

Securities/M&A Litigation Alert

Delaware Supreme Court Confirms that *Corwin* Rule Applies to Aiding and Abetting Claim

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The Delaware Supreme Court's May 6, 2016 decision in *Singh v. Attenborough*, No. 645, reconfirms the rule set forth in *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015), that when a majority of a company's disinterested, fully informed, and uncoerced stockholders vote in favor of a merger with an acquirer that is not the company's controlling stockholder, the business judgment rule applies to a claim for breach of fiduciary duty against the company's board of directors and "dismissal is typically the result." The *Singh* decision also clarifies that, under these circumstances, claims against the company's financial advisor for aiding and abetting the directors' alleged breaches will also be dismissed.

Joseph S. Allerhand, co-head of Weil's Securities Litigation practice, argued *Singh* for the director defendants and Signet Jewelers Limited.

Background

Singh affirms the Court of Chancery's dismissal of a case challenging Signet Jewelers Limited's \$690 million acquisition of Zale Corporation. Shortly after the merger was announced, the Zale board learned that an employee of its financial advisor, Bank of America Merrill Lynch ("Merrill Lynch"), had pitched a potential acquisition of Zale to Signet shortly before being engaged by Zale. After investigating and discussing Merrill Lynch's potential conflict, the Zale board determined that it did not impact the board's determination to recommend the merger. Accordingly, the Zale board reaffirmed its commitment to the merger and disclosed the pitch to Zale stockholders, a majority of whom ultimately voted in favor of the transaction.

Stockholder plaintiffs asserted claims for breach of fiduciary duty against the Zale directors, alleging among other things that four of Zale's nine directors were conflicted with respect to the transaction and that the board failed to fulfill its duty to obtain the best price for Zale's stockholders, and a claim against Merrill Lynch for aiding and abetting the directors' alleged breaches. In its initial ruling on the defendants' motion to dismiss, the Court of Chancery dismissed the claim against the directors, holding that the plaintiffs had failed to allege any non-exculpated claim for breach of fiduciary duty. *In re Zale Corp. S'holder Litig.*, 2015 WL 5853693 (Del. Ch. Oct. 1, 2015) ("*Zale I*"). Applying enhanced scrutiny under *Revlon* despite the approval of the transaction by a fully informed majority of the disinterested stockholders, the

Court determined that it was reasonably conceivable that the directors had breached their duty of care when they failed to learn of the Merrill Lynch pitch until after the merger was announced. The Court further determined that plaintiffs had sufficiently alleged that Merrill Lynch knowingly participated in the directors' breach of fiduciary duty by consciously delaying disclosure of the pitch until after the merger was announced. Accordingly, the Court of Chancery declined to dismiss the plaintiffs' aiding and abetting claim against Merrill Lynch.

The day after the decision in *Zale I*, the Supreme Court decided *Corwin*. Merrill Lynch moved for reconsideration of *Zale I*, arguing that, under *Corwin* and in light of the fully-informed vote of the disinterested stockholders, the business judgment standard of review applied and Merrill Lynch could be held liable for aiding and abetting only if the plaintiffs had alleged that the directors had committed waste. Although the Court agreed that *Corwin* made clear that the business judgment rule – and not *Revlon*'s “range of reasonableness” standard of review – applied, the Court disagreed that the plaintiffs' claim could survive only if it rose to the level of waste. Instead, the Court held that the plaintiffs could rebut the business judgment rule by alleging facts sufficient to support a finding of gross negligence. Ultimately, the Court determined that the allegations were insufficient to support a finding of gross negligence and dismissed the claim against Merrill Lynch. *In re Zale Corp. S'holders Litig.*, 2015 WL 6551418 (Del. Ch. Oct. 28, 2015).

Delaware Supreme Court's Decision

The unanimous holding in *Singh* eliminates any ambiguity that may have arisen out of *Zale I*'s analysis of the impact of the stockholder vote on the standard of review. The order, written by Chief Justice Strine, explains that a “fully informed, uncoerced vote of the disinterested stockholders invoked the business judgment rule standard of review” and insulated the transaction from all challenges other than waste. *Singh* further states that “because the vestigial waste exception has long had little real-world relevance,” when a vote invokes the business judgment rule

standard of review “dismissal is typically the result.” Accordingly, the Supreme Court upheld the Court of Chancery's dismissal of the claims against the *Zale* board and Merrill Lynch on the basis of the fully informed, uncoerced vote by the disinterested majority of *Zale* stockholders.

The discussion in *Singh* regarding the merits of the aiding and abetting claim against Merrill Lynch, although confined to dictum, is noteworthy. The Court expressed “skeptic[ism] that the supposed instance of knowing wrongdoing – the late disclosure of a business pitch that was then considered by the board, determined to be immaterial, and fully disclosed in the proxy – produced a rational basis to infer scienter.” The Court distinguished the allegations against Merrill Lynch from the financial advisor's conduct in *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), which, as stated in *Singh*, held that a financial advisor “whose bad-faith actions cause[d] its board clients to breach their situational fiduciary duties (e.g., the duties *Revlon* imposes in a change-of-control transaction) is liable for aiding and abetting.” The *Singh* Court emphasized that “[n]othing in this record comes close to approaching the sort of behavior at issue in *RBC*.”

Key Takeaways

This decision reconfirms Delaware's deference to decisions of disinterested, uncoerced, and fully informed stockholder electorates. In addition, this decision should help put at ease those who are concerned that the Delaware Supreme Court's holding in *RBC* opened the floodgates for advisor liability. The dictum in *Singh* appears to elucidate the Court's view that *RBC* was decided based on its unusual facts and that the level of culpability that a plaintiff must plead to state a claim for aiding and abetting a breach of fiduciary duty remains high. Where a financial advisor knowingly engages in egregious conduct that is not disclosed to the directors or the stockholders, however, it may be held liable for causing the directors to commit a breach of fiduciary duty for which the directors themselves are exculpated (i.e., the duty of care).

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