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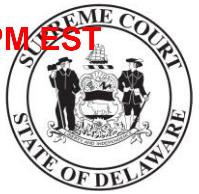

# IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ELIZABETH MORRISON,<br>Individually and on Behalf of All Others<br>Similarly Situated, | ) | |
| Plaintiff-Below, Appellant, | ) | No. 445, 2017 |
| v. | ) | Court Below: Court of Chancery of the State of Delaware, |
| RAY BERRY, RICHARD A. ANICETTI, MICHAEL D. CASEY, JEFFREY NAYLOR, RICHARD NOLL, BOB SASSER, ROBERT K. SHEARER, MICHAEL TUCCI, STEVEN TANGER, JANE THOMPSON and BRETT BERRY, | ) | C.A. No. 12808-VCG<br><br>PUBLIC VERSION --<br>FILED: JANUARY 25, 2018 |
| Defendants-Below, Appellees. | ) | |

## DIRECTOR DEFENDANTS-BELOW/APPELLEES' ANSWERING BRIEF

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## NATURE OF PROCEEDING

As the Chancery Court observed in its September 28, 2017 decision ("Opinion" or "Op.") dismissing Plaintiff's Complaint, this matter is an "exemplary case" of the utility of this Court's *Corwin* doctrine. Op. at 3 (citing *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015)).

The transaction at issue here, the acquisition of The Fresh Market, Inc. ("TFM" or the "Company") by affiliates of Apollo Global Management, LLC ("Apollo"), consisted of a cash tender offer, followed by a cash merger, pursuant to 8 *Del. C.* § 251(h). The transaction was approved by a majority of the Company's fully-informed stockholders after a committee of independent members of TFM's independent board of directors (the "Board") ran a robust sales process and secured a deal price at a large premium over the preannouncement trading price of the Company's stock.

Plaintiff filed a verified putative shareholder class action complaint on October 6, 2016 (the "Complaint"). In her Complaint, Plaintiff alleged that the stockholder vote was uninformed because the Company failed to fully disclose certain early communications between Apollo and the Company's founder and Board chairman, Ray Berry, which allegedly impacted the sales process. Plaintiff also alleged that the Company's financial disclosures were inadequate.

The Chancery Court dismissed the Complaint on September 28, 2017, noting that the "problem with the Plaintiff's argument is that the *facts* regarding Berry's involvement with Apollo were disclosed." *Id.* at 6. The Chancery Court also determined that the alleged disclosure deficiencies regarding the financial projections were meritless because the Company hired an independent financial advisor, J.P. Morgan Securities LLC ("J.P. Morgan"), to provide a fairness opinion. J.P. Morgan "used management projections, engaged in a DCF analysis, and determined that the purchase price was within the range of fairness," and "nothing indicates that the management projections or J.P. Morgan's analysis are anything other than their best estimates, which were adequately described." *Id.* at 4-5 (internal footnotes omitted).

Plaintiff now appeals the Chancery Court's dismissal of the Complaint. As described below, this Court should affirm this dismissal based on *Corwin* and its progeny. Alternatively, this Court should affirm dismissal as to the Director Defendants[1] because Plaintiff has failed to plead a non-exculpated breach of the duty of loyalty.

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[1] References herein to the "Director Defendants" refer to all defendants in this action other than Ray and Brett Berry.

## STATEMENT OF FACTS

The alleged facts demonstrate that the Company's independent Board members fulfilled their fiduciary duties in securing a premium deal, which was approved by a fully-informed majority of TFM's stockholders following a comprehensive sales process and thorough strategic and financial review.[2]

### A. Background

Throughout 2015, TFM, a specialty grocery retailer, experienced a steady decline in stock price and store sales that reflected downward trends facing the specialty food retail industry generally. A43.[3] On September 1, 2015, the Board announced that it had named Richard Anicetti as the Company's CEO and appointed him to the Board. A149 (¶ 39). His fellow Board members (all defendants in this action) were Ray Berry (the Company's founder and then-

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[2] The Complaint relies upon and incorporates by reference certain documents produced to Plaintiff in response to her prior demand for the production of books and records under 8 *Del. C.* § 220. As such, the Court may rely on these documents in connection with the motion to dismiss. *See Freedman v. Adams*, 2012 WL 1345638, at *16 (Del. Ch. Mar. 30, 2012); *see also Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016).

[3] References to "A__" are to pages in the Appendix to Appellant's Opening Brief. References to "B__" are to pages in the Appendix to the Director Defendants-Below/Appellees' Answering Brief. References to "¶__" refer to paragraphs of the Verified Complaint, which begins at A135. References to Appellant's Opening Brief appear in the format "OB __."

Chairman of the Board) and eight independent directors. A146-47 (¶¶ 23-32). Mr. Anicetti immediately began working with management to develop a long-term strategy to improve the Company's performance. A75.

### B. Apollo's Initial Indication of Interest

On October 1, 2015, Apollo submitted a non-binding and unsolicited indication of interest to acquire TFM in an all-cash transaction for $30 per share. A150 (¶ 44); A75. Apollo stated in its submission that Ray Berry and his son, Brett Berry (who was neither an employee nor director of the Company at the time, A147 (¶ 34)), supported Apollo's acquisition efforts and had expressed their desire to roll over their minority equity stake if the Company agreed to the proposed transaction. A150 (¶ 44).

The Company's General Counsel then spoke to Ray Berry, who confirmed that he (i) had told Apollo during conversations in the preceding months that he would consider an equity rollover depending on the terms of any eventual transaction; (ii) would be willing to sell his shares for cash in a transaction supported by the Board; (iii) was not committed to a transaction with Apollo; and (iv) was not working exclusively with Apollo. A151 (¶ 46); A75.

### C. Formation of the Strategic Transaction Committee

On October 15, 2015, the Board met to discuss Apollo's submission. A151 (¶ 46). The Company's General Counsel reported the details of his conversation with Ray Berry to the Board, which Mr. Berry confirmed. A75-76. Mr. Berry then recused himself from the meeting and provided written waiver of notice of any Board meeting where any potential acquisition was to be discussed. *Id*. Thereafter, the Board decided to wait until management completed its strategic plan before replying to Apollo's offer. A152-53 (¶¶ 50-51). The Board also created a Strategic Transaction Committee (the "Committee") to review and evaluate communications from stockholders (including a letter received from stockholder Neuberger Berman LLC encouraging a review of strategic alternatives) and to make recommendations to the Board regarding Apollo's proposal and any other proposals from third parties. A154 (¶ 53).

The Board appointed three independent directors to the Committee. A76. The Board also retained an independent financial advisor, J.P. Morgan, and independent counsel, Cravath, Swaine & Moore LLP and Richards, Layton and Finger P.A., to assist with the strategic review. *See id.*; A77.

### D. News Report of Apollo's Proposal and Continued Work on Strategic Plan

On October 16, 2015, a news report was published based on information leaked from an unknown source, alleging that Ray Berry had contacted private equity firms and that Apollo had agreed to work with the Berrys in a deal. A154 (¶ 54). In light of the public report, Apollo communicated to TFM that it wished to accelerate consideration of its offer.

The Board met on October 18 to discuss a response and decided to issue a press release announcing that it would conduct a review of "strategic and financial alternatives," including a potential sale. A155 (¶¶ 55-56). The Board separately informed Apollo that its proposal would be evaluated during this strategic and financial review. A77. On October 21, Apollo withdrew its proposal. A156 (¶ 60).

Over the ensuing six weeks, TFM's management worked on the strategic plan with a retained outside consultant, McKinsey & Co. ("McKinsey"). The Committee met regularly with management, legal counsel, J.P. Morgan, and McKinsey regarding the development of the strategic plan and accompanying forecasts. A156-57 (¶ 62); A77.

### E. Renewal of Apollo's Proposal

On November 25, 2015, Apollo renewed its proposal to acquire TFM in an all-cash transaction at $30 per share and represented that its proposal was made "together with Ray Berry and Brett Berry." A158 (¶ 65). In response, the Company directed its counsel to clarify Ray Berry's position with respect to Apollo. *Id.* (¶ 66).

In a November 28 email, Ray Berry's counsel told TFM that, with respect to Ray Berry's communications with Apollo, "[s]ince Apollo withdrew its earlier offer in October, Mr. Berry has had one conversation with Apollo. During that conversation, he agreed, as he did in October, that, in the event Apollo agreed on a transaction with TFM, he would roll his equity interest over into the surviving entity. Apollo determined the price that was offered. Mr. Berry's agreement with Apollo is oral. They have no written agreement." A40. The email also reiterated Ray Berry's view, first shared with the Board in October, that Apollo was "uniquely qualified to generate value" because of its recent success with another specialty grocer. *Id.*; *see* A31.

### F. Management Presents the Strategic Plan to the Board

During a two-day Board meeting held on December 1-2, 2015, TFM's management and McKinsey presented the strategic plan and accompanying

financial forecast, referred to as the "November 17 Management Case." A44-45. Management also reviewed with the Board the Company's declining Q3 FY2015 performance and expected continued decline in Q4. A43. McKinsey projected that a turnaround pursuant to management's strategic plan would take several years. A45. J.P. Morgan presented its own financial analysis, which included illustrative sensitivities it had performed on the November 17 Management Case, and various approaches for the Company moving forward. A161 (¶ 73); A185 (¶ 127).

The Board then expanded the Committee's authority and directed it to commence a process to gauge third-party interest in the Company. A161-62 (¶ 74).

### G. Solicitation of Initial Indications of Interest

The Committee and its advisors initiated the process authorized by the Board, and J.P. Morgan ultimately canvassed 32 potential bidders, including nine strategic parties. A79-80. Throughout the process, the Committee met 19 times.

Early in the process, the Company's counsel "informed Mr. Berry's counsel that it would be important to the integrity of any sales process that J.P. Morgan be able to confirm to all potentially interested parties . . . that Mr. Berry was not working exclusively with any one bidder and that he would be available to discuss

an equity rollover with any winning bidder, and that no participants in the process would be permitted to speak with Mr. Berry regarding these matters until authorized." A79. Mr. Berry agreed to abide by this process and there is no allegation that he did not adhere to these terms. A162-63 (¶¶ 75-76).

Twenty-one potential bidders entered into confidentiality agreements and received process letters from the Company. A80. Those letters set a January 25, 2016 deadline for submitting indications of interest. The letters also indicated that Ray Berry was open to discussing a rollover with any advancing party and that rollover discussions would not be allowed until all interested bidders had submitted definitive proposals. A164 (¶ 80). There is no allegation that any bidder expressed concern with this structure. A64-65, 166-67 (¶¶ 80-81, 86).

**H. Submissions of Initial Indications of Interest**

Five bidders (including one strategic party) submitted indications of interest by the January 25, 2016 deadline. A80. Those submissions — at a time when TFM's share price was $18.46 per share — ranged from $24 to $31.25 per share. A81. Apollo submitted the highest offer, but its offer was contingent on the Company granting it exclusivity for a three-week period. *Id.* The Company refused to do so and instead focused on soliciting additional bids. A82.

### I. Management's Report of Continued Declining Performance and Waning Bidder Interest

On February 2, 2016, the Board began a two-day meeting during which management reported continued declining performance results and conveyed its expectation that the Company's operating performance would continue to decline moving forward. B86-87.

Also in early February, another strategic party provided a preliminary indication of interest. The Committee decided to include that strategic party's submission in the process (although it was after the submission deadline) and permitted it to receive due diligence. A82-83. After receiving this diligence, the strategic party withdrew from the process because "TFM was in the early stages of a turnaround that would require significant work in execution." A85.

On February 25, the Committee noted that several bidders had expressed concern over the high degree of perceived execution risk for the strategic plan. B100. The Committee "discussed the need for additional scenario analyses with respect to the management base case forecast developed in November 2015 in light of the [Company's] recent business performance and risks relating to the [Company's] ability to execute on its strategic plan, as well as the trends facing the specialty food retail industry as a whole." B101-102. The Committee then

instructed management to develop additional financial projection scenarios reflecting updated projected performance data. A86.

In late February, the remaining strategic bidder asked to discuss a joint bid with two of the remaining financial bidders. The Committee permitted these talks in hopes of spurring additional bids. B100-101. On March 3, 2016, the Committee discussed the possibility that the remaining strategic bidder would be unable to reach an agreement with either financial party in the near term. A87.

### J. Apollo's Acquisition of TFM

On March 8, 2016, Apollo submitted a definitive proposal for $27.25 per share. A167 (¶ 88). This bid was not contingent on an equity rollover by the Berrys. A168 (¶ 89). Apollo stated that it had lowered its prior bid based on several factors, including worse-than-anticipated Q1 FY2016 performance results, diligence showing that the Company would require a more significant turnaround period than previously anticipated, and market conditions making debt financing more difficult. A167 (¶ 88); A88. These reasons were consistent with concerns expressed by other bidders throughout the process. *See* B100.

In response, the Committee demanded a better offer. *See* A169 (¶ 90). On March 9, Apollo submitted a "best and final offer" that included a 21 day go-shop period and an increased price of $28.50. *Id.* (¶ 91); A89. Apollo's offer was fully

financed and not conditioned on a rollover agreement with the Berrys, although Apollo reiterated its desire to negotiate a potential equity rollover. A169 (¶ 91); A89. The Committee then permitted supervised discussions among the Berrys and Apollo. A169 (¶ 91).

On March 10, the Committee met to discuss Apollo's revised final offer. A170 (¶ 92). At that meeting, management and J.P. Morgan presented updates on the Company's performance, forecast, and valuation and reviewed the preliminary Q1 results, which showed performance falling below the strategic plan. A170-71 (¶¶ 92-96). The Committee also reviewed the Adjusted Scenarios created by management in response to the Committee's February 25 request. The Adjusted Scenarios included (i) an adjusted comparable growth scenario reflecting the risk to revenue, (ii) a downward-adjusted gross margin scenario, and (iii) a combined comparable growth and gross margin scenario. B106; *see* A170-71 (¶ 95). That same day, the Committee discussed that the remaining strategic party was unlikely to reach agreement with the remaining financial parties to submit a joint bid. A90. Also on March 10, Apollo's counsel forwarded to TFM's counsel a draft rollover, contribution and exchange agreement, which TFM's counsel relayed to the Berrys' counsel. A171 (¶ 98).

On March 11, after learning that the remaining strategic bidder was no longer interested in a transaction, the Board met to review Apollo's final offer. A90. After receiving J.P. Morgan's Fairness Opinion and a recommendation from the Committee, the Board voted in favor of the Merger, conditioned upon the stockholders tendering a majority of the Company's outstanding shares at a price of $28.50 per share. A91.

The 21 day go-shop period then commenced during which J.P. Morgan reached out to 32 potential bidders, but no other bids emerged. B79. Meanwhile, Apollo engaged in negotiations with the Berrys regarding a rollover agreement. *See* A172 (¶ 106). In addition, the Company issued a Schedule TO and a 14D-9 containing extensive information concerning the transaction's background, the basis for the Committee's recommendation, and J.P. Morgan's Fairness Opinion. The Company later issued an amendment to the 14D-9 containing even more detail. A74-108; A127; B76-84.

The Tender Offer expired on April 21, 2016. Approximately 68.2% of the outstanding shares validly tendered and another 9.5% delivered Notices of Guaranteed Delivery. B111-116.

## SUMMARY OF ARGUMENT

**I.** ***Denied.*** As the Chancery Court concluded, this case presents an "exemplary" application of the *Corwin* doctrine, which establishes that "there is little utility in a judicial review of a corporate merger in which an uncoerced and fully informed vote of the common stockholders has ratified a decision of the directors that the merger is in the stockholders' best interest." Op. at 3-4 (citing *Corwin*, 125 A.3d at 306). As the Chancery Court found, the Company fully disclosed the *facts* regarding Ray Berry's involvement with Apollo and the structure of the sales process; it is only Plaintiff's self-serving gloss on those facts that was not disclosed. Op. at 6-7. The Company also disclosed detailed information regarding the basis for management's forecasts and J.P. Morgan's Fairness Opinion. *See id*. at 5. Accordingly, any purported omissions were immaterial. Thus, because the disclosures fully informed stockholders in deciding whether to tender their shares, and there is no allegation of stockholder coercion, the business judgment rule applies.

**II.** Alternatively, this Court should affirm the Chancery Court's dismissal of the Complaint as to the Director Defendants on the independent basis that Plaintiff has failed to plead a non-exculpated breach of fiduciary duty. The Company's certificate of incorporation contains an exculpatory provision, and

Plaintiff has not sufficiently alleged that a majority of the Board members were interested in the transaction or acted in bad faith by consciously disregarding their duties in approving the transaction.

## ARGUMENT

### I. This Court Should Affirm the Chancery Court's Dismissal of Plaintiff's Complaint Under *Corwin*.

#### A. Question Presented

Did the Chancery Court correctly conclude that the Merger was approved by a fully informed, uncoerced vote of the disinterested stockholders, such that dismissal of Plaintiff's complaint was proper under *Corwin*? B1-75, 121-163.

#### B. Scope of Review

This Court's review of the Chancery Court's decision to dismiss the Complaint is *de novo*. *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

#### C. Merits of Argument

Under *Corwin*, when a transaction "not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." *Corwin*, 125 A.3d at 309, 314; *see In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 747 (Del. Ch. 2011), *aff'd*, 156 A.3d 697 (Del. Feb. 9, 2017) (TABLE)) (extending *Corwin* to tender offers). Here, a majority of disinterested stockholders tendered their outstanding shares, approving the Merger. Plaintiff argues that misstatements and omissions in the disclosures nevertheless preclude application of *Corwin*.

As the Chancery Court found, however, Plaintiff's arguments fail for several reasons. *First*, the allegedly omitted material *facts* were disclosed. *See* Op. at 5-8; *infra* at §§ I(C)(1)(a); C(2). *Second*, to the extent that the alleged omissions relate to inferences that Plaintiff draws based on the disclosed facts, the Company's disclosures were not required to include "the gloss on those facts that the Plaintiff supplies." Op. at 8-10; *infra* at § I(C)(1)(b)(i). *Third*, the other alleged disclosure deficiencies fail to satisfy the materiality threshold, which requires a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Malpiede*, 780 A.2d at 1086; Op. at 8-9, *infra* at §§ I(C)(1)(b)(ii)-(iv).

Neither category of disclosure deficiencies alleged by Plaintiff – (i) those relating to Ray Berry's involvement with Apollo nor (ii) those relating to the Company's financial projections – precludes application of *Corwin*.

### 1. Plaintiff's Allegations Relating to Ray Berry Are Unavailing.

#### a. The Material Facts Relating to Ray Berry's Involvement with Apollo Were Fully Disclosed.

Plaintiff claims that "Ray Berry's full involvement with Apollo was not disclosed to the stockholders." OB at 39. As the Chancery Court found, however,

"the *facts* regarding Berry's involvement with Apollo were disclosed." Op. at 6. These factual disclosures were extensive and fully covered Ray Berry's involvement with Apollo.

#### i. Disclosures Relating to Apollo's Initial Indication of Interest

The disclosures informed stockholders of the following detailed information regarding Ray Berry's involvement with Apollo prior to Apollo submitting its initial unsolicited indication of interest to TFM on October 1, 2015:

> On July 3, 2015, Andrew Jhawar, a senior partner of Apollo Management, L.P., . . . had a general discussion with Ray Berry, the Chairman of the Board of The Fresh Market about current conditions in the food retail industry. . . . Mr. Jhawar discussed with Mr. Berry in general terms various potential transactions involving The Fresh Market. Mr. Berry stated that while he would be willing to consider, he was not in a position to do so at that time.
>
> On September 4, 2015, Mr. Jhawar contacted Ray Berry to tell him that [Apollo] . . . , remained interested in acquiring The Fresh Market and to ask Mr. Berry if he was in a position to make a decision at that time about participating in such a transaction. Mr. Berry advised Mr. Jhawar that, while any transaction would ultimately be a decision for the Board of The Fresh Market and that he would be open to considering either an equity rollover or a cash sale of his stake, he was interested in engaging in discussions with [Apollo] about such a transaction and recommended that Mr. Jhawar contact his son, Brett

> Berry, to explore various structural alternatives for an equity rollover transaction.
>
> Mr. Jhawar and Brett Berry had several communications regarding potential transaction structures.

A129 (Schedule TO at 27).

> On September 25, 2015, Mr. Jhawar placed a call to Ray Berry and Brett Berry to inform them that [Apollo] would be sending an offer letter to The Fresh Market and to inquire if they remained interested in pursuing a transaction and whether they were in a position to confirm they would participate in such a transaction. Ray Berry and Brett Berry indicated they were interested in such a transaction, but also indicated that they would like to retain the flexibility to participate in a similar transaction with other potential transaction partners in the event that [Apollo]'s proposal was not well received by The Fresh Market Board.

A130 (Schedule TO at 28).

> On October 1, 2015, the Board received an unsolicited preliminary non-binding indication of interest from [Apollo] . . . proposing to acquire TFM in an all-cash transaction for a purchase price of $30.00 per share. . . . [Apollo]'s proposal stated that [Apollo] had discussed with Ray Berry, the chairman of the Board, and his son Brett Berry, who collectively owned approximately 9.8% of TFM's outstanding common stock as of the date of the proposal, the opportunity to roll over their TFM shares in a transaction with [Apollo]. [Apollo]'s letter also included a reference that [Apollo] and Messrs. Ray and Brett Berry would be working in an exclusive partnership in connection with a potential acquisition of TFM.

A75 (14D-9 at 17).

> On October 5, 2015, Scott Duggan, TFM's Senior Vice President—General Counsel, reached out to Ray Berry to clarify Mr. Berry's relationship with Apollo and his interactions with Apollo prior to [its] submission of its October 1st proposal. Mr. Berry informed Mr. Duggan that he had engaged in three separate conversations with a representative of [Apollo] regarding a potential transaction.

*Id.*

As a result of these disclosures, stockholders were provided ample information regarding discussions among Apollo, Ray Berry, and Brett Berry prior to Apollo's October 1 indication of interest, as well as Ray Berry's involvement with that submission.

**ii. Disclosures Relating to Discussion at the October 15, 2015 Board Meeting Regarding Apollo's Initial Offer**

The disclosures similarly contained detailed information regarding the discussion at TFM's October 15, 2015 Board meeting relating to Apollo's initial offer, including that:

> Mr. Duggan reported to the Board his conversation with Mr. Berry which had taken place after the October 1st proposal was received and Mr. Berry, who was in attendance for this portion of the meeting, confirmed the same facts for the Board. Mr. Berry reiterated that he had not committed to any transaction with [Apollo] (or any other potential bidder), that he had communicated to

> [Apollo] that he would only participate in a transaction that was supported by the Board and that he would also be willing to sell his shares to any potential purchaser for cash in a Board-supported transaction. Mr. Berry informed the other members of the Board that, in light of the reference to him in the [Apollo] proposal and his desire to possibly rollover his equity interest in any Board-supported transaction, he would recuse himself from the Board meeting so that the members of the Board could engage in a discussion without him present.

A75-76 (14D-9 at 17-18).

> On October 15, 2015, [Apollo] sent a follow-up letter to the Board, reaffirming the October 1st proposal . . .. [Apollo] stated that it was making the proposal together with Ray Berry and Brett Berry.

A130 (Schedule TO at 28).

Thus, stockholders were told that (i) Apollo's proposal had been discussed at the October 15, 2015 Board meeting, (ii) according to Apollo's letter, the Berrys had made the proposal with Apollo, and (iii) Ray Berry recused himself from the Board meeting so the other Board members could discuss Apollo's offer without him present.

#### iii. Disclosures Relating to News Report of Talks Between Ray Berry and Apollo

The disclosures further described the October 16, 2015 news report that Plaintiff alleges led other bidders to believe that TFM was "working exclusively" with Apollo:

> On October 16, 2015, before TFM had conveyed the Board's response discussed at the October 15, 2015 meeting to [Apollo], a news outlet published an article speculating that Ray Berry was exploring a bid to take TFM private with the help of a private equity firm and that [Apollo] had agreed to work with Mr. Berry on a potential offer for TFM.

A76 (14D-9 at 18).

Accordingly, stockholders were made aware that there was public speculation regarding Ray Berry's involvement with, and potential preference for, Apollo as early as October 2015.

#### iv. Disclosures Relating to Apollo's November 25 Proposal and Ray Berry's November 28 Email.

The disclosures further described Apollo's November 25, 2015 proposal that renewed Apollo's prior preliminary non-binding indication of interest and the November 28 email from Ray Berry's counsel's to TFM's counsel. Specifically, the disclosures stated that:

> On November 20, 2015, Mr. Jhawar, Ray Berry and Brett Berry discussed a potential equity rollover transaction.

> Ray and Brett Berry informally stated that, if [Apollo] were to be successful in agreeing to a transaction with The Fresh Market, they would participate in an equity rollover, subject to diligence and agreement on terms.
>
> On November 25, 2015, [Apollo] sent a letter to the Board reaffirming its prior preliminary non-binding indication of interest . . . to acquire [TFM] in an all-cash transaction for a purchase price of $30.00 per share. [Apollo] stated that it was making the proposal together with Ray Berry and Brett Berry . . ..

A130 (Schedule TO at 28).

> After receiving the November 25th letter from [Apollo], representatives of Cravath and Richards Layton contacted Mr. Berry's legal counsel to determine if [Apollo]'s proposal accurately reflected any arrangement between [Apollo] and Messrs. Ray and Brett Berry.
>
> . . .
>
> On November 28, 2015, Mr. Berry's counsel contacted [TFM counsel], and stated that since [Apollo]'s earlier offer had expired on October 20, 2015, Mr. Berry had engaged in one conversation with [Apollo], and during that conversation he had agreed that he would roll his equity interest over into the surviving entity if [Apollo] were to be successful in agreeing to a transaction with TFM. Mr. Berry's counsel said that the arrangement was oral and there was no written agreement. Mr. Berry's counsel also said that in the event that another buyer, and not equity funds managed by [Apollo], were to acquire TFM, Mr. Berry would also consider rolling his equity interest over in such a transaction.

A78 (14D-9 at 20).

Thus, contrary to Plaintiff's assertions, the disclosures clearly support the Chancery Court's finding that "a review of the SEC filings indicates that Berry's involvement with Apollo was disclosed to the stockholders." Op. at 7.

**b. Any Purported Omissions Related to Ray Berry Were Immaterial to the Stockholders' Decision to Tender.**

**i. Ray Berry's Purported Favoritism Toward Apollo was Immaterial and Did Not Affect the Sales Process or Its Outcome.**

Plaintiff alleges that (i) Ray Berry "favored" Apollo and this supposed favoritism was not disclosed; (ii) Ray Berry had a secret "agenda" to force a sale to Apollo, and the Board's "acquiescence" to that agenda compromised the auction process; and (iii) the sales process was structured to prevent Berry's communication with potential bidders because "[t]he Board did not trust Ray Berry not to discourage competing bids" and this rationale was likewise not disclosed. OB 37, 38-39. Plaintiff claims that such disclosure would have raised questions about the "Board's decision to undertake a sale process" and the "robustness of [the] sale process" itself. *Id.* at 38.

As an initial matter, any favoritism Ray Berry harbored for Apollo was not material to the stockholders because "for purposes of adequate disclosure to cleanse, disclosure to the stockholders of [a board member's] subjective intent with respect to hypothetical bidders is not material to the stockholders." *In re Merge*

*Healthcare, Inc. S'holders Litig.*, 2017 WL 395981, at *13 (Del. Ch. Jan. 30, 2017); *see also In re OM Grp., Inc. S'holders Litig.*, 2016 WL 5929951, at *15 n.84 (Del. Ch. Oct. 12, 2016) ("Plaintiffs do not cite a single case, and I am aware of none, in which a remote potential conflict of a single fiduciary was deemed *per se* material."); *cf. In re MONY Grp. Inc. S'holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004) ("[D]isclosures relating to the Board's subjective motivation or opinions are not *per se* material, as long as the Board fully and accurately discloses the facts material to the transaction.").

Further, all of the essential facts surrounding the structure of the auction were fully disclosed to the stockholders. Specifically, the 14D-9 disclosed Ray Berry's conversations with Apollo prior to the start of the sales process and his expressed willingness to roll over his shares should Apollo be successful in a transaction with TFM. A75, 78 (14D-9 at 17, 20). The 14D-9 further disclosed that Ray was recused from all Board Meetings from October 2015 up to the announcement of the Merger. A76-77 (14D-9 at 18-19). Most importantly, it further stated that the Committee determined, at the outset of the sales process, "that it would be important to any process that all bidders be made aware that Mr. Berry was not working with any party in the process on an exclusive basis" and that counsel for TFM confirmed with counsel for Mr. Berry that he would "agree

not to engage in any discussions regarding an equity rollover with any potentially interested party, including [Apollo], until authorized to do so by TFM."[4] A79 (14D-9 at 21). Accordingly, the structure of the auction was fully disclosed, and nothing about this structure gives any credence to Plaintiff's statement in her Opening Brief (OB at 6) that the independent Board was coerced by Ray Berry.[5] Thus, Mr. Berry's supposed subjective preference would not have influenced the Board's ultimate decision to enter the Merger Agreement or the stockholders' ultimate decision to tender.

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[4] To the extent Plaintiff now argues that the auction process did not adhere to best practice for a "management buyout" (OB at 38), this allegation is inapposite because this was not a "management buyout." That term refers to a transaction where management, not a sole minority stockholder, has a proprietary interest as a purchaser (as the article Plaintiff cites to support her "net-buyer theory" itself recognizes, *see* Guhan Subramanian, *Deal Process Design in Management Buyouts*, 130 HARV. L. REV. 590, 591 n.1 (2016)). Moreover, this allegation was not made in the Complaint, and reflects an assessment stockholders were capable of making based on publicly available information, including the Company's disclosures.

[5] Notably, Plaintiff has not alleged that the *stockholder* vote was coerced, and the Chancery Court observed that it was not. *See* Op. at 3 ("Here there was no coercion applied to the stockholder vote"). Moreover, to the extent Plaintiff alleges that Ray Berry secretly manipulated the Board through a long-term scheme to oust the prior CEO and ensure that his "preferred" acquirer would prevail in the sales process, these allegations are not reasonably conceivable, as the Chancery Court readily concluded. *See* Op. at 9, n.54.

Moreover, as the Chancery Court concluded, Plaintiff's allegation that the supposed favoritism of Ray Berry toward Apollo affected the auction process is "self-defeating" and a "non sequitur." Op. at 7. Plaintiff's theory is that the prohibition against bidders speaking with Ray Berry during the process chilled the auction because an October 16, 2015 news article "gave auction participants reason to suspect that Ray Berry was working with Apollo, and they knew they were restricted from talking to Ray Berry during the sale process."[6] OB at 39. As the Chancery Court observed, the problem with this logic is that, even if Plaintiff were correct that the October 1 article was sufficient to depress bidding (which is not a reasonable inference), the stockholders would likewise have been aware of this "chilling" because the article was publicly available and the 14D-9 expressly disclosed it. A76 (14D-9 at 18); *see In re Trulia, Inc. S'holder Litig.*, 129 A. 3d 884, 905 (Del. Ch. 2016) (recognizing that publicly-available information is part of the total mix of information).

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[6] The Director Defendants in no way concede that the auction structure in fact had such a chilling effect. Indeed, the process was so broad-based that "[o]n February 4, 2016, J.P. Morgan received a written unsolicited preliminary non-binding indication of interest, based on publicly available information, from a private equity firm which had investments in food retail companies . . . to acquire TFM in an all-cash transaction at a price range of $27.00 to $30.00 per share." A82-83 (14D-9 at 24-25).

Consequently, even if, as Plaintiff alleges, the Board commenced or structured the sales process in acquiescence to pressure from Ray Berry, the stockholders were fully apprised of the precise information that allegedly affected the bidding, and the stockholders were free to refuse to tender. This is the very purpose of the *Corwin* doctrine: where "the real parties in interest — the disinterested equity owners — can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them." *Corwin*, 125 A.3d at 313.

**ii. The Alleged Omissions Regarding the October 15, 2015 Board Meeting Fail to Support Plaintiff's Claim.**

Plaintiff alleges that the disclosure documents omitted the following facts relating to the October 15, 2015 TFM Board meeting: Ray Berry "(i) falsely denied having an agreement with Apollo, (ii) claimed to be unaware of the substance of conversations between Brett Berry and Apollo, and (iii) stated that he would be uncomfortable rolling over his equity with anyone other than Apollo." OB at 5. However, as the Chancery Court found, these alleged disclosure violations do not diminish the cleansing effect of *Corwin*.

*First*, the disclosures plainly informed *stockholders* of an oral agreement between Ray Berry and Apollo in fall 2015 that Ray Berry would roll over his equity interest if Apollo's bid were accepted. Specifically, the disclosures informed stockholders that Ray Berry's counsel had informed TFM's Board on November 28, 2015 that:

> Mr. Berry had engaged in one conversation with [Apollo], and during that conversation he had agreed that he would roll his equity interest over into the surviving entity if [Apollo] were to be successful in agreeing to a transaction with TFM. Mr. Berry's counsel said that the arrangement was oral and there was no written agreement.

A78 (14D-9 at 20). Thus, even if the Board did not learn this until November 28, 2015, the stockholders knew at the time they tendered their shares that Ray Berry had a conversation with Apollo prior to November 28 in which he orally agreed to roll his equity interest into the surviving entity if Apollo's bid were successful. *See also infra* at 30 (addressing why Ray Berry's counsel's November 28 email does not support Plaintiff's allegation of a "lie"). Moreover, as the Chancery Court concluded, "[m]ore importantly, whether Berry initially was forthcoming about his relationship with Apollo, . . . his position as of the time of the auction process and go-shop—that is, at the time material to stockholders—was adequately disclosed." Op. at 8.

*Second*, the disclosures explicitly stated that Ray Berry told Apollo in September 2015 that he "was interested in engaging in discussions with [Apollo] about such a transaction and [Ray] recommended that Mr. Jhawar [of Apollo] contact his son, Brett Berry, to explore various structural alternatives for an equity rollover transaction." A129 (Schedule TO at 27). The disclosures then stated that Apollo represented in its October 1, 2015 submission that the submission was made based on discussions with Ray and Brett Berry. A130 (Schedule TO at 28). Nothing more about Ray Berry's knowledge of Apollo's conversations with Brett Berry would have been material to the total mix of information available. *See Merge*, 2017 WL 395981, at *9 ("'Fully informed' does not mean infinitely informed. . . .").

*Third*, nothing in the October 15, 2015 Board minutes quoted by Plaintiff suggests that Ray Berry ever stated that he would be uncomfortable rolling over his shares with another acquirer. In fact, the disclosures accurately reported that Ray Berry's counsel told the Board before the beginning of the auction process that if a purchaser other than Apollo were to acquire TFM, Ray Berry "would also consider rolling his equity interest over in such a transaction." A78 (14D-9 at 20). Plaintiff's inference to the contrary is drawn out of thin air, and TFM was under no obligation to disclose such unreasonable assumptions. *See Skeen v. Jo-Ann Stores,*

*Inc.*, 750 A.2d 1170, 1173 (Del. 2000) ("Unsupported conclusions and speculation are not a substitute for facts."). Nor, if true, would this statement have impacted the sales process. The bidders were all informed that no bidder could discuss potential rollovers with Ray Berry until final bids were received, and these parameters were fully disclosed to the stockholders. *See supra* § I(C)(1)(b)(i).

**iii. The Alleged Omissions Relating to Ray Berry's Counsel's November 28 Email Do Not Affect Whether the Tender Offer was Fully Informed.**

Plaintiff claims that the disclosures omitted that "on November 28, Ray Berry's counsel (i) admitted that Ray Berry had orally agreed in October to roll over his equity if Apollo bought [TFM], [(ii)] attested to Ray Berry's belief that Apollo was uniquely qualified among private equity firms, and (iii) conveyed Ray Berry's threat to sell his stake if the Company remained public." OB at 5. Plaintiff further asserts that the Board learned on November 28 that Mr. Berry had lied to them regarding his agreement with Apollo yet nevertheless "acquiesced" to a sale to Apollo and that this basis for the Board's decision was not disclosed in the 14D-9. *Id.* at 37.

*First*, the disclosures informed stockholders that on November 28, 2015, Ray Berry's counsel told TFM that "Mr. Berry had engaged in one conversation with [Apollo], and during that conversation he had agreed that he would roll his

equity interest over into the surviving entity if [Apollo] were to be successful in agreeing to a transaction with TFM." A78 (14D-9 at 20). Thus, contrary to Plaintiff's assertion that the Chancery Court "confused how Ray Berry's October agreement with Apollo was disclosed to the Board on November 28, but was never disclosed to the stockholders" (OB at 8), the Chancery Court correctly recognized that Ray Berry's pre-November 28 agreement with Apollo was explicitly disclosed. Op. at 7-8.

Further, with respect to Ray Berry's purported "lie" to the Board, nothing is inherently contradictory between Ray Berry's statements at the October 15 Board meeting and Ray Berry's counsel's November 28 email. At the October 15 Board meeting, Ray Berry stated that he "had not committed to any transaction with Apollo" and that he had "communicated to Apollo that he would only participate in a transaction that was supported by the Board." A31. The November 28 email stated that Ray Berry had previously discussed in October an oral agreement with Apollo to roll over his shares "*in the event* Apollo agreed on a transaction with TFM." A40 (emphasis added). Thus, the November 28 email simply highlighted that Ray had only agreed orally to roll over shares if the Board supported a transaction with Apollo.

Moreover, and as the Chancery Court found "[m]ore important[]", Ray Berry's "position as of the time of the auction process and go-shop—that is, at the time material to stockholders—was adequately disclosed." *See* Op. at 8. Consequently, more information regarding Ray Berry's position with respect to Apollo in October and November 2015 would have been of little reasonable significance to the stockholders when they decided whether to tender their shares in spring 2016. *See Malpiede*, 790 A.2d at 1088 (where two Board members resigned months before the stockholder vote on a merger agreement, a "significant logical leap" was required "to suppose that reasonable stockholders would consider [the reason for their resignation] significant in the total mix of information available" at the time of the vote on the merger).

*Second*, Plaintiff alleges that the disclosures failed to notify stockholders that the November 28 email reported that Ray Berry would roll over his shares with another acquirer "provided he has confidence in its ability to properly oversee the company" and that he viewed Apollo as "uniquely qualified to generate value." A40. As noted above, the mere fact that Ray Berry favored Apollo is not itself material. *See supra* § I(C)(1)(b)(i). Moreover, the fact that Ray Berry expressed that he would only roll over his shares if he had confidence in the purchaser is a reasonable inference that could have been drawn by a reasonable stockholder.

*Abrons v. Maree*, 911 A.2d 805, 813 (Del. Ch. 2006) ("Consistent and redundant facts do not alter the total mix of information, nor are insignificant details and reasonable assumptions material.") In addition, as the Chancery Court found, Ray Berry's view of Apollo vis-à-vis other potential acquirers in November 2015 was of little significance where, at the time of the tender, Ray Berry's position during the auction process, the sale and the tender offer was adequately disclosed. Op. at 8.

*Third*, Plaintiff alleges that the statement in the November 28 email that "[i]f [TFM] remains public, Mr. Berry will give serious consideration to selling his stock when permitted" (A40) constituted a "threat" that should have been disclosed to the stockholders. OB at 37. As the Chancery Court determined, however, this fact was not likely to have altered the total mix of information. First, as the Chancery Court observed, knowledge of this purported threat would not have made investors any less likely to tender.[7] Op. at 8-9. In addition, "Berry's activities and

[7] Plaintiff asserts that the Chancery Court misapplied the test for materiality because a fact may be "important" to the stockholders whether it would make them less *or more* likely to tender. OB at 40. However, Plaintiff overlooks the context of the Chancery Court's full statement that "it is not clear to [the Court] how this [information] would have affected the total mix of information disclosed . . ." Op. at 8-9. Throughout its Opinion, the Chancery Court correctly applied this test for materiality as the governing standard. *See, e.g.*, Op. at 8-9. It is nonsensical for Plaintiff to argue, in a specific instance where Plaintiff is claiming disclosure of

his connection to Apollo were adequately disclosed to stockholders deciding whether to tender their shares." *Id*. at 9. Further, the Chancery Court noted that it is "[u]nsurprising[]" that a majority of stockholders tendered their shares in light of the "large premium the merger payment represented over the preannouncement trading price of [TFM] stock." *Id*. Indeed, disclosure of this statement from the November 28 email would not have significantly altered the total mix of information available at the time of the tender offer, especially because Ray Berry explicitly stated that if he had confidence in another acquirer, he "would consider rolling his equity interest over" in a non-Apollo transaction, as disclosed in the Company's 14D-9 and acknowledged in the Complaint. A40 (November 28 email); *see* A78 (14D-9 at 20); A182 (¶ 123). Moreover, there is no basis for this Court to make the "significant logical leap" to suppose that reasonable stockholders would consider Ray Berry's counsel's full statement from November 28, which in no way altered the Board's independent judgment or the outcome of the process, significant to their decision-making months later. *See Malpiede,* 780 A.2d at 1088.

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certain information could have made stockholders less likely to tender, that the Court applied the incorrect standard simply because the Court found this was not so.

#### iv. Alleged Pressure from Outside Investors Was Adequately Disclosed and Was Otherwise Irrelevant to the Stockholder Decision to Tender.

Plaintiff further alleges that the Board was pressured by outside investors such as Neuberger Berman to sell the Company, yet failed to disclose this motivation for the sale. OB at 37. As the Chancery Court determined, however, communications from stockholders were adequately disclosed: "the Board disclosed that the Company 'could become the subject of shareholder pressure and communications' if it didn't 'enhance efficiency,' and in fact already 'initiate[d] a comprehensive strategic review' and 'hir[ed] outside financial advisers' as recommended by Neuberger Berman." Op. at 8 (internal footnotes omitted). Disclosure of discrete communications from individual stockholders – which, rather than pressure to sell, merely encouraged action the Board was already taking (A26-28) – would not have impacted a reasonable stockholder's vote and equates to "a 'tell me more' request that, unlike a viable disclosure claim, fails to identify how the analysis [in the 14D-9] is misleading or incomplete." *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *13 (Del. Ch. June 30, 2014).

### 2. Plaintiff's Allegations Pertaining to the Financial Projections Fail to Make It Reasonably Conceivable That the Tender Was Materially Uninformed.

Plaintiff's alleged disclosure deficiencies related to the Company's financial disclosures, which the Chancery Court labelled the "easiest to deal with," similarly fail to preclude application of *Corwin*. *See* Op. at 4.

#### a. The November 17 Management Case and Adjusted Scenarios Were Adequately Disclosed and Reflected Management's Best Estimate of the Company's Future Performance.

Plaintiff argues that the disclosures were materially misleading as to the optimistic nature of the November 17 Management Case because the disclosures omitted information related to a 15% risk adjustment incorporated into the Management Case. OB at 41. As the Chancery Court concluded, however, this allegation fails to state an inadequate disclosure where "nothing indicates that the management projections . . . are anything other than . . . best estimates, which were adequately described." Op. at 5 (internal footnotes omitted). Indeed, in addition to providing the best estimate of the Company's future financial performance, the disclosures made clear that, following the development of the November 17 Management Case, the Committee directed management to develop additional projection scenarios to reflect different assumptions in light of "the overall softness of the financial markets, the continuing difficulty in macroeconomic trends in the

specialty food retail industry, and TFM's performance during the fourth quarter of 2015 and early 2016." A104 (14D-9 at 46).

Together, the disclosures informed stockholders about the November 17 Management Case, which incorporated "unaudited prospective financial information," and the Adjusted Scenarios. *See* A104-08 (14D-9 at 46-50); B80-83. The Company further disclosed that the November 17 Management Case and the additional scenarios reflected "numerous estimates and assumptions made by TFM's management with respect to industry performance, general business, economic, regulatory, market and financial conditions and other future events." A107 (14D-9 at 49). The risk adjustment was fully incorporated into the overall projection figures, and the Company was under no obligation to disclose every such input applied in development of the November 17 Management Case. *See In re Morton's Rest. Grp. Inc.*, 74 A.3d 656, 675 (Del. Ch. 2013) (noting that a company is only required to disclose "management's best estimates" of the company's future returns).

In addition, the Company disclosed that all of management's projections "reflect subjective judgment in many respects and thus are susceptible to multiple interpretations and periodic revisions based on actual experience and business developments," as was evidenced by the disclosed Adjusted Scenarios. *Id.* Based

on management's work preparing the Adjusted Scenarios in light of disappointing Q4 FY2015 and Q1 FY2016 results (which fell well below the November 17 Management Case), management considered the November 17 Management Case to be "optimistic." B106. By contrast, management considered the Adjusted Scenarios to be "realistic and helpful in understanding how things could play out." *Id.* The collective scenarios thus represent, as required, "the material information necessary" to inform the stockholder vote on the tender offer. *See Morton's*, 74 A.3d at 675.

#### b. Information Regarding the December Sensitivities Was Adequately Disclosed, Particularly In Light of Their Limited Relevance by March 2016.

Plaintiff complains that the disclosures misleadingly omitted description of an upwardly adjusted sensitivity that was prepared by J.P. Morgan and shared with the Board at the December 2015 Board meeting. As the Chancery Court found, however, J.P. Morgan's analysis was "adequately described." Op. at 5.

First, with respect to J.P. Morgan's analysis, "stockholders are entitled to receive in the proxy statement a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender [offer] rely." *Trulia*, 129 A.3d at 900 (internal quotation marks omitted). The 14D-9 contained J.P. Morgan's full

Fairness Opinion and a ten-page summary of J.P. Morgan's analysis, including a detailed summary of the November 17 Management Case and the Adjusted Scenarios. *See* A98-108, 120 (14D-9 at 40-50, Annex A). Even more detail was added by a subsequent amendment. *See* B76-84. Plaintiff does not allege that the description of J.P. Morgan's analysis as a whole is misleading, and "disclosures that provide extraneous details do not contribute to a fair summary." *Trulia*, 129 A.3d at 901 ("A fair summary "is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions."); *see Merge*, 2017 WL 395981, at *10 ("[A] fair summary is just that, a summary.").

Moreover, the Company was not required to disclose discrete detail concerning the preliminary sensitivities run by J.P. Morgan in December 2015. The information gleaned from the sensitivities had directly influenced the creation of the Adjusted Scenarios, (A104 (14D-9 at 46); B80), which superseded the earlier sensitivities, and before rendering its opinion, J.P. Morgan expressed to the Board that it "believed more current information, including the headwinds in the industry that were now affecting stronger players like Kroger, warranted adjustments" to the valuation analyses. *See* B106. The impact of the earlier sensitivities on the creation of the Adjusted Scenarios was disclosed (A104 (14D-9 at 46); B80), as were the then-current valuation analyses (A98-108 (14D-9 at 40-

42); B79-83). Thus, any information concerning the sensitivities J.P. Morgan ran on the November 17 Management Case in December 2015 was stale by the time the 14D-9 was distributed. Moreover, information concerning the discrete inputs to the sensitivities is of the granular level of detail that need not be disclosed. *See In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) ("Delaware courts have repeatedly held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion." (internal quotation marks omitted)).

## II. This Court Should Affirm the Dismissal of Plaintiff's Complaint on the Independent Basis That Plaintiff Fails to State a Claim for a Non-Exculpated Breach of Fiduciary Duty.

### A. Question Presented

Did Plaintiff fail to plead a non-exculpated breach of fiduciary duty by the Director Defendants? B59-74, 148-162.

### B. Scope of Review

Although the Chancery Court did not reach the Director Defendants' argument that Plaintiff's Complaint should be dismissed for failure to state a claim for a non-exculpated breach of fiduciary duty, this Court's *de novo* review may be based on "any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

### C. Merits of Argument

Even if this Court were to conclude that the *Corwin* ratification doctrine does not apply here, this Court should, in the alternative, affirm the Chancery Court's dismissal of the Plaintiff's Complaint as to the Director Defendants because Plaintiff fails to state a claim for a non-exculpated breach of fiduciary duty.

Where, as here, the Company's certificate of incorporation[8] contains an exculpatory provision that protects the Director Defendants "[t]o the fullest extent permitted" by 8 *Del. C.* § 102(b)(7), (B118 (Art. VIII)), Plaintiff must sufficiently allege that "[1] a majority of the board was not disinterested or independent, or [2] that the board was otherwise disloyal because it failed to act in good faith." *Nguyen v. Barrett*, 2016 WL 5404095, at *3 (Del. Ch. Sep. 28, 2016). Plaintiff does not come close to meeting her burden on either of these grounds.

#### 1. Plaintiff Alleges No Disabling Self-Interest to Support a Duty of Loyalty Claim Against the Director Defendants.

Even assuming Plaintiff pleaded a viable claim against Ray Berry, which she has not, the Complaint does not contain a single allegation that any of the remaining Director Defendants was (i) beholden to either Ray Berry or Apollo or (ii) otherwise motivated to act in bad faith. *See In re Alloy*, 2011 WL 4863716, at *9 (Del. Ch. Oct. 13, 2011) (whether a director is dominated or controlled by another must be shown through "specific allegations of actual control"). Moreover, the primary alleged conflict of interest, that the Director Defendants

[8] The Court can take judicial notice of the existence of a Section 102(b)(7) exculpatory provision. *See Malpiede*, 780 A.2d at 1090.

held stock options[9] that would vest in the event of a transaction, is self-defeating. Indeed, the equity interests *align* the Board's interests with all stockholders. *Koehler v. NetSpend Hldgs., Inc.*, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (stock ownership is "an indication that the . . . directors' interests are aligned with the interests of the stockholders generally"); *see also In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) ("Our Courts have [ ] routinely held that an interest in options vesting does not violate the duty of loyalty.").[10]

Further, Plaintiff indirectly alleges that Mr. Anicetti was incentivized to create lowball forecasts "that would enable Apollo to acquire the Company cheaply" to take advantage of Apollo's alleged promise that "'when Apollo makes money, the management team makes money.'" A152-53 (¶ 51). This conclusory allegation is unavailing because no other director was part of the management

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[9] In fact, with the exception of Mr. Anicetti, who was granted stock options in September 2015, the Director Defendants were granted only Restricted Stock Units, not stock options. *See* B62.

[10] The sole individualized allegation of interest as to any Director Defendant is that Mr. Anicetti was purportedly entitled to "over $9 million in change-of-control benefits." A174 (¶ 104). This allegation fails to sustain a claim for breach of the duty of loyalty and does not demonstrate that Mr. Anicetti would favor selling to Apollo (or any other acquirer, for that matter) at the expense of stockholder value. Nor are there any allegations that Mr. Anicetti took *any* actions that differed from those of the other disinterested directors.

team. *See Nguyen*, 2016 WL 5404095, at *5 (finding damaging plaintiff's failure to explain why the directors would cash out at a low price, rather than wait to maximize company value).

In addition, Plaintiff's conclusory allegation that the Director Defendants acted to entrench themselves similarly fails to state a claim for a conflict of interest. Not only has Plaintiff failed to put forward reasonably conceivable allegations that the Board received communications from "stockholder activists" seeking to remove the Board, or of an "ongoing threat," Plaintiff asserts no allegation that the independent directors found their directorships to be material. Moreover, the possibility of losing their directorships is not, without more, a disabling conflict. *See Krim v. ProNet, Inc.*, 744 A.2d 523, 528 (Del. Ch. 1999).

#### 2. Plaintiff Cannot Establish That the Board Acted in Bad Faith.

To show bad faith, Plaintiff must allege an "extreme set of facts" establishing that the Board "intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for [their] duties." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). The Complaint is devoid of all such factual allegations, simply alleging in a conclusory manner that the Director Defendants acted in "bad faith." A187-88 (¶¶ 134-41).

*First*, there are no well-pleaded allegations that the Director Defendants intended to conceal information from stockholders or took affirmative steps to do so. Nor would that make sense, given that the Director Defendants (i) possessed incentives aligned with the stockholders; (ii) made fulsome disclosures; and (iii) fully shopped the Company through a robust process. Further, the allegation that Ray Berry purposely misled the Board, even if credited, cannot establish that the majority of the Board (or any other Board member for that matter) acted in bad faith. *See In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 818 (Del. Ch. 2011) (finding that under exculpatory provisions, board members would likely be absolved of personal liability based on actions taken while misled by financial advisor).

Second, Plaintiff fails to plead that the disinterested and independent Director Defendants acted in bad faith in negotiating and approving the Merger. Specifically, there are no allegations of the requisite scienter in the Complaint. *See, e.g.*, *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (stating that plaintiffs pleading bad faith must allege scienter). At most, Plaintiff alleges that the Board was influenced by stockholder pressure and J.P. Morgan's financial analysis to initiate a sales process and that "Ray Berry used his fiduciary status to help create a temporary vulnerability for the Company, exploited that vulnerability and then

*deceived the Board* in order to effectuate his group's buyout plan." A136-37, 161 (¶¶ 1, 74 (emphasis added)). Once again, even if these conclusory allegations are credited, being deceived does not equate to conscious wrongdoing. *See Del Monte*, 25 A.3d at 818.

Additionally, given the extensive process set forth herein, Plaintiff fails to meet her burden to allege that the Merger was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *In re BJ's Wholesale Club, Inc. S'holders Litig*., 2013 WL 396202, at *7 (Del. Ch. Jan. 31, 2013) (internal quotation marks omitted). Far from "utterly failing to attempt" to achieve the best sale, the Director Defendants ran a robust process and obtained a premium return to stockholders.

Accordingly, even if this Court does not to affirm the dismissal of the Complaint under *Corwin*, the Complaint should be dismissed as to the Director Defendants for failure to state a claim for a non-exculpated breach of the duty of loyalty.

## CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Chancery Court dismissing Plaintiff's Complaint in its entirety.

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