

KRIENS SCOTT  
Form 4  
June 11, 2018

**FORM 4**

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

OMB APPROVAL

OMB Number: 3235-0287  
Expires: January 31, 2015  
Estimated average burden hours per response... 0.5

Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. See Instruction 1(b).

**STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP OF SECURITIES**

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

(Print or Type Responses)

1. Name and Address of Reporting Person \*  
**KRIENS SCOTT**

(Last) (First) (Middle)

**ONE LAGOON DRIVE, 4TH FLOOR**

(Street)

**REDWOOD CITY, CA 94065**

(City) (State) (Zip)

2. Issuer Name and Ticker or Trading Symbol  
**EQUINIX INC [EQIX]**

3. Date of Earliest Transaction  
(Month/Day/Year)  
**06/07/2018**

4. If Amendment, Date Original Filed(Month/Day/Year)

5. Relationship of Reporting Person(s) to Issuer

(Check all applicable)

Director  10% Owner  
 Officer (give title below)  Other (specify below)

6. Individual or Joint/Group Filing(Check Applicable Line)

Form filed by One Reporting Person  
 Form filed by More than One Reporting Person

**Table I - Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned**

1. Title of Security (Instr. 3)	2. Transaction Date (Month/Day/Year)	2A. Deemed Execution Date, if any (Month/Day/Year)	3. Transaction Code (Instr. 8)	4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)	5. Amount of Securities Beneficially Owned Following Reported Transaction(s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Beneficial Ownership (Instr. 4)
				(A) or (D)	Amount		
				Code	V		Price

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

**Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.**

SEC 1474 (9-02)

**Table II - Derivative Securities Acquired, Disposed of, or Beneficially Owned (e.g., puts, calls, warrants, options, convertible securities)**

1. Title of Derivative Security	2. Conversion or Exercise	3. Transaction Date (Month/Day/Year)	3A. Deemed Execution Date, if any	4. Transaction Code	5. Number of Derivative	6. Date Exercisable and Expiration Date (Month/Day/Year)	7. Title and Amount of Underlying Securities (Instr. 3 and 4)	8. Price of Derivative Security

Edgar Filing: KRIENS SCOTT - Form 4

(Instr. 3)	Price of Derivative Security	(Month/Day/Year)	(Instr. 8)	Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)	(Instr. 3)	(Instr. 4)	(Instr. 5)	(Instr. 6)	(Instr. 7)	(Instr. 8)	(Instr. 9)	(Instr. 10)
			Code	V	(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares		
Restricted Stock Units	\$ 0	06/07/2018	A		629		(1)	(2)	Common Stock	629		\$ 0

## Reporting Owners

Reporting Owner Name / Address	Relationships			
	Director	10% Owner	Officer	Other
KRIENS SCOTT ONE LAGOON DRIVE 4TH FLOOR REDWOOD CITY, CA 94065		X		

## Signatures

Samantha Lagocki  
06/11/2018  
Date

\*\*Signature of Reporting Person

## Explanation of Responses:

- \* If the form is filed by more than one reporting person, see Instruction 4(b)(v).
  - \*\* Intentional misstatements or omissions of facts constitute Federal Criminal Violations. See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).
- The Restricted Stock Units shall vest on the earlier of (i) the one-year anniversary of the grant date or (ii) if the reporting person does not stand for re-election as a director of the Company, the date of the regular meeting of the Company's stockholders held in the calendar year
- (1) subsequent to the grant date; provided that, in either case, the reporting person remains in continuous Service through such vesting date. Pursuant to a Deferral Election, vested shares will be delivered to the reporting person thirty days after the reporting person's separation from Service or earlier in the event the Company is subject to a change in control event or in the event of the reporting person's death.
  - (2) Restricted stock unit award expires upon reporting person's termination of services

Note: File three copies of this Form, one of which must be manually signed. If space is insufficient, see Instruction 6 for procedure. Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB number. "bottom">\$4.00 \$5.25

Barclays noted that on the basis of the selected precedent transaction analysis, the transaction consideration of \$7.35 per Share was above each of the ranges of implied equity values per Share calculated.

(d) Item 4 of the Statement is hereby further amended and supplemented by amending and restating the section captioned *Opinion of Charming's Financial Advisor Discounted Cash Flow Analysis* to read as follows:

*Discounted Cash Flow Analysis*

## Edgar Filing: KRIENS SCOTT - Form 4

In order to estimate the present value of the Shares, Barclays performed a discounted cash flow analysis of Charming. A discounted cash flow analysis is a traditional valuation methodology used to derive a valuation of an asset by calculating the present value of estimated future cash flows of the asset. Present value refers to the current value of future cash flows or amounts and is obtained by discounting those future cash flows or amounts by a discount rate that takes into account macroeconomic assumptions and estimates of risk, the opportunity cost of capital, expected returns and other appropriate factors.

To calculate the estimated enterprise value of Charming using the discounted cash flow method, Barclays added (i) Charming's projected after-tax unlevered free cash flows for fiscal years 2012 through 2016 based on management projections, discounted to their present values using a range of selected discount rates, to (ii) the residual value of Charming at the end of the forecast period based on management's projections for such five year forecast period, or terminal value, as of January 31, 2017, discounted to its present value using a range of selected discount rates. The after-tax unlevered free cash flows were calculated by taking the tax-affected earnings before interest and tax expense, adding depreciation and amortization, subtracting capital expenditures and restructuring charges, adjusting for changes in net working capital and adding decreases in the value of deferred tax assets and \$20 million in illustrative proceeds from a possible divestiture of the Fashion Bug division, as per management's estimates. Stock-based compensation was treated as a cash expense in this analysis. The terminal value was estimated by selecting a range of terminal value multiples of 5.0x to 7.0x and applying such range to the 2016E EBITDA management projections. The range of after-tax discount rates of 14% to 16% was selected based on an analysis of the weighted average cost of capital of Charming and the selected public companies. Barclays then calculated a range of implied equity values per Share by subtracting estimated net debt as of January 28, 2012 from the estimated enterprise value using the discounted cash flow method and dividing such amount by the fully diluted number of Shares. The following table summarizes the result of these calculations:

<b>Implied Equity Value Per Share (rounded to nearest \$0.25)</b>	
<b>Low</b>	<b>High</b>
\$6.00	\$8.25

Barclays noted that on the basis of the discounted cash flow analysis, the transaction consideration of \$7.35 per Share was within the range of implied equity values per Share calculated using management projections.

(e) Item 4 of the Statement is hereby further amended and supplemented by amending and restating the section captioned *Opinion of Charming's Financial Advisor - Discounted Future Stock Price Analysis* to read as follows:

*Discounted Future Stock Price Analysis*

Barclays performed a discounted future stock price analysis with respect to Charming using the management projections. Pursuant to this analysis, Barclays calculated a range of prices at which the Shares might trade at the beginning of 2014 if the Shares then traded at prices representing forward multiples of between 13.0x and 15.0x the projected normalized earnings of \$0.62 per Share for 2014 (based on the previously provided management projections of \$0.61, adjusted to reflect a normalized tax rate of 37.5%). The implied Share prices at the beginning of 2014 that were generated through this analysis were then discounted to reflect indicative current per Share equity values using a cost of equity discount rate of 16.9%. The following table summarizes the result of these calculations:

Implied Equity Value Per Share (rounded to nearest \$0.25)	
Low	High
\$6.00	\$6.75

Barclays noted that on the basis of the discounted future stock price analysis, the transaction consideration of \$7.35 per Share was above the range of implied equity values per Share calculated using management projections.

(f) Item 4 of the Statement is hereby further amended and supplemented by amending and restating the section captioned *Opinion of Charming's Financial Advisor - Illustrative Leveraged Buyout Analysis* to read as follows:

*Illustrative Leveraged Buyout Analysis*

Barclays performed an illustrative leveraged buyout analysis in order to ascertain a price for the Shares which might be achieved in a leveraged buyout transaction with a financial buyer using a debt capital structure based upon current market conditions. Barclays assumed the following in its analysis: (i) \$20 million in proceeds from an illustrative sale of the Fashion Bug division at the end of fiscal year 2011, as per management's estimates, (ii) an equity investment that would achieve a rate of return of approximately 20% to 25% over 5 years and (iii) a projected EBITDA terminal value multiple of 5.0x to 7.0x in five years applied to the management projections (adjusted to exclude certain public company expenses that would not be incurred as a private company). Based on these assumptions, Barclays calculated a range of implied equity values per Share. The following table summarizes the result of these calculations:

Implied Equity Value Per Share (rounded to nearest \$0.25)	
Low	High
\$5.50	\$6.50

Barclays noted that on the basis of the illustrative leveraged buyout analysis, the transaction consideration of \$7.35 per Share was above the range of implied equity values per Share calculated.

(g) Item 4 of the Statement is hereby further amended and supplemented by deleting the sixth paragraph under the heading *Charming Projections* and the table immediately following that paragraph and replacing them with the following:

A summary of the projected financial information is provided below and is not being included in this Schedule 14d-9 to influence a shareholder's decision whether to tender Shares in the Offer. Readers of this Schedule 14d-9 are strongly cautioned not to place undue reliance on the projections set forth below. This summary of projected financial information should be evaluated, if at all, in conjunction with Charming's historical financial statements and other information regarding Charming contained elsewhere in this Schedule 14d-9 and Charming's other public filings with the SEC. As Charming had previously disclosed its intention to divest its Fashion Bug business, the projections prepared by Charming's management assumed the sale of the Fashion Bug business in 2012. Fashion Bug's contribution to the Company's fiscal 2011 EBITDA was \$16 million and management's fiscal 2012 projections assumed the same level of contribution. The fiscal 2012 projections for the Fashion Bug business were only used in internal analysis prepared by management, and were not included in the projections shared with prospective bidders, which assumed the sale of the Fashion Bug business in 2011.

Consolidated (amounts in millions, except per share data)	2012	2013	2014	2015	2016
Net sales	\$ 1,432	\$ 1,497	\$ 1,629	\$ 1,710	\$ 1,796
EBITDA(1)	\$ 100	\$ 141	\$ 193	\$ 209	\$ 224
EBIT(2)	\$ 53	\$ 88	\$ 126	\$ 134	\$ 149
Assumed tax rate	37.5%	37.5%	37.5%	37.5%	37.5%
Capital expenditures	\$ 94	\$ 104	\$ 91	\$ 75	\$ 75
Restructuring expenses	\$ 8	\$ 3	\$ 3		
Changes in net working capital	\$ 38	\$ (29)	\$ 5	\$ (5)	\$ (5)
Decline in deferred tax assets	\$ 8	\$ 22	\$ 20		
Unlevered free cash flow(3)	\$ 44	\$ (7)	\$ 76	\$ 79	\$ 88
Earnings per share(4)	\$ 0.28	\$ 0.57	\$ 0.61		
Shares outstanding	119	120	121		

- (1) EBITDA is defined as earnings before interest expense, taxes, depreciation and amortization.
- (2) EBIT is defined as earnings before restructuring, interest expense and taxes.
- (3) Unlevered free cash flow was determined by calculating Charming's earnings before interest and actual tax expense, subtracting an illustrative tax expense based on an assumed tax rate of 37.5% (assuming no interest expense), then adding depreciation and amortization, subtracting capital expenditures and restructuring charges, adjusting for changes in net working capital and adding decreases in the value of deferred tax assets and, for FY 2012E, adding \$20 million in illustrative net proceeds from a possible divestiture of the Fashion Bug business.
- (4) Earnings per share (EPS) shown is as was provided to Ascena. The 2014 EPS amount provided by Charming to Barclays reflected more current analysis of the company's net operating losses as reported in its Annual Report on Form 10-K for the year ended January 28, 2012. In the table above, the projections of EBIT, EBITDA, unlevered free cash flow and earnings per share are projections of financial measures that are not calculated in accordance with generally accepted accounting principles (GAAP). The following table provides a reconciliation of each of these non-GAAP financial measures to the most comparable projected financial measure calculated in accordance with GAAP.

Edgar Filing: KRIENS SCOTT - Form 4

(Amounts in Millions)	2012	2013	2014	2015	2016
<b>Net income</b>	<b>\$ 25</b>	<b>\$ 66</b>	<b>\$ 72</b>	<b>\$ 83</b>	<b>\$ 92</b>
Income tax provision	8	7	46	50	55
Interest expense (net)	12	13	5	2	2
<b>Income from operations</b>	<b>\$ 45</b>	<b>\$ 85</b>	<b>\$ 123</b>	<b>\$ 134</b>	<b>\$ 149</b>
Restructure Expense	8	3	3		
<b>EBIT</b>	<b>53</b>	<b>88</b>	<b>126</b>	<b>134</b>	<b>149</b>
Depreciation and Amortization	47	52	67	75	75
<b>EBITDA</b>	<b>* \$ 100</b>	<b>\$ 141</b>	<b>\$ 193</b>	<b>\$ 209</b>	<b>\$ 224</b>

\* Results may not add due to rounding

	2012	2013	2014
<b>Net income per diluted share, on a GAAP basis</b>	<b>\$ 0.21</b>	<b>\$ 0.55</b>	<b>\$ 0.60</b>
Restructure Expense	0.07	0.03	0.02
<b>Net income per diluted share, on a non-GAAP basis</b>	<b>* \$ 0.28</b>	<b>\$ 0.57</b>	<b>\$ 0.61</b>

\* Results may not add due to rounding

(Amounts in Millions)	2012	2013	2014	2015	2016
<b>Net income</b>	<b>\$ 25</b>	<b>\$ 66</b>	<b>\$ 72</b>	<b>\$ 83</b>	<b>\$ 92</b>
Income tax provision	8	7	46	50	55
Interest expense (net)	12	13	5	2	2
<b>Income from operations</b>	<b>\$ 45</b>	<b>\$ 85</b>	<b>\$ 123</b>	<b>\$ 134</b>	<b>\$ 149</b>
Less: Restructure Expense	8	3	3		
Earnings before restructure, interest & taxes	53	88	126	134	149
Illustrative Tax Expense	(20)	(33)	(47)	(50)	(56)
Unlevered Net Income	33	55	79	84	93
Plus: Depreciation and Amortization	47	52	67	75	75
Less: Capital Expenditure	(94)	(104)	(91)	(75)	(75)
Less: Changes in Net Working Capital	38	(29)	5	(5)	(5)
Less: Restructure Expense	(8)	(3)	(3)		
Plus: Decrease in Deferred Tax Asset	8	22	20		
Plus: Illustrative Fashion Bug Proceeds	20				
<b>Unlevered Free Cash Flow</b>	<b>* \$ 44</b>	<b>\$ (7)</b>	<b>\$ 76</b>	<b>\$ 79</b>	<b>\$ 88</b>

\* Results may not add due to rounding

**Item 8. Additional Information.**

Explanation of Responses:

## Edgar Filing: KRIENS SCOTT - Form 4

Item 8 of the Statement is hereby further amended and supplemented by amending and restating the section captioned *Litigation Related to the Merger* to read as follows:

On May 4, 2012, a Verified Shareholder Derivative and Class Action Complaint captioned Pamela Kraus v. Charming Shoppes, Inc., et al., No. 2012-04154, was filed in the Court of Common Pleas of Bucks County, Pennsylvania (the Kraus Complaint). The Kraus Complaint purports to assert claims derivatively on behalf of Charming and names as defendants the members of the Board, as well as Charming and Ascena. The Kraus Complaint alleges, among other things, that Charming's directors breached their fiduciary duties to Charming's shareholders in connection with the Offer and the Merger, and further claims that Ascena aided and abetted those alleged breaches of fiduciary duty. The Kraus Complaint further alleges that Charming's directors engaged in abuse of control and gross mismanagement by entering into the Merger Agreement. The Kraus Complaint also alleges that the Offer and Merger involve an unfair and self-serving sales process with preclusive deal protection devices, and that Charming's directors agreed to the transactions to benefit themselves personally. The Kraus Complaint seeks rescission of the Merger Agreement and injunctive relief, including an order prohibiting defendants from consummating the Offer and Merger, and an award of attorneys' fees and costs, in addition to other relief.

On May 4, 2012, Charming received a letter from counsel for Mario Lamanna (the Demand Letter) demanding that the Board commence an action on behalf of Charming against the individual members of the Board for breaches of fiduciary duty arising out of allegedly wrongful conduct in connection with the Offer and the Merger. Specifically, the Demand Letter asserts that Charming's directors breached their duties of loyalty, care, good faith, and/or candor by causing and/or allowing Charming to be acquired by Ascena for inadequate consideration and by failing to adequately shop Charming before the transaction. The Demand Letter also alleges that Charming's directors agreed to the Offer to benefit themselves personally, approved improper deal protection devices and ignored or failed to protect against conflicts of interest.

On May 7, 2012, a Verified Shareholder Derivative and Class Action Complaint captioned Philip E. Ricciardi v. Charming Shoppes, Inc., et al., No. 2012-04154, was filed in the Court of Common Pleas of Bucks County, Pennsylvania (the Ricciardi Complaint). The Ricciardi Complaint purports to assert both direct and derivative claims and names as defendants the members of the Board, as well as Charming, Ascena and Merger Sub. The Ricciardi Complaint alleges, among other things, that Charming's directors breached their fiduciary duties to Charming's shareholders in connection with the Offer and the Merger, and further claims that Ascena and Merger Sub aided and abetted those alleged breaches of fiduciary duty. The Ricciardi Complaint further alleges that Charming's directors engaged in self-dealing and corporate waste by entering into the Merger Agreement. The Ricciardi Complaint seeks rescission of the Merger Agreement and injunctive relief, including an order prohibiting defendants from consummating the Offer and Merger, and an award of attorneys' fees and costs, in addition to other relief.

On May 14, 2012, Charming received a letter dated May 8, 2012, from counsel for Phillip E. Ricciardi (the Ricciardi Demand Letter) demanding that the Board conduct an investigation and commence an action on behalf of Charming against the individual members of the Board for breaches of fiduciary duty arising out of allegedly wrongful conduct in connection with the Offer and the Merger. The Ricciardi Demand Letter refers to the allegations set forth in the Ricciardi Complaint.

On May 8, 2012, a Verified Class Action and Shareholder Derivative Complaint captioned Mario Lamanna v. Charming Shoppes, Inc., et al., No. 2012-04275, was filed in the Court of Common Pleas of Bucks County, Pennsylvania (the Lamanna Complaint). The Lamanna Complaint purports to assert both direct and derivative claims and names as defendants the members of the Board, Charming, Ascena and Merger Sub. The Lamanna Complaint alleges, among other things, that Charming's directors engaged in waste of corporate assets and breached their fiduciary duties to Charming's shareholders in connection with the Offer and the Merger, and further claims that Ascena and Merger Sub aided and abetted those alleged breaches of fiduciary duty. Specifically, the Lamanna Complaint asserts that Charming's directors wrongfully allowed or caused Charming to be acquired by Ascena for unfair and inadequate consideration. The Lamanna Complaint further alleges that Charming's directors failed to take steps to maximize the value of Charming to its public shareholders, failed to properly value Charming and its assets and operations, and ignored or failed to protect against conflicts of interest with respect to the Offer and Merger. The Lamanna Complaint also alleges that the Offer and Merger involve unfair and preclusive deal protection devices, and that Charming's directors agreed to the transactions to benefit themselves personally. As to the Board's rejection of the Demand Letter, the Lamanna Complaint alleges the Board's rejection was unreasonable, not in good faith, and not protected by the business judgment rule. The Lamanna Complaint seeks rescission of the Merger Agreement and injunctive relief, including an order that prohibits defendants from consummating the Offer and Merger, and an award of attorneys' fees and other fees and costs, in addition to other relief.

On May 9, 2012, a Verified Shareholder Derivative and Class Action Complaint captioned Robert Steinfeld v. Charming Shoppes, Inc., et al., No. 2012-04284, was filed in the Court of Common Pleas of Bucks County, Pennsylvania (the Steinfeld Complaint). The Steinfeld Complaint purports to assert claims derivatively on behalf of Charming and names as defendants the members of the Board, as well as Charming and Ascena. The Steinfeld Complaint alleges, among other things, that Charming's directors breached their fiduciary duties to Charming's shareholders in connection with the Offer and the Merger, and further claims that Ascena aided and abetted those alleged breaches of fiduciary duty. The Steinfeld Complaint further alleges that Charming's directors engaged in abuse of control and gross mismanagement by entering into the Merger Agreement. The Steinfeld Complaint also alleges that the Offer and Merger involve an unfair and self-serving sales process with preclusive deal protection devices, and that Charming's directors agreed to the transactions to benefit themselves personally. The Steinfeld Complaint seeks rescission of the Merger Agreement and injunctive relief, including an order prohibiting defendants from consummating the Offer and Merger, and an award of attorneys' fees and costs, in addition to other relief.

## Edgar Filing: KRIENS SCOTT - Form 4

On May 22, 2012, a Verified Class Action and Shareholder Derivative Complaint captioned John Vineyard v. Charming Shoppes, Inc., et al., No. 2012-04715, was filed in the Court of Common Pleas of Bucks County, Pennsylvania (the Vineyard Complaint ). The Vineyard Complaint purports to assert both direct and derivative claims and names as defendants the members of the Board, Charming, Ascena and Merger Sub. The Vineyard Complaint alleges, among other things, that Charming's directors engaged in waste of corporate assets and breached their fiduciary duties to Charming's shareholders in connection with the Offer and the Merger, and further claims that Ascena and Merger Sub aided and abetted those alleged breaches of fiduciary duties. Specifically, the Vineyard Complaint asserts that Charming's directors wrongfully allowed or caused Charming to be acquired by Ascena for unfair and inadequate consideration. The Vineyard Complaint further alleges that Charming's directors failed to take steps to maximize the value of Charming to its public shareholders, failed to properly value Charming and its assets and operations, and ignored or failed to protect against conflicts of interest with respect to the Offer and Merger. The Vineyard Complaint also alleges that the Offer and Merger involve unfair and preclusive deal protection devices, and that Charming's directors agreed to the transactions to benefit themselves personally. In addition, the Vineyard complaint alleges that the defendants disseminated a materially false and misleading Schedule 14d-9. The Vineyard Complaint seeks rescission of the Merger Agreement and injunctive relief, including an order that prohibits defendants from consummating the Offer and Merger, and an award of attorneys' fees and other fees and costs, in addition to other relief.

On May 23, 2012, an Individual and Class Action Complaint captioned Judith Nadler v. Charming Shoppes, Inc., et al., No. 2:12-cv-02838-HB, was filed in the United States District Court for the Eastern District of Pennsylvania (the Federal Action ). The complaint in the Federal Action names as defendants Charming and the members of the Board. The complaint in the Federal Action alleges, among other things, that defendants disseminated a Schedule 14d-9 in which they made untrue statements of material facts or failed to state all material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading, or engaged in deceptive or manipulative acts or practices. The complaint in the Federal Action also alleges that the Offer and the Merger are on terms that are fundamentally unfair. The Federal Action seeks injunctive relief, including an order that prohibits defendants from consummating the Offer and Merger, and an award of attorneys' fees and other fees and costs, in addition to other relief.

On May 23, 2012, by agreement of the parties, a Stipulation and Order Regarding Consolidation of Related Actions and Appointment of Lead Counsel was filed with the Court of Common Pleas, Bucks County, Pennsylvania with regard to the actions described in the Kraus Complaint, the Ricciardi Complaint, the Lamanna Complaint, the Steinfeld Complaint and the Vineyard Complaint. The court approved the order on May 24, 2012, which consolidated these proceedings before the Court of Common Pleas, Bucks County, Pennsylvania, into a single case captioned In Re Charming Shoppes, Inc. Derivative and Class Action Litigation, No. 2012-04154 (the Consolidated Action ). Also on May 24, 2012, the plaintiffs in the Consolidated Action filed a Verified Amended Class Action and Derivative Complaint (the Amended Complaint ) that purports to assert both direct and derivative claims and names as defendants the members of the Board, Charming, Ascena and Merger Sub. The Amended Complaint alleges, among other things, that Charming's directors engaged in waste of corporate assets and breached their fiduciary duties to Charming's shareholders in connection with the Offer and the Merger, and further claims that Ascena and Merger Sub aided and abetted those alleged breaches of fiduciary duties. Specifically, the Amended Complaint asserts that Charming's directors wrongfully allowed or caused Charming to be acquired by Ascena for unfair and inadequate consideration. The Amended Complaint further alleges that Charming's directors failed to take steps to maximize the value of Charming to its public shareholders, failed to properly value Charming and its assets and operations, and ignored or failed to protect against conflicts of interest with respect to the Offer and Merger. The Amended Complaint also alleges that the Offer and Merger involve unfair and preclusive deal protection devices, and that Charming's directors agreed to the transactions to benefit themselves personally. In addition, the Amended Complaint alleges that the Schedule 14d-9 was materially false and misleading. The Amended Complaint seeks rescission of the Merger Agreement and injunctive relief, including an order that prohibits defendants from consummating the Offer and Merger, and an award of attorneys' fees and other fees and costs, in addition to other relief.

The defendants named in the Consolidated Action and the Federal Action (collectively, the Defendants ) believe that the Consolidated Action and the Federal Action are entirely without merit, and that they have valid defenses to all claims raised by Judith Nadler and the plaintiffs named in the Consolidated Action (collectively, the Plaintiffs ). Nevertheless, and despite their belief that they ultimately would have prevailed in the defense of the Plaintiffs' claims, to avoid the costs, disruption and distraction associated with such litigation, on May 31, 2012, the Defendants entered into a Memorandum of Understanding (MOU ) with the Plaintiffs. Under the MOU, the Plaintiffs and the purported class of Charming shareholders they represent agreed to negotiate and present a final stipulation of settlement to the court presiding over the Consolidated Action which provides for the dismissal with prejudice of the Consolidated Action and the Federal Action and the discharge and release of the Defendants, their agents, advisors and certain affiliated parties from and against all direct, derivative, legal or equitable claims, known and unknown, that are based on, arise out of or relate in any way, directly or indirectly, to the allegations and claims in the Consolidated Action, the Federal Action, the Contemplated Transactions, the negotiations and deliberations related to the Merger Agreement, the various public filings relating to the Contemplated Transactions and certain other potential legal or equitable claims described more fully in the MOU. In exchange for such settlement and release, the parties agreed, after arm's length discussions between and among the Defendants and Plaintiffs, that Charming would include additional supplemental disclosures in the Statement (such disclosures, as well as disclosures not sought by Plaintiffs, being set forth in this Amendment), although Charming and the other Defendants do not make any admission that such additional supplemental disclosures are material as a matter of law or in the context of a shareholder's decision to tender Shares into and accept the Offer. After reaching agreement on the substantive terms of the MOU, the parties also agreed that they would attempt to reach an agreement as to an amount of attorneys' fees and expenses that Charming, or its successor, will pay to Plaintiffs' counsel. If the parties are not able to agree on the amount of fees payable to Plaintiffs' counsel within two weeks of executing the MOU, then Plaintiffs' counsel will seek an award of attorneys' fees and expenses from either the court presiding over the Consolidated Action or the court presiding over the Federal Action, but not both. If agreement is reached on the amount of attorneys' fees and expenses payable to Plaintiffs' counsel, Plaintiffs' counsel will seek an award of attorneys' fees and



## Edgar Filing: KRIENS SCOTT - Form 4

expenses and Charming, or its successor, will pay an amount decided by the court, not to exceed the agreed upon amount. Defendants reserved their right to contest the amount of fees and expenses sought by Plaintiffs' counsel. The settlement is also contingent upon, among other things, consummation of the Contemplated Transactions and the approval of the Court of Common Pleas, Bucks County, Pennsylvania. The MOU recognizes, among other things, that the parties will cooperate and use their best efforts to execute a Stipulation of Settlement and present the Stipulation of Settlement and such other documentation as may be required by the court within thirty (30) days from the date of the MOU in order to obtain court approval of the settlement.

The MOU provides that the Defendants deny that they committed any violation of law or breach of duty or acted improperly in any way, and they believe that they acted properly at all times and that the Consolidated Action and the Federal Action have no merit, but wish to settle the Consolidated Action and the Federal Action in order to avoid the costs, disruption and distraction of further litigation.

Any settlement will not affect the amount of the Offer Price or the Merger Consideration. There can be no assurance that the parties will ultimately enter into a stipulation of settlement or that the Court of Common Pleas, Bucks County, Pennsylvania will approve the settlement even if the parties were to enter into such stipulation. In such event, the proposed settlement as contemplated by the MOU may be terminated. In the event that the MOU is not approved and the conditions described above are not satisfied, the Defendants will continue to vigorously defend the Consolidated Action and the Federal Action.

This summary of the MOU does not purport to be complete and is qualified in its entirety by reference to the MOU, which is filed as Exhibit (d)(5) to the Statement and which is incorporated herein by reference.

### **Item 9. Exhibits.**

Item 9 is hereby amended and supplemented by adding the following thereto:

- (d)(5) Memorandum of Understanding, In Re Charming Shoppes, Inc. Derivative and Class Action Litigation, No. 2012-04154, dated May 31, 2012

**SIGNATURE**

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

**CHARMING SHOPPES, INC.**

By: /s/ Anthony M. Romano  
Name: Anthony M. Romano  
Title: Chief Executive Officer and President

Dated June 1, 2012

S-1