness opinion, and later references an analysis they allegedly "disclaimed . . . in their fairness opinions." OB 22, 42. However, Citi was not asked to, and did not, render a fairness opinion. *See* A200.

E. The Company Issues the Proxy, and Stockholders Overwhelmingly Tender Their Shares

On May 14, 2019, the Company issued the definitive Proxy recommending that stockholders tender their shares in connection with the Merger. Op. at 10. The Proxy spans seventy-seven pages, attaches the two fairness opinions issued by the advisors, and contains a detailed sixteen-page background of the Merger section. A158. "The Proxy Statement disclosed the financial advisors' conflicts." Op. at 10. "It further disclosed the change-in-control payments that management would receive." *Id*.

The Proxy also dedicates approximately six pages to explaining the Board's rationale for recommending the Merger. A203-09. It included, among other things,

- 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.

Op. at 11; A203-09.

After receiving the Proxy, Plaintiff determined that he disagreed with the Board's business judgment and wrote a letter to the Board voicing his disapproval (A261), which he subsequently leaked to Bloomberg (A272). Yet Plaintiff did not make a Section 220 demand, did not seek appraisal, and did not seek to enjoin the Merger. Instead, he tendered his shares and received the Merger consideration.

By June 17, 2019, stockholders owning 87% of the outstanding shares, including 78% of the outstanding shares Ares did not own, tendered their shares. Op. at 11. The Company also received Notices of Guaranteed Delivery for an additional 3,451,587 shares, which was approximately 5% of the Company's total outstanding shares. A287. Thus, holders of over 90% of the Company's outstanding shares indicated their approval for the Merger.

The Merger closed on June 20, 2019. Op. at 11. Ares received approximately $287 million for its shares of the Company.

F. Apollo Subsequently Sells the Company's Business Lines

On March 6, 2020, Apollo sold the Company's business-to-business food provider division to US Foods for $970 million. Op. at 11; A69. On May 17, 2021, Apollo sold the remainder of the Company to Bodega Latina for $620 million, plus the assumption of the Company's debt. Op. at 11; A70.

G. Plaintiff Brings Suit, and the Court of Chancery Dismisses His Claims

On April 14, 2022—nearly three years after the Merger's announcement—Plaintiff filed the original complaint in the Court of Chancery. Op. at 11. After Defendants moved to dismiss, Plaintiff filed his First Amended Complaint on July 15, 2022 and his Second Amended Complaint (which is the operative Complaint) on March 31, 2023. *Id.*

The Complaint asserts four counts: 1) breach of fiduciary duty against Ares as a controller; 2) breach of fiduciary duty against David Hirz, Richard Phegley, and Leland Smith as directors and/or officers; 3) aiding and abetting breach of fiduciary duty against Citigroup and Jefferies; and 4) waste against Hirz, Phegley, and Smith. Op. at 12.[7]

On October 15, 2024, the Court of Chancery held oral argument on Defendants' Motions to Dismiss. Op. at 12. On February 3, 2025, the Court of Chancery issued its Memorandum Opinion (the "Opinion").

The Court of Chancery correctly held that the Complaint should be dismissed under *Corwin.* As explained in the Opinion, under long settled Delaware law, Plaintiff's allegation that Ares was in "harvest mode" is insufficient to plead a

[7] As the Court of Chancery noted, "Plaintiff abandoned the waste claim by failing to brief it." Op. at 12. Plaintiff likewise did not address the waste claim in his opening appeal brief, meaning he has waived any theory of relief under the business judgment standard. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

conflict, and Plaintiff's disagreements with the Committee's and Board's business judgments "do not give rise to an inference that Ares faced unique external pressures that would put its interest in gaining liquidity at odds with the Company's best interests." Op. 15-16. Because Plaintiff did not plead that Ares had a conflict with respect to the Merger, entire fairness does not apply. Op. at 14, 17.

The Court further held that Plaintiff's attacks on the sufficiency of disclosures in the Proxy failed as a matter of law and that a fully informed, uncoerced majority of disinterested stockholders approved the Merger, cleansing the transaction under *Corwin* and affording business judgment review. Op. at 17-23. Holding that Plaintiff failed to state a claim under that standard, the Court granted Defendants' motions to dismiss. Op. at 23. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT *CORWIN* APPLIES BECAUSE THE TRANSACTION WAS NOT SUBJECT TO ENTIRE FAIRNESS REVIEW

a. Question Presented

Whether the Court of Chancery correctly held that Plaintiff failed to allege a liquidity-driven controller conflict that would subject the Merger to entire fairness review. Op. at 14-17.

b. Scope of Review

Decisions granting motions to dismiss are reviewed *de novo. Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011).

c. Merits of Argument

In *Corwin v. KKR Financial Holdings LLC*, this Court held that business judgment is the applicable standard of review where (i) the transaction is not subject to entire fairness review and (ii) stockholders vote to approve the transaction in a fully informed, uncoerced manner. 125 A.3d 304 (Del. 2015). In *In re Volcano Corporation Stockholder Litigation*, the Supreme Court affirmed the Court of Chancery's holding that *Corwin* cleansing likewise applies where stockholders express their approval by tendering their shares in a tender offer. 143 A.3d 727, 747 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017) (TABLE).

Here, holders of the overwhelming majority of the Company's stock—more than 90%—committed to tender their shares. Although Plaintiff initially voiced disagreement with the Merger, he too voluntarily tendered his shares.

Aside from his disclosure claims (addressed below), Plaintiff attempts to evade *Corwin* cleansing, and the corresponding application of the business judgment rule, by alleging that the Company's controlling stockholder, Ares, was conflicted because it needed to liquidate its investment in the Company. Plaintiff's theory rests entirely on his allegation that the funds that held Ares's investment in the Company were in "'harvest mode', as opposed to 'deployment mode,'" as part of a multi-year windup process, "meaning they were 'generally not seeking to deploy capital into new investment opportunities'" and the investment manager was not earning fees. A68-70.[8]

The Court of Chancery correctly held that these allegations were insufficient to plead a conflict that would trigger entire fairness review. The arguments in Plaintiff's Opening Brief provide no basis to disturb the trial court's ruling.

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[8] Plaintiff originally pleaded that one of Ares's funds had already liquidated. But that was factually untrue, and Plaintiff removed the inaccurate allegation from his subsequent complaints once that was brought to the attention of his counsel.

1. The Court of Chancery Correctly Held That the Lifecycle Stage of Ares's Funds is Insufficient to Plead a Liquidity-Driven Conflict

Ares participated in the Merger pro rata, ***forgoing a control premium and receiving the same per-share consideration as all of the Company's other stockholders.*** "When a stockholder who is also a fiduciary receives the same consideration for her shares as the rest of the shareholders, their interests are aligned." *Iroquois Master Fund Ltd. v. Answers Corp.*, 105 A.3d 989, 989 n.1 (Del. 2014) (TABLE) (quoting *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012) (internal quotations and alterations omitted)); *Presidio*, 251 A.3d at 255; Op. at 14-15. That is because Delaware law recognizes 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.'" *Presidio*, 251 A.3d at 255; Op. at 15.

Delaware law recognizes that "there is a good deal of utility to making sure that when controlling stockholders afford the minority pro rata treatment, they know that they have docked within the safe harbor created by the business judgment rule." *Synthes*, 50 A.3d at 1035. Accordingly, only where "the controller receives a unique benefit by extracting something uniquely valuable to the controller" will Delaware courts apply entire fairness review. *Maffei v. Palkon*, 2025 WL 384054, at *19 (Del.

Feb. 4, 2025) (internal citations and alterations omitted). To sustain this theory, a plaintiff must allege facts rendering it reasonably conceivable that "the controller used its power over the company to cause the company to enter into a transaction that . . . unfairly diverted proceeds that should have been shared ratably with all stockholders to itself." *Synthes*, 50 A.3d at 1033; *Cent. Mortgage Co.*, 27 A.3d at 537 ("[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability.") (internal quotations omitted). This Court has recently clarified that the alleged non-ratable benefit flowing to the controller must be material to state a claim. *Maffei*, 2025 WL 384054, at *20.

Delaware law views attempts to plead a non-ratable benefit resulting from a disparate need for liquidity with "***marked skepticism, characterizing them as 'unusual,' 'counterintuitive, and 'aggressive***.'" *Larkin v. Shah*, 2016 WL 4485447, at *16 (Del. Ch. Aug. 25, 2016) (quoting *Synthes*, 50 A.3d at 1034-35) (emphasis added). That is because the theory defies the common-sense notion, long recognized by Delaware courts, that "[t]he controlling stockholder ha[s] more incentive than anyone to maximize the sale price of the company." *Synthes*, 50 A.3d at 1024. Thus, the theory is cognizable only in "very narrow circumstances[,]" where a controller's "immediate need for liquidity" motivates the controller to force the company to pursue "a crisis, fire sale." *Id.* at 1036.

Plaintiff alleges nothing of the sort. Rather, his liquidity-conflict theory rests entirely on his allegation that Ares was in "harvest mode," *i.e.*, Ares was gradually liquidating its assets over the course of years and ceasing to make new investments. That allegation is insufficient to support an inference that Ares wanted to sell its investment in a value-destroying process—much less that Ares actually caused the Company to do so.

As the trial court explained, the Court of Chancery has repeatedly rejected this exact theory. Op. at 15-16. In *Presidio*, the Court of Chancery collected Delaware cases assessing alleged liquidity-driven conflicts and found that the successful cases were never premised on the lifecycle stage of the controller's investment vehicle. 251 A.3d at 258. The Court dismissed the idea that the end-stage cycle of a fund supports a conflict, explaining:

> The desire to wrap up an existing fund or to provide potential investors with attractive realizations while raising a new fund can affect a fund manager's approach to achieving liquidity for an investment. ***The cyclical process, however, is not so formulaic and structured that the cycle itself would support an inference of a liquidity-based conflict.*** Instead, this court has reasoned that because investment managers cyclically raise and liquidate funds on a somewhat predictable schedule, the pattern suggests that the monetization phase does not necessarily create a problematic interest.

Id. (emphasis added).[9] The Court of Chancery reached the same conclusion in *Larkin v. Shah*, explaining that the fact that "venture capital firms cyclically raise and liquidate funds on a predictable schedule . . . is hardly an 'unusual crisis' in the venture capital space." 2016 WL 4485447, at *17.

Further, this Court recently clarified that "a materiality requirement is appropriate in the context of this case where the principal focus has been on the alleged non-ratable benefits potentially flowing to the controller." *Maffei*, 2025 WL 384054, at *20. There is nothing in the Complaint that would suggest that the purported liquidity benefit to Ares was material. *Id.* Ares owned approximately 44 million shares in the Company at the time of the Merger. A165. Every dollar of consideration was thus worth about $44 million to Ares, and Ares ultimately received $287 million for those shares. Plaintiff does not even attempt to explain how whatever liquidity benefit Ares might have obtained is material in light of the consideration Ares was to be paid through a sale that maximizes the value of the Company.

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[9] *Presidio* involved more substantial allegations than those pleaded here. In that case, the controller stated that exit activity for the relevant fund would take place that year, the controller was about to lose its ability to appoint the majority of the seller's board, and the controller had made significant sales before the transaction at issue, lowering the seller's stock price. *Presidio*, 251 A.3d at 258-59. Yet even that was not enough to infer that the controller would dispose of its sizeable holdings in a rapid, depressed-price sale. Plaintiff here cannot even muster anything close to those (insufficient) allegations.

Much less can Plaintiff allege why the liquidity benefit would be material to the Ares funds overall. The $287 million the Ares funds received in connection with the Merger constituted less than 1.6% of the $18 billion value the Complaint attributes to the two Ares funds invested in the Company (Compl. ¶ 137), definitively undermining any suggestion that an alleged liquidity benefit was material to Ares, much less that Ares rushed a sale of Smart & Final because of an urgent need for cash.

The remaining allegations in the Complaint undermine the notion that Ares did anything to cause the Company to sell at a depressed price to satisfy a liquidity need. *Synthes*, 50 A.3d at 1033. Ares stated at the outset of the process and throughout that it "did not need to liquidate [its] positions in the Company." A48; A58; A62. Concerned with "headwinds" facing the Company, the Board determined that exploring a sale was in the Company's best interests and formed the Committee of independent directors to do so. Op. at 4; A187. The Committee independently pursued a thorough sale process over the course of nine months. *See* A37-38. The Court of Chancery correctly held that Plaintiff's disagreements with the Committee's and Board's business decisions do not plead a liquidity-driven conflict. Op. at 16 (holding that Plaintiff's arguments concerning "circumstances that favored the Company continuing on as a standalone entity" merely "point to valid business determinations by the Board, determinations to which Ares is not alleged to have contributed”). Nothing in the Complaint suggests that Ares acted to undermine the process or coerce the Company to sell promptly at a depressed price.

The cases cited by Plaintiff upholding liquidity-driven conflicts involve extreme facts and highlight what is absent from the Complaint here. In *In re Mindbody, Inc. Shareholders Litigation*, the complaint alleged a “rare fact pattern” in which the CEO had personal expenses in the “multi-millions” but limited ability to tap into his net worth, which was “locked inside Mindbody” because of a 10b5-1 plan. 2020 WL 5870084, at *16, *18 (Del. Ch. Oct. 2, 2020). The complaint alleged that the CEO told his financial advisors that his limited ability to sell was “top of mind” and he was tired of “sucking through a very small straw.” *Id.* at *16. And in *Manti Holdings, LLC v. Carlyle Group Inc.*, the complaint pleaded that a representative of a private equity investor “emphasized the ‘urgency’” of the sale in discussions with a bidder, and expressed that “he ‘was under pressure to sell Authentix because it was one of the last investments still open in the applicable fund, and it was time for Carlyle to monetize and close that fund so the money could be returned to investors.’” 2022 WL 1815759, at *9 (Del. Ch. June 3, 2022). Ares did the opposite—repeatedly emphasizing that it did ***not*** need to promptly liquidate its investments. A48, A58, A62.[10]

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[10] Other Court of Chancery cases sustaining allegations of a liquidity-driven conflict likewise demonstrate how far off Plaintiff is from stating a claim. In *In re Answers Corporation Shareholders Litigation*, a stockholder, stuck in an illiquid investment,

The Court of Chancery's holding that the Complaint did not plead a liquidity-driven conflict is supported by settled Delaware authority and should be affirmed.

2. Plaintiff's Opening Appeal Brief Identifies No Grounds for Reversal.

Plaintiff's Opening Brief is largely unresponsive to the Opinion. Other than rehashing the "harvest mode" theory the trial Court properly rejected, Plaintiff makes two meritless arguments.[11]

First, Plaintiff asserts that Ares's "executing a support agreement to avoid losing [Apollo's] bid . . . is further evidence of Ares's motivation to forgo profit for

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allegedly threatened to terminate management if they did not sell the company in the near future and caused them to pursue a truncated sale process against the advice of the company's financial advisor. 2012 WL 1253072, at *2 (Del. Ch. Apr. 11, 2012). *Goldstein v. Denner* involved an alleged attempt to sell quickly to "lock-in a sure gain on [] illicit stock purchases" made with inside information. 2022 WL 1671006, at *34 (Del. Ch. May 26, 2022). In *McMullin v. Beran*, an 80% stockholder with an "immediate cash need[]" was allowed to fully negotiate a sale transaction, and the board recommended approval to the stockholders on an "expedited" basis without doing anything to evaluate the company's going-concern value. 765 A.2d 910, 924-25 (Del. 2000). And in *N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, a 37% stockholder faced more than $25 million in debt, had stepped down as CEO, was not receiving a salary, "did not hold investments that provided him with 'meaningful cash[,]'" and desired to launch a new business. 2011 WL 4825888, at *2-3 (Del. Ch. Sept. 30, 2011). The stockholder engaged "a pattern of threats and bullying," including an "unauthorized press release encouraging a sale" at a time when "the market was ill-suited," threatening the board with lawsuits, and attacking management—all to force a sale that would provide the stockholder with liquidity. *Id.* at *3-4. Nothing even close is alleged here.

[11] Plaintiff's Opening Brief also argues that "[t]he Complaint satisfies Rule 23.1[.]" OB 31. That assertion appears to be an error, as Plaintiff did not attempt to allege any derivative claims below.

liquidity[.]" OB 37. That allegation does not come close to supporting a liquidity-driven conflict. The Opening Brief cites no authority to the contrary. And it is undisputed that Ares did not propose the support agreement; rather, it was a condition ***raised by Apollo*** in one of its proposals to the Committee. A196. Ares was under no obligation to scuttle Apollo's interest by refusing to sign a support agreement. Moreover, it is likewise undisputed that the "Ares Holders were unwilling to accommodate the condition in Apollo Management IX's proposal to enter into a support agreement as part of a transaction unless, among other things, such support agreement would terminate in the event the Board were to change its recommendation to the Company's stockholders that they tender their Shares in such transaction." A196. And Ares did not even execute the support agreement until the day the Board approved the Merger. B1-14. There is no reasonable basis to infer that Ares pressured the Committee or the Board to pursue a value-destroying deal by agreeing to Apollo's request to sign a support agreement.

Second, Plaintiff cites recent articles from McKinsey & Company and the Harvard Law School Forum on Corporate Governance, which suggest that private equity exits ***in 2024 and 2025*** were "backlog[ged]" and taking longer to accomplish than before. OB 33-34. Based on these sources, Plaintiff argues that "[p]rivate 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." OB at 33 (emphasis in original). This commentary published years after the Merger is not legal authority (and to the extent proffered as a factual matter, not part of the record) and does not support Plaintiff's apparent disagreement with well-settled Delaware law—which law he does not directly ask this Court to overturn in any event.

Indeed, to the extent they are relevant at all (or appropriately part of the record), these sources only undermine Plaintiff's fire-sale liquidity theory and bolster the Court of Chancery's conclusions. Private equity firms taking longer to exit, and "plan[ning] even further ahead" to find the "right exit" and avoid "jeopardizing returns" (OB 34), is the opposite of pursuing a value-destructive transaction at a depressed price for the sake of near-term liquidity.[12] Moreover, these articles evaluate 2024 and 2025 market data, which is ***five and six years after the Merger closed***. Even if Plaintiff were correct that private equity has generally been pursuing subpar exits over the last year, that says nothing about what Ares would

[12] Indeed, the McKinsey article states that "LPs are receptive to longer holding periods if there is consistent value creation during that time," and "IRR is still the top-ranked performance metric." B92. The Bain & Company article cited at page 35 of the Opening Brief likewise explains that "[w]hen capital finally starts flowing again, the winners will be funds with a clear, differentiated strategy and a record of consistent performance." B19.

have done (let alone what it actually did) in 2018 to 2019 with respect to its investment in the Company.

Nothing in the Opening Brief undermines the trial court's well-reasoned analysis.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT THE STOCKHOLDER APPROVAL WAS FULLY INFORMED AND THEREFORE HAD CLEANSING EFFECT UNDER *CORWIN*

a. Question Presented

Whether the Court of Chancery correctly held that the business judgment standard applies under *Corwin* because Plaintiff did not allege disclosure violations. Op. at 17-23.

b. Scope of Review

Decisions granting motions to dismiss are reviewed *de novo. Cent. Mortg. Co.,* 27 A.3d at 535.

c. Merits of Argument

As explained above, under *Corwin v. KKR Financial Holdings LLC*, a transaction that would otherwise be subject to enhanced scrutiny will receive business judgment deference if it is "approved by a fully informed, uncoerced majority of the disinterested stockholders." 125 A.3d at 306. Plaintiff attempts to circumvent *Corwin* by claiming that the Proxy was false and misleading. As the Court of Chancery correctly held, Plaintiff has not pleaded a viable disclosure claim. Op. at 17-23.

At the pleading stage, the plaintiff bears the burden to identify a disclosure deficiency that would prevent the application of *Corwin*. *Morrison v. Berry,* 191 A.3d 268, 282 & n.60 (Del. 2018), *as revised* (July 27, 2018). A stockholder vote is fully informed where disclosures provide "all material information" and are not materially misleading. *Morrison*, 191 A.3d at 282. Information is material if there is a "substantial likelihood that a reasonable [stock]holder would consider it important in deciding how to vote." *Rosenblatt v. Getty Oil Co*., 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *see also id*. ("[T]here must be a substantial likelihood that the disclosure . . . would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").

Plaintiff alleged three purported disclosure violations, asserting: (1) the Proxy's disclosure that Ares did not need immediate liquidity was misleading in light of the fact that the funds were in "harvest mode"; (2) the Proxy misrepresented management's employment discussions with Apollo; and (3) the Proxy's disclosures concerning the economic situation surrounding the Company and the Board's reasons for recommending the Merger were false. For the reasons explained below, the Court of Chancery correctly rejected each of these disclosure claims.

1. The Court of Chancery Correctly Rejected Plaintiff's Argument That the Company Should Have Disclosed That Ares Had a Purported Liquidity-Driven Conflict

Plaintiff's first theory is the purported failure to disclose "Ares's motivation to trade value for liquidity (e.g., the Funds were harvesting and not paying management fees))." *See* OB at 45. The trial court rejected this claim because "Plaintiff failed to adequately allege a misalignment of interests arising from the lifecycle of the Ares funds" and "[t]he posture of Ares's funds was both innocuous and immaterial. This additional information would not have substantially altered the total mix of information available to stockholders." Op. at 19-20.

The trial court's ruling was well-founded. As discussed above, the Court of Chancery correctly concluded that Plaintiff failed to establish that Ares had a liquidity-based conflict. Plaintiff cannot defeat the application of *Corwin* by merely repackaging his meritless conflict theory as a disclosure violation. *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 736 (Del. Ch. 1999) ("In addition, the questions posed by plaintiffs, by and large, do no more than reflect the plaintiffs' substantive allegations of wrongdoing."); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997), *as revised* (Sept. 18, 1997) (disclosures need not engage in self-flagellation).

Moreover, Plaintiff identifies no actual facts that were misstated. Plaintiff does not contest that Ares actually told the Board, repeatedly, that it did not need to sell. A48; A58; A62. The Board had no obligation to issue a contrary disclosure when it had no reason to think those assertions were untrue. *Cinerama, Inc. v. Technicolor, Inc.*, 1991 WL 111134, at *24 (Del. Ch. June 24, 1991), *aff'd in part, rev'd in part on other grounds*, 634 A.2d 345 (Del. 1993); *see also Kahn ex rel. Dekalb Genetics Corp. v. Roberts*, 679 A.2d 460, 468 (Del. 1996) (Fiduciaries are "under no duty to disclose views with which they disagreed and thought were unsupported.”). Plaintiff did not plead a disclosure deficiency concerning Ares’s (not existent) liquidity-based conflict.

2. The Court of Chancery Correctly Rejected Plaintiff’s Claim That the Company Should Have Disclosed Purported Management Compensation Negotiations

Plaintiff’s second alleged disclosure violation is that the Proxy was misleading regarding management’s discussions of post-merger employment terms. Plaintiff claims it is “inferentially dubious and misleading” for the Proxy to suggest “that management didn’t negotiate its continued employment directly with Apollo” because the CEO, “at the Committee’s direction, expressed his concern to [Apollo] representatives regarding employee retention if outstanding employee equity awards were not accelerated and paid out to employees as part of the proposed transaction.” OB 46-47.

The trial court correctly rejected this disclosure claim both because it was not pleaded and because the underlying facts were disclosed in the Proxy. Op. at 20-21.

As the trial court explained, Plaintiff’s failure to plead this disclosure claim “is a sufficient basis to reject it.” Op. at 20. Plaintiff does not contest that waiver finding (which alone warrants affirming), and regardless, his theory makes even less sense on appeal. Plaintiff now claims that “the Proxy indicates that no terms of any post-closing employment or post-closing equity participation in the surviving company were discussed,” but Plaintiff offers no cite for that proposition. OB 46.

That is because the Proxy does not make the disclosure that Plaintiff attacks. Rather, the Proxy discloses that while no post-closing employment agreements had been reached and the Merger was not contingent on any such agreements, "it is possible that Parent, S&F, or their respective affiliates may enter into employment or other arrangements with certain of S&F's executive officers in the future." A185.

Moreover, the Proxy discloses that, "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." Op. at 20; A200. The Proxy also discloses that "Apollo Management IX agreed to permit the outstanding employee equity awards to be cancelled and converted into the right to receive payment on the terms set forth in Item 3 [of the Proxy]," and contains a detailed description of those accelerated management awards. Op. at 20-21; A171; A200.

Based on these facts, Plaintiff speculates that management must have had further discussions about employment that were not disclosed. OB 46-47. But speculation is not a basis for a disclosure claim under Delaware law. *Loudon*, 700 A.2d at 145; *English v. Narang*, 2019 WL 1300855 (Del. Ch. Mar. 20, 2019), *aff'd*, 222 A.3d 581 (Del. 2019) (TABLE); *Teamsters Local 677 Health Servs. & Ins. Plan v. Martell*, 2023 WL 1370852, at *18 (Del. Ch. Jan. 31, 2023) (*as corrected*, Feb. 1, 2023). Plaintiff's conjecture that management ***must have been*** errantly discussing employment is especially unfounded, given that the one conversation on which it is based was held specifically at the direction of the Committee (and disclosed in the Proxy). A200.

3. The Court of Chancery Correctly Rejected Plaintiff's Claim That the Company Should Have Agreed With and Disclosed Plaintiff's Views Concerning the Company's Prospects

Finally, the trial court correctly held that Plaintiff's "grab-bag" of disagreements with the business judgment of the Board in pursuing the Merger did not state a disclosure claim. Op. at 21-22. Plaintiff provides no basis to overturn that ruling.

Plaintiff's real grievance is betrayed by the central question raised in his brief: "If the Company were exceeding the projections on which prospective buyers were bidding, why sell at all?" OB 42. The Proxy answers that question and details the reasons the Board determined to sell. As the trial court explained, those reasons include not only the Company's recent performance and financial condition, but also "headwinds" in the industry concerning food inflation and e-commerce, other macroeconomic factors (such as uncertainty around food retailer valuations and the potential for additional competition to enter the market), the costs associated with remaining a public company, and "the Board's determination that prolonging the sale process was not in the Company's best interest." Op. at 21-22; A203-04.

Other than Plaintiff's meritless liquidity-conflict theory, Plaintiff does not assert that these reasons are not the Board's actual reasons for recommending the Merger. There is thus no basis to infer these disclosures concerning the Board's reasoning are untrue. *See Narang*, 2019 WL 1300855, at *10 (dismissing disclosure claims where "plaintiffs offer no logical reason why any of the members of the Board would want a lower price for the Company"). Plaintiff's actual grievance, therefore, is that he simply disagrees with the Board's business judgment. But that disagreement cannot support a disclosure claim. *In re JCC Hldg. Co., S'holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003) (rejecting disclosure claim where "[t]he plaintiffs' only beef" was alleged "mistakes in subjective judgment, even though those judgments were disclosed").

In his Opening Brief, Plaintiff asserts that "[p]aradoxically, management publicly announced that the Company was outperforming its goals" and faults the Board for running a "sale process in which the bidders were *not* bidding on projections that were realigned with actual performance." OB 41; *see also* OB 44 ("[t]he Proxy omitted management's observations of Smart & Final's favorable performance against projections and, ultimately, the Five-year Plan"). But Plaintiff knows the information concerning the Company's performance was disclosed, because ***he himself obtained it from a May 1, 2019 earnings call.*** *See* A66-67. Information that was available to stockholders cannot serve as a basis for a disclosure claim. *In re MONY Gp., Inc. S'holder Litig.*, 853 A.2d 661, 683 (Del. Ch. 2004), *as revised* (Apr. 14, 2004) (Delaware law does not require disclosure of "facts known or reasonably available to the stockholders."). ***Stockholders thus had the relevant facts well before the tender date*** to evaluate whether the Committee's negotiation process was appropriate in light of the Company's performance over that period—and notwithstanding the Company's first-quarter performance, ***they overwhelmingly chose to tender.*** And in any event, the Company's first quarter performance does not undermine the concerns on which the Board predicated its recommendation.

Plaintiff's Opening Brief proceeds with a "grab bag" of meritless complaints:

- Plaintiff asserts that the Board's decision to avoid "remaining a standalone company wasn't based on any analysis from the Professionals" because they "disclaimed any such analysis in their fairness opinions." OB 42. But the scope of the fairness opinions was disclosed in the Proxy, and the opinions themselves were attached thereto. A244-53. Plaintiff does not argue otherwise. Nothing was omitted.

- Plaintiff faults the Committee for not pursuing the $7.00 proposal from Parties J and D. OB 42. But the reasons the Committee chose not to move forward are disclosed in the Proxy; it held concerns over those bidders' lack of financing, as well as the lengthy duration of their requested additional due diligence. A197-200. Plaintiff's claimed disagreement with this reasoning cannot support a disclosure claim. *In re JCC Hldg. Co., S'holders Litig.*, 843 A.2d at 721.

- Plaintiff asserts that the Committee's belief "that prolonging the sale process could have resulted in a loss of an opportunity to enter into the Merger Agreement…if [Apollo] wasn't granted exclusivity" was a "pretext" because Apollo previously made a bid in February 2018. OB 43. But Apollo's February 2018 offer was not for a whole-company sale. Plaintiff provides no legitimate reason to dispute the Committee's concern

> that Apollo might withdraw its offer—especially given that it had recently lowered its offer price. Even worse, Plaintiff provided no reason to suspect the Committee did not actually believe that risk, even if Plaintiff may think it was unfounded. Here again, Plaintiff's disagreements are not a disclosure claim.

As the trial court found, Plaintiff's disclosure claims merely amount to disagreement over whether the Company should sell or continue as a going concern. That is no basis for a claim.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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