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Case Number 94,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLENN J. KREVLIN, an individual, 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

APPELLEE JEFFERIES LLC'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellee Jefferies LLC ("Jefferies"), by and through its undersigned counsel, respectfully submits this Answering Brief in response to plaintiff Glenn J. Krevlin's ("Plaintiff") appeal of the Court of Chancery's February 3, 2025 Memorandum Opinion (the "Opinion" or "Op."), which dismissed Plaintiff's Second Amended Verified Stockholder Class Action Complaint (the "SAC").

Plaintiff is a former shareholder of Smart & Final Stores, Inc. ("Smart & Final" or the "Company"), a company that operated a grocery store and food delivery business. In June 2019, Smart & Final entered into a "cash out merger" (the "Transaction") with affiliates of Apollo Global Management, LLC ("Apollo"). Through the Transaction, Apollo acquired all of the Company's shares for $6.50 per share, representing a 25% premium over their publicly-traded price. More than 90% of Company's shareholders—including Plaintiff himself—committed to tender their shares as part of the Transaction.

Nonetheless, the SAC asserts breach of fiduciary duty claims against the Company's former majority owners—two Ares-backed private equity funds ("Ares")—and three members of its management (the "Individual Defendants"), based upon their having allegedly recommended and/or voted in favor of the Transaction. Plaintiff also seeks to hold Jefferies, a financial advisor to an

independent committee that recommended the Transaction, liable for these purported breaches of fiduciary duty under an aiding and abetting theory.

Plaintiff does not dispute that if Delaware law's business judgment standard applies to the Transaction, then its breach of fiduciary duty claims must be dismissed. Instead, Plaintiff makes two arguments that a different standard should apply. First, citing to its allegation that Ares was in "harvest mode," Plaintiff claims that Ares was a conflicted controlling shareholder, and in turn Delaware's entire fairness standard should apply. Alternatively, citing what Plaintiff claims are misstatements or omissions contained in a proxy statement, Plaintiff argues that the other shareholders' votes in favor of the Transaction were not "fully informed," and therefore enhanced scrutiny should apply.

The trial court rejected both arguments and dismissed Plaintiff's claim. On the "entire fairness" issue, the trial court applied the voluminous Delaware case law holding that a controlling shareholder's desire for liquidity does not, on its own, give rise to a conflict with minority shareholders such that the entire fairness standard should apply. The trial court also held that the "grab-bag" of "disclosure issues" identified by Plaintiff were nothing more than disagreements with the board's decision to approve the Transaction, which were insufficient to require enhanced scrutiny review. Accordingly, the trial court applied the business judgment standard

to the Transaction and dismissed all of Plaintiff's claims. The trial court did not address Jefferies' separate arguments for dismissal.

On appeal, Plaintiff challenges both of the trial court's holdings.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly determined that Plaintiff's allegations concerning a purported "liquidity-driven conflict theory" are insufficient to render Ares a conflicted controller.

2. Denied. The trial court correctly determined that Plaintiff's allegations concerning purported disclosure deficiencies are insufficient to render the stockholder vote uninformed.

3. The Opinion dismissing Plaintiff's aiding and abetting breach of fiduciary duty claim against Jefferies ("Count III") should be affirmed on the alternative ground that Plaintiff fails to plead facts to show that Jefferies acted with actual or constructive knowledge concerning any fiduciaries' purported breaches, or that Jefferies provided "substantial assistance" to the fiduciaries' purported breaches.

STATEMENT OF FACTS[1]

In 2018, Smart & Final was a publicly traded grocery store chain. (A36, ¶ 2.) At the time, Ares Corporate Opportunities Fund III, L.P. ("Ares Fund III") and Ares Corporate Opportunities Fund IV, L.P. ("Ares Fund IV"), together, held a majority of Smart & Final's shares and, in turn, acted as "a control group with majority voting power." (A36, ¶ 5; A39-A40, ¶ 15.)

In June 2018, Smart & Final's board of directors (the "Board") formed a Strategic Review Committee (the "Committee") to "evaluate a broad range of potential strategic alternatives that might be available to the Company." (A47, ¶¶ 51–52 (quotations omitted).) The Committee was comprised of three independent, non-Ares affiliated members of the nine-member Board. (A41, ¶¶ 22–24; A47, ¶ 52.) In July 2018, the Committee engaged Jefferies to serve as one of its financial advisors. (A41, ¶ 27; A49, ¶ 58.) Jefferies' fee was contingent upon its issuance of a fairness opinion and upon Smart & Final consummating a transaction. (A49, ¶ 60.)

[1] Solely for the purposes of this Appeal, Jefferies treats "well-pleaded" factual allegations as true. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

Jefferies disclosed to the Committee that it had previously worked for Smart & Final, Ares, and Apollo.[2] (A48, ¶ 55 ("these conflicts were disclosed"); A49, ¶ 58.) Neither the Committee, nor anyone else at the Company, is alleged to have objected to Jefferies' role based on purported conflicts.

The Committee also engaged two additional financial advisors: Citigroup Global Markets, Inc. ("Citi"), which itself had a prior relationship with Smart & Final as well as with Ares and Apollo, and Centerview Partners, LLC ("Centerview"), which had no prior material business relationship with Ares or Ares' affiliates. (A41, ¶ 26; A42, ¶ 28; A48-A49, ¶¶ 55, 58, 61.)

Plaintiff alleges that in its role as financial advisor, Jefferies took only five actions:

1. In September 2018, Jefferies "recommend[ed]" that the Committee "proceed with a structured process to identify, solicit and evaluate potential third party interest in the Company." (A51, ¶ 67 (quotations omitted).)

2. In October and December of 2018, Jefferies "presented a preliminary list of potential buyers" and then participated in "aggressive[]" outreach, through

[2] In particular, Plaintiff alleges that Jefferies had done approximately $50 million worth of business with Ares and Apollo in the two years preceding the transaction. (A49, ¶ 58.)

which it "contact[ed]" some of the potential buyers. (A37-A38, ¶ 8; A51, ¶¶ 68–70; A53, ¶ 76.)

3. In March 2019, the Company received an offer to acquire the entire Company from Apollo (for $6.50 per share). (A38, ¶ 9; A56, ¶ 89.) The Company also received separate offers from "Party D" and "Party J" to acquire portions of the Company. (A38, ¶ 9; A55-A56, ¶ 87.) In response, the Committee instructed Jefferies to request that Parties D and J submit a *joint* proposal to purchase the entire Company (rather than purchasing through separate transactions). (A57, ¶ 91.) A proposal was subsequently submitted by Parties D and J to acquire the entire Company at $6.50 per share. (A58, ¶ 98.) Plaintiff does not allege that Jefferies was ever asked to opine on or otherwise consider that proposal, nor that Jefferies ever did so.

4. In April 2019, Jefferies indicated that it could render a fairness opinion, "from a financial point view, of the consideration to be paid in the . . . proposed transaction with [Apollo]." (A62, ¶ 110 (quotations omitted).) The SAC does not allege that Jefferies was asked to consider any alternative transaction or opportunity in rendering its opinion.

5. Jefferies subsequently issued a formal fairness opinion. (A64, ¶ 118.) Plaintiff admits that the opinion was limited to analyzing the fairness of the per share cash consideration to shareholders in the proposed transaction with Apollo. (*Id.*)

The opinion did not address the fairness of Apollo's offer vis-à-vis any other competing offer. (*Id.*)

The SAC fails to link any of the above-alleged facts to the purported breaches of fiduciary duty that are alleged against Ares or the Individual Defendants. For example, the SAC alleges that Ares "pressed the [B]oard to pursue a sale of Smart & Final," and "steered" the Committee toward a sale to Apollo "on the basis of the proposed merger's speed and lack of complication over a higher offer." (A73, ¶ 157.) According to Plaintiff, Ares' actions were motivated by their desire to monetize their investment in Smart & Final because they were in "harvest mode" and sought to have Ares Fund III's investors "exit on schedule" with its purported liquidation target date. (A36, ¶ 5; A68, ¶ 133; A70, ¶ 144; A74, ¶ 158.) But the SAC pleads no facts indicating that Jefferies knew of Ares' supposed motivation to generate cash.

Nor does the SAC plead any facts even suggesting that Jefferies' opinion letter played a role in accelerating the Board's decision to consider, and then ultimately approve, the sale to Apollo. To the contrary, the SAC effectively concedes that Jefferies' opinion letter was just one of multiple opinion letters upon which the Board and/or Committee may have relied. (A62, ¶ 113; A64-A65, ¶ 119.)

Similarly, Plaintiff alleges that the Individual Defendants made misleading disclosures about the Company's anticipated financial performance, and in particular

regarding food inflation and e-commerce trends, to "dr[i]ve the process to Apollo to suit Ares' purposes." (A76-A79, ¶¶ 170–75.) For instance, Plaintiff alleges that the Individual Defendants were stating publicly that e-commerce trends were going to be disruptive while privately telling Plaintiff over dinner in 2017 that it was not a primary concern. (A44, ¶ 40; A77-A79, ¶ 173.) But Plaintiff does not plead that Jefferies had any knowledge of these disclosures or their allegedly misleading nature, much less that Jefferies encouraged or otherwise enabled the Individual Defendants to make them.

ARGUMENT

I. The Trial Court Correctly Determined that Ares Was Not a Conflicted Controller at the Pleadings Stage

A. Question Presented

Did the trial court err in holding that Plaintiff's allegations are insufficient to plead that Ares was a conflicted controller, such that the entire fairness doctrine applies to the Transaction? (Op. at 14-17; A125-A137; A574-A575; A627-A635; A655; A667-A676.)

B. Standard and Scope of Review

"Whether the Chancellor properly decided the Chancery Rule 12(b)(6) motion to dismiss is a question of law." *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996). Accordingly, it is subject to *de novo* review on appeal. *Id*.

C. Merits of Argument

Jefferies hereby joins the Answering Brief submitted by Ares, which explains in detail both:

(i) how the trial court correctly dismissed Plaintiff's breach of fiduciary duty claims because Plaintiff's allegations concerning a "liquidity-driven conflict theory" did not warrant entire fairness review of the Transaction (*see generally* Ares Br. 24-30); and

(ii) why Plaintiff's arguments on appeal provide no basis for overturning that decision (Ares Br. 30-33).

It is well-established that "an aiding and abetting claim . . . may be summarily dismissed based upon the failure of the breach of fiduciary duty claims . . . ." *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 750 (Del. Ch. 2016) (quotation marks omitted). Accordingly, the Court's dismissal of the Plaintiff's aiding and abetting claims against Jefferies should be affirmed as well.

II. The Trial Court Correctly Determined that Plaintiff Failed to Adequately Allege a Disclosure Violation

A. Question Presented

Did the trial court err in holding that the Plaintiff's allegations are insufficient to plead a disclosure violation which rendered the stockholder vote "uninformed," such that enhanced scrutiny should apply? (Op. at 17-23; A138-A146; A574-A575; A636-A641; A655; A676-A688.)

B. Standard and Scope of Review

As noted in Section I(B) above, the standard of review is *de novo*.

C. Merits of Argument

Jefferies also joins in Ares's arguments explaining why the trial court correctly determined that the SAC failed to allege any disclosure violation, such that enhanced scrutiny should apply to the transaction. (Ares Br. at 34-41). And, as is explained in Section I(C), supra, because this issue is dispositive of Plaintiff's underlying breach of fiduciary duty claims, the trial court's decision to dismiss the aiding-and-abetting claim against Jefferies should also be affirmed.

III. The Opinion Dismissing Count III Against Jefferies Should Be Affirmed on Alternative Grounds

A. Question Presented

Should the Opinion dismissing the aiding and abetting breach of fiduciary duty claim against Jefferies (Count III) be affirmed on the alternative grounds that the SAC does not allege any facts to show that Jefferies acted with actual or constructive knowledge concerning the fiduciaries' purported breaches, or that Jefferies provided "substantial assistance" to the fiduciaries' purported breaches? (*See* A576-A585; A649-A650; A655-A658.)

B. Standard and Scope of Review

As set forth above in Section I(B), "[w]hether the Chancellor properly decided the Chancery Rule 12(b)(6) motion to dismiss is a question of law" and is subject to *de novo* review. *Solomon*, 672 A.2d at 38. Nonetheless, the Supreme Court may affirm an order granting a Rule 12(b)(6) dismissal "on the basis of a different rationale than that which was articulated by the trial court [so long as] the issue was fairly presented to the trial court." *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933, 937 (Del. 2019) (quotation marks and citations omitted).

C. Merits of the Argument

The issue of whether Plaintiff sufficiently stated a claim for aiding and abetting breach of fiduciary duty was fully briefed and fairly presented to the trial court.

Accordingly, if this Court were to determine that Plaintiff pleaded a breach of fiduciary duty claim against any of the other defendants, this Court should affirm the Opinion to the extent it dismissed Count III against Jefferies on the alternative ground that Plaintiff failed to plead any facts to state a claim of aiding and abetting. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995) (affirming dismissal of aiding and abetting breach claim on alternative ground presented to trial court below).

i. Plaintiff Fails to Allege Facts to Show that Jefferies Acted with Knowledge

In order to state a claim for aiding and abetting a breach of fiduciary duty, "it is necessary that the plaintiff[] make factual allegations from which knowing participation may be inferred[.]" *In re Telecomms., Inc. S'holders Litig.*, 2003 WL 21543427, at *2 (Del. Ch. July 7, 2003). "Knowing participation in a . . . fiduciary['s] breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *In re Mindbody, Inc., S'holder Litig.*, 332 A.3d 349, 390 (Del. 2024) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001)); *see also Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016) ("Delaware has provided [financial] advisors with a high degree of insulation from liability by employing a defendant-friendly standard that requires plaintiffs to prove scienter and awards advisors an effective immunity from due-care liability.").

In the proceeding below, Jefferies demonstrated that the SAC fails to plead facts indicating that Jefferies had any "knowledge" of any other defendants' misconduct. (A575-577.) Indeed, the SAC does not allege that Jefferies was aware of Ares' purportedly illicit motive for selling their shares in Smart & Final. (A576.) It also does not allege that Jefferies knew (or could have known) about the Individual Defendants' purported misrepresentations to shareholders about the purposes of the transaction with Apollo. (*Id.*) In turn, the SAC necessarily fails to plead an aiding and abetting claim against Jefferies. *See Lee v. Pincus*, 2014 WL 6066108, at *14 (Del. Ch. Nov. 14, 2014) (granting motion to dismiss aiding and abetting claim against investment banks, where plaintiff did not plead that the banks knew that their actions would facilitate a breach of fiduciary duty).

Plaintiff has no answer to this argument. Within his 48-page appellate brief, Plaintiff fails to even address whether Jefferies had any purported knowledge concerning the alleged fiduciary breaches. And in the briefing below, Plaintiff focused entirely on his allegation that Jefferies' contingency-fee compensation created an incentive for Jefferies to see the Transaction close. (A650.) But in so arguing, Plaintiff ignored the plethora of authority demonstrating that a contingent compensation arrangement says nothing about Jefferies' knowledge (or lack thereof) of either Ares' or the Individual Defendants' purported breaches of fiduciary duties. *See, e.g.*, *Tilden v. Cunningham*, 2018 WL 5307706, at *18 (Del. Ch. Oct. 26, 2018)

(rejecting argument that a fee structure that incentivizes the consummation of a transaction was sufficient to demonstrate "knowing participation" in breaches of fiduciary duty); *Lee*, 2014 WL 6066108, at *14 (holding that it was "not reasonable to infer" that advisors' receipt of fees established knowing participation); *see also In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 (Del. Ch. May 20, 2011) (recognizing contingency fee arrangements for financial advisors in a merger context as "somewhat 'routine'").

In sum, the mere fact of Jefferies' contingency fee arrangement is insufficient to establish that Jefferies acted with the requisite illicit state of mind. And because the SAC contains no other allegations indicating that Jefferies was aware of any breaches of fiduciary duty by either Ares or the Individual Defendants, the Opinion's order dismissing Count III against Jefferies should be affirmed.

ii. Plaintiff Fails to Allege that Jefferies Substantially Assisted Any Breaches of Fiduciary Duties

The SAC also contains no facts to show that Jefferies "*provided substantial assistance*" in connection with Ares' or the Individual Defendants' purported breaches of fiduciary duties. *See Buttonwood Tree Value P'rs, L.P. v. R.L. Polk & Co., Inc.*, 2017 WL 3172722, at *9 (Del. Ch. July 24, 2017) (emphasis in original) (citation omitted) (dismissing aiding and abetting claim because the plaintiffs failed to allege that defendants knowingly provided substantial assistance).

To satisfy the substantial assistance requirement, a plaintiff needs to plead facts showing that the aider and abettor substantially participated in the fiduciary's decisions giving rise to the breach, conspired with the fiduciary, or otherwise caused the fiduciary to make the decisions at issue. *Malpiede*, 780 A.2d at 1098 (dismissing aiding and abetting claim where plaintiff failed to allege that third party "participated in the board's decisions, conspired with [the] board, or otherwise caused the board to make the decisions at issue").

Accordingly, a financial advisor cannot be held liable simply because it was adjacent to a transaction and failed to prevent fiduciaries from breaching their own duties. *See, e.g.*, *Buttonwood Tree Value P'rs*, 2017 WL 3172722, at *10 (holding that a financial advisor's "passive awareness" of material omissions did not amount to "substantial assistance" of any director's alleged failure to disclose such facts).

In the proceedings below, Jefferies demonstrated that the SAC contains no facts to show that Jefferies misled Ares or the Individual Defendants or withheld relevant information from them. (A579-A580.) The SAC also does not allege that Jefferies had any role in Ares' purported influencing of the Board with respect to the sale to Apollo, or that Jefferies had any role in the Individual Defendants' purported misleading disclosures to shareholders. (A580.) Rather, the SAC alleges nothing more than that Jefferies, a financial advisor, stood adjacent to a sales process that was vetted by an independent committee of the Board and supported by two other

financial advisors. (*Id.*) This does not come remotely close to the level of substantial assistance required under Delaware law. *See, e.g.*, *Buttonwood Tree Value P'rs, L.P.*, 2017 WL 3172722, at *10 ("There is . . . no allegation here that [the financial advisor] worked a fraud on the directors, or otherwise caused misrepresentations . . . by withholding information from fiduciaries."); *Houseman v. Sagerman*, 2014 WL 1600724, at *9 (Del. Ch. Apr. 16, 2014) (granting motion to dismiss aiding and abetting claim against financial advisor where plaintiff failed to allege that the advisor misled the board or otherwise withheld information from it); *see also In re Dole Food Co., Inc. S'holders Litig.*, 2015 WL 5052214, at *42 (Del. Ch. Aug. 27, 2015) (dismissing aiding and abetting claim against a financial advisor following trial where the advisor "did not . . . participate in" the alleged breaches, "did not make any of the misrepresentations, was not present for them, and did not conceal information from the Committee").

In the proceedings below, Plaintiff did not acknowledge the legal requirement that he must plead some form of "substantial assistance" to state an aiding-and-abetting claim. (A649-A650.) Nor did Plaintiff address how Jefferies' issuance of a limited fairness opinion could be construed as participating in the fiduciaries' decisions giving rise to the breach. And in his appellate brief, Plaintiff makes no effort to address any of these deficiencies which are dispositive of his claim.

Accordingly, due to Plaintiff's fundamental failure to plead "substantial assistance," the dismissal of Count III against Jefferies should be affirmed.

CONCLUSION

For the foregoing reasons, the Opinion should be affirmed.

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Dated: May 15, 2025

CERTIFICATE OF SERVICE

I, Mary F. Dugan, Esquire, hereby certify that on May 15, 2025, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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