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 REPLY BRIEF

Dated: May 30, 2025

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ARGUMENT

I. CORWIN DOES NOT APPLY BECAUSE THE MERGER IS SUBJECT TO THE ENTIRE FAIRNESS REVIEW.[1]

The Court of Chancery erred in concluding that Plaintiff's allegations of Ares's desire to exit were insufficient to plead a liquidity-driven conflict. Plaintiff's theory does not rest "entirely" on Ares's and, thus, Gies's and Kaplan's imputed knowledge that the Funds were in harvest as opposed to deployment mode, as Defendants suggest. To the contrary, the Funds began winding down years before the Merger. A68, ¶ 134.

Furthermore, if the pleadings only averred that the Funds were close to their anticipated exit target dates, Defendants' argument that some additional quantum of evidence was lacking and dismissal warranted because the investment process is "not so formulaic and structured that the cycle itself would support an inference of liquidity based conflict" might have sufficient traction. *Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, 258 (Del. Ch. 2021). The Complaint, however, alleges in detail the Funds's aggressive monetizations, starting in 2016, their total transition from investment to distributions, and the corresponding effect on management fees. A68-70, ¶¶ 132-144. The Funds sought exits from their remaining unmonetized investments through bankruptcies. A624; A648. A year

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[1] Unless otherwise defined, capitalized terms shall have the same meaning as those set forth in Appellant's Opening Brief. Dkt. 12.

after the Merger, Fund III had disappeared completely from Ares's investor presentation. A69, ¶ 139.

Despite quoting the entire passage from *Presidio*, Defendants lose sight of the Vice Chancellor's recognition that a fund manager's approach to achieving liquidity can be affected by his desire to find an exit. AB[2] at 27-28. Vice Chancellor Laster rightly observed that the pattern alone suggests a problematic interest but something more is needed at the pleadings phase. *Presidio, Inc.*, 251 A.3d at 258. The foregoing provides substantially more than the cyclic nature of private equity investment and divestment. These are specific allegations of Ares soliciting a pro-rata cash merger years before (A45-46, ¶¶ 43-47), the Funds chasing and announcing exits and cataloging their winding down processes, including the manager waiving fees (implying a lack of liquidity in the Funds's waning lifetime), all while shareholders were being told that Ares didn't need to sell—and nothing more—by two Ares principals sitting on the Board.

Defendants continue to rely on Vice Chancellor Laster's characterization of a controller's disparate need for liquidity as unusual or counterintuitive when the fundamental nature of control private equity's investment strategy, although rational, is often misaligned with typical shareholders whose common-sense

[2] Citations to "AB __" refer to the Answering Brief of Appellees Ares Corporate Opportunities Fund III, L.P. and Ares Corporate Opportunities Fund IV, L.P. Dkt. 17.

elevates maximizing the sale price of the company over the timing of that sale. *Larkin v. Shah*, 2016 WL 4485447, at *16 (Del. Ch. Aug. 25, 2016). That paradox is accentuated by statistics and observations set forth in Plaintiff's opening brief, which include a 20-year average buyout hold time of 5.7 years and the industry's annual exit peak during the pandemic, not long after the Merger. The observation of industry experts that managers are under increasing pressure to find exits, which are proving more difficult to identify, confirms that control private equity managers like Ares have always been under pressure to identify and execute exit strategies to meet their investors' expected rates of return.

Materiality is a strange fight to pick. Defendants want to convince an objective arbiter that achieving liquidity is divorced from a private equity fund manager's modus operandi, immaterial, and therefore not a non-ratable benefit to fund managers like Ares. *See Maffei v. Palkon*, 2025 WL 384054, at *20 (Del. Feb. 4, 2025). That reading is contrary to the Court of Chancery's thinking in *Presidio* that the timing and availability of exits is at the heart of every control private equity fund manager's decision making. Ares, together with its principals Gies and Kaplan—both of whom served on the Company's board—believed that its potential need to liquidate its holdings was material to shareholders. Accordingly, Ares informed the board and management, who then advised shareholders that Ares had no obligation to liquidate its position. And so, Ares can't now claim that it did not materially benefit from liquidating its position in the Company in furtherance of winding down the Funds.

II. STOCKHOLDER APPROVAL WAS NOT FULLY INFORMED AND, THUS, DEFENDANTS CANNOT AVAIL THEMSELVES OF A CORWIN DEFENSE.

Again, in the Board's view, Ares's need to liquidate its positions in the Company was material and, so, it advised shareholders that it did not need to liquidate. Somehow, Ares simultaneously insists that its concurrent liquidation of all positions in the Funds is immaterial and its failure to inform the Committee of that winding down was in no way misleading. Unlike the facts of *Cinerama*, Gies and Kaplan sat on the Board when it decided that Ares's purported lack of a need to sell was material. *See generally Cinerama, Inc. v. Technicolor, Inc.*, 1991 WL 111134 (Del. Ch. June 24, 1991). At the same time, the same Board must have concluded that Ares's motivation to sell (its liquidity need), as evidenced by its real-time fund liquidation, was immaterial. That distinction doesn't represent a difference of opinion among board members. *See Kahn ex rel. Dekalb Genetics Corp. v. Roberts*, 679 A.2d 460, 468 (Del. 1996). It is a glaring contradiction from which one can reasonably infer the potential to confuse and mislead shareholders. "Once a board broaches a topic in its disclosures, a duty attaches to provide information that is 'materially complete and unbiased by the omission of material facts.'" *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007) (quoting *In re Pure Ress. S'holders Litig.*, 808 A.2d 421, 448 (Del. Ch. 2002)).

Defendants characterize the rational inference that management's continued employment and significant compensation from the merger motivated it to influence the Committee's process as conjecture. Instead, Defendants would have the Court take from the Complaint that the business plan (although wildly successful in its infancy) failed to translate to shareholder value, making Apollo's tender offer the best option. Apollo, nonetheless, became convinced at Hirz's suggestion—a concern that the Committee directed Hirz to convey after Hirz brought it to their attention—that it needed to continue implementing the unsuccessful business plan and, thus, rewarded management with continued employment and merger consideration. A60, ¶ 105. After all, Hirz and his team were telling shareholders that the business plan was achieving results that outpaced projections. That information did not, however, find its way into the Proxy. Then, Apollo split and sold both divisions in less than a year from closing.

Against that backdrop, the disclosures don't pass the smell test, and the Court can reasonably infer that Hirz and his management team's self-interest infected the Committee and the process and that the Proxy's assertion that post-closing terms were not discussed pre-signing with Apollo is false. A75, ¶ 165. Management's solicitation and negotiation of continued employment to ensure the future success of a supposedly failing business plan that the buyer didn't need to maintain to accomplish a back-to-back sale was a quid-pro-quo for management's silence in crafting the Proxy and, thus, a material matter that should have been disclosed.

The Complaint seeks relief for duty of loyalty and candor breaches for Hirz, Smith, and Phegley arranging undisclosed post-merger employment prior to closing and influenced the Committee (*id*.), and "[m]isleading and inaccurate disclosures included … advising that Safe & Final directors and executive officers *may* have interests in the deal that are different from or in addition to other stockholders when the Individual Defendants know that they most certainly did." A77-79, ¶ 173. That disclosure does not sufficiently describe management's self-interested support for and participation in the process, including crafting a misleading Proxy.

Defendants acknowledge that the Proxy made no mention of the Company's performance exceeding the projections underlying the winning bid. While it's true that Plaintiff learned of the Company's success from management on a May 1, 2019 earnings call, the implication that Plaintiff obtained financial statements—statements that would have been available to all shareholders—is nowhere in the pleading. Management advised shareholders that the Company had exceeded Q1 guidance in some areas and provided EBITDA projections for the second half of the year. There is no basis in the pleading to conclude that Company financials were reasonably available to the stockholders well before the tender date as

Defendants now suggest. There is, however, no mention in the Proxy of the Company's specific performance metrics evaluated against the projections on which the tender offer was based. When a proxy statement fails to disclose "earlier, more optimistic projections[,]" *Corwin* cleansing is unavailable at the pleading stage because those projections are material. *Chester Cty. Emples. Ret. Fund v. KCG Hldgs., Inc.*, 2019 Del. Ch. LEXIS 233, at *32-35 (Del. Ch. June 21, 2019). That is because, as then-Vice Chancellor Strine explained, "[i]n the context of a cash-out merger, reliable management projections of the company's future prospects are of obvious materiality to the electorate." *In re PNB Hldg. Co. S'holders Litig.*, 2006 Del. Ch. LEXIS 158, at *59 (Del. Ch. Aug. 18, 2006). And where "more optimistic projections" are reliable, they are, therefore, material and must be disclosed. *See generally, Chester Cty. Emples. Ret. Fund*, 2019 Del. Ch. LEXIS 233.

Lastly, Defendants spend no time addressing why the Proxy's failure to mention the eleventh-hour, pre-merger spike in food inflation, which, as management pointed out, led to increased revenue, sales, and margins, didn't leave the Proxy wanting and shareholders uninformed. A76, ¶ 170; OB[3] 36-39. The disclosure claim should survive on that basis alone and prevent Defendants from availing themselves of *Corwin* cleansing at this stage.

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[3] Citations to "OB __" refers to Appellant's Opening Brief.

CONCLUSION

For the reasons set forth in Plaintiff's Opening Brief and based on the foregoing, Plaintiff respectfully requests that the ruling below be reversed.

Dated: May 30, 2025

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