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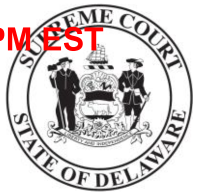

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELIZABETH MORRISON, Individually and on Behalf of All Others Similarly Situated, Appellant, Plaintiff-Below, v. 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, Appellees, Defendants-Below.	PUBLIC VERSION FILED ON: February 9, 2018 No. 445, 2017 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 12808-VCG

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Defendants cannot obtain the cleansing effect of *Corwin* by scrubbing bad facts from their public disclosures. Without denying that Plaintiff's Section 220 inspection uncovered negative facts about the challenged transaction excluded from the Company's Schedule 14D-9, defendants shift to the alternative ground that the Complaint fails to state a claim for breach of the duty of loyalty. As set forth below, this alternative ground is without merit as to each defendant. Moreover, the weaknesses of this alternative ground further illustrate why dismissal under *Corwin* is inappropriate.

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ARGUMENT

I. THE COMPLAINT STATES A CLAIM FOR DISLOYALTY AGAINST RAY BERRY

The Complaint alleges that Ray Berry misused his status as Chairman of the Board to induce the Board of Directors to commence a sale process at a time of management transition, when the Board of Directors was vulnerable to stockholder activism and there was a wide discrepancy between Fresh Market's stock price and its prospects. Ray Berry lied to the Board on October 15, 2015 about his oral agreement with his favored private equity partner, Apollo. He coerced the Board on November 28, 2015, by threatening to sell his stake if the Company was not sold. He took these actions for the benefit of himself and his son, Brett Berry, as prospective rollover investors.

Ray Berry argues that a "logical flaw[]" in plaintiff's theory of liability is that "there is nothing wrong about a director, in his capacity as a stockholder, negotiating with a potential buyer of the company." (Berry Defs.' Br. at 8) (citing *Citron v. Steego Corp.*, 1988 WL 04738, *8 (Del. Ch. Sept. 9, 1988)). Chancellor Allen's decision in *Citron* supports plaintiff's theory of liability:

> Our law does not regard a control premium as a corporate asset that must be shared among all shareholders. *A fortiori* a shareholder without control, even if he is a director, and thus owes a duty of

> loyalty to the corporation and its shareholders, may *qua* shareholder negotiate the sale of his stock on whatever terms he is able to arrange. ***If, however, a director-shareholder uses his corporate office to advantage himself in a way denied to other shareholders, he has misused his office.*** Therefore, if, in securing a better deal for himself alone, an officer uses confidential corporate information, any premium he secures may be claimed by the corporation. Similarly, if he secures more advantageous treatment by a promise, express or implied, that he will promote the buyer's interest within the corporation, it is obviously the case that the premium is the fruit of a breach of duty and may be impressed with a constructive trust.

Citron, 1988 WL 94738, at *8 (citations omitted) (emphasis added).

Fiduciaries of a Delaware corporation have no entitlement to join forces with a private equity firm, assist the firm in making a bid for the corporation, and then manipulate the deliberative processes of the board of directors for their own selfish purposes. As this Court famously held in a control contest involving a bidder affiliated with corporate officers: "judicial reluctance to assess the merits of a business decision ends in the face of illicit manipulation of a board's deliberative processes by self-interested corporate fiduciaries." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989). In *Dow Chemical Co. v. Reinhard*, 2007 WL 2780545 (E.D. Mich. Sept. 20, 2007), the District Court, applying Delaware law, sustained a complaint against a corporate officer who allegedly "participated-without authorization-in discussions about a potential offer

for the company" and "did not provide information of which he was aware about a potential offer of the company." *Id.* at *6 (citing *Hollinger Int'l. Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004); *HMG/Courtland Properties, Inc. v. Gray*, 749 A.2d 94, (Del. Ch. 1999); and *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150 (Del. Ch. 2005)).

Ray Berry does not argue that he was candid with the Board on October 15, 2015, when, according to the board minutes, he represented that he:

- "told Apollo that if there were a transaction that the Board supported, he would consider an equity rollover depending on the terms, but that he would also be willing to sell his shares for cash at an appropriate valuation if the Board supported such a transaction";

- "was not involved in Apollo's formulation of its proposal";

- "had not committed to any participation in a transaction with Apollo";

- "was not working with Apollo on an exclusive basis, and he had no arrangement or agreement with Apollo with respect to any transaction with the Corporation"; and

- "was not aware of any conversations that may or may not have occurred with Apollo and Brett Berry."

(A31) Instead, Ray Berry argues that six weeks later, on November 28, 2015, his counsel "provided the Board with a complete and accurate description of his discussions with Apollo."[1] (Berry Defs.' Br. at 9)

According to his counsel's email of November 28, Ray Berry had a discussion with Apollo some time following Apollo's withdrawal of its earlier offer on October 21, 2015, during which discussion, "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." (A40 (emphasis added)) Ray Berry's admitted October agreement with Apollo contradicts his representations to the Board on October 15.

Ray Berry's lies on October 15 induced the Board to put the Company in play. The Board relied on Ray Berry's false representation respecting his supposed lack of an "arrangement or agreement with Apollo." (A31) On October 15, the Board created a Strategic Transaction Committee for the purpose of considering Apollo's proposal and instructed the committee to work with J.P. Morgan

[1] Ray Berry's assertion of belated candor to the Board is belied by his failure to inform the Board that he (i) sought out Apollo (A149 ¶40), (ii) instructed Apollo to talk to Brett Berry about structuring a rollover (A129; A150 ¶42), and (iii) communicated with Apollo and Brett about Apollo's initial bid (A130; A150-51 ¶¶43, 46-47).

Securities LLC on a potential engagement. (A33-35) On October 20, Fresh Market issued a press release announcing that the Board was reviewing strategic alternatives, including the sale of the Company. (A77) By October 23, Fresh Market had received twelve inbound inquiries from financial sponsors regarding the potential acquisition of the Company and preliminary feedback from certain strategic parties. (A77)

Ray Berry argues that the Board's decision on December 2 to initiate a sale process "was made on a fully informed basis." (Berry Defs.' Br. at 9) Ray Berry ignores that his counsel's email of November 28 contained a threat: "If The Fresh Market remains public, Mr. Berry will give serious consideration to selling his stock when permitted …." (A40) Upon consideration of Ray Berry's threat, which, if acted upon, could sink the Company's stock price,[2] the Board reached a consensus on December 1: "it would be useful to solicit interest from third parties to get an indication of the value that might be achievable in a sale transaction." (A50; *see* A47, A51)

[2] Ray Berry and his son Brett Berry and his son-in-law Michael Barry owned 16% of the outstanding shares in the aggregate. (A137 ¶3)

A fiduciary has no safe harbor to engage in fraud and then, after the fraud is discovered, engage in coercion, even if the resulting transaction is at a "fair" price. *See ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *19 (Del. Ch. July 21, 2017, corrected, Aug. 8, 2017) ("Factors such as coercion, the misuse of confidential information, secret conflicts, or fraud could lead a court to hold that a transaction that fell within the range of fairness was nevertheless unfair compared to what faithful fiduciaries could have achieved."). Here, the price was far from "fair" as demonstrated by JP Morgan's valuation using the unmanipulated management projections. (A177-78 ¶¶109-114)

Ray Berry incorrectly argues that "Plaintiff never even attempts to explain" why Ray Berry would "***understate*** the extent of his commitment to Apollo" if his goal was "to coerce the Board into selling the Company, or to dissuade other potential bidders from competing with Apollo[.]" (Berry Defs.' Br. at 9 (emphasis in original)) Plaintiff's opening brief cited a leading academic observer to explain why Ray Berry would understate the extent of his commitment to Apollo. As a prospective rollover investor, Ray Berry was incentivized to proclaim his willingness to talk to all potential purchasers, in order to induce the Board to

initiate a sale process, even if Ray Berry also wanted to discourage competing bids:

> If the CEO is a net buyer in the transaction, the CEO will have personal financial incentives to discourage overbids, which push the price up. A well-advised CEO would of course make representations of being willing to work with third-party bidders, in order to maximize the price paid to exiting shareholders, but these representations will have limited credibility in this scenario.

Guhan Subramanian, *Deal Process Design in Management Buyouts*, 130 HARV. L. REV. 591, 625 (2016), *quoted in* Pl's. Br. at 36. The Board fell into Ray Berry's trap. They acquiesced to a sale process, without trusting Ray Berry to cooperate with prospective bidders during the sale process. (Pl's. Br. at 23, 37-38)

Without citing any legal authority, Ray Berry argues that it is "fatal" to Plaintiff's claim that Ray Berry's daughter Amy[3] "ultimately was a *seller* to Apollo." (Berry Defs.' Br. at 10 (emphasis in original)) Plaintiffs do not allege that Ray Berry's scheme "cost his daughter more than it allegedly profited him," and thus there is no "conundrum" that required explanation in the Opening Brief. (*Id.*) Ray Berry's son-in-law presumably could have rolled over his stake if he

[3] Amy is married to former Chief Financial Officer and former Vice Chairman of the Board Michael Barry. (A137 ¶3) According to Fresh Market's 2015 Proxy Statement, Michael Barry (not Amy) owned a 6.4% stake in Fresh Market, including trusts as to which he had sole voting and investment power. (AR4-5)

preferred that option. His acceptance of the premium paid to selling stockholders could turn on unique factors, such as liquidity needs, investment opportunities, or family dynamics. It could also be viewed as a hedge of Ray Berry's decision to roll over his shares at a favorable price and double his percentage ownership in a more highly leveraged Fresh Market. After all, Ray Berry's heirs stand to benefit if Ray Berry makes a fortune on his rollover investment.

In sum, the claim against Ray Berry is not "illogical and contradictory," and it requires no "flights of fancy" or "wild inferences." (*Id.* at 8, 10)

II. BRETT BERRY'S ARGUMENTS FOR DISMISSAL ARE MERITLESS

Brett Berry is alleged to have aided and abetted his father's breach of fiduciary duty, and to have aided and abetted the Director Defendants' breach of their fiduciary duties. (A189 ¶¶142-45)

The Complaint alleges that Ray Berry advised Apollo on September 4, 2015 "to work solely with his son, Brett Berry, to explore the best structure for an equity rollover transaction," in order to "maintain plausible deniability about his own involvement." (A138 ¶5) At the Board meeting of October 15, 2015, however, Ray Berry claimed to be "not involved in Apollo's formulation of its proposal" and "not aware of any conversations that may or may not have occurred with Apollo and Brett Berry." (A31) Ray Berry lied at that same Board meeting about having "no arrangement or agreement with Apollo with respect to any transaction with the Corporation" (*id.*) Ray Berry's counsel later admitted, on November 28, 2015, that "in October," Ray Berry orally agreed with Apollo that, "in the event Apollo agreed on a transaction with TFM, he would roll his equity interest into the surviving entity." (A40)

"A third party may be liable for aiding and abetting a breach of a corporate fiduciary's duty to the stockholders if the third party knowingly participates in the

breach." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015). The element of knowing participation is satisfied if "the third party act[s] with the knowledge that the conduct advocated or assisted constitutes such a breach." *Id.* at 861-62 (internal quotation omitted). "[T]he question of whether a defendant acted with *scienter* is a factual determination." *Id.* at 862.

Brett Berry does not cite any law. He merely points to his filial relation to his father, their respective ages, their respective tenures as CEOs of Fresh Market, and their respective stock ownership in the Company, and argues that it is "particularly unremarkable" that Ray Berry delegated to Brett Berry the task of working with Apollo to structure a buyout proposal. (Berry Defs.' Br. at 13)

At the pleading stage, Plaintiff is entitled to the reasonable inference that Brett Berry worked with Apollo to assist his father in an "illicit manipulation of the Board's deliberative process for self-interested purposes." *RBC Capital Markets*, 129 A.3d at 863. It served the joint interests of Brett Berry and Ray Berry as prospective rollover investors with Apollo if Ray Berry could play dumb about Brett Berry's structuring of a rollover transaction with Apollo. The Berrys' ability to effect a rollover transaction with Apollo at the lowest possible price depended in part on Ray Berry's ability to deceive the Board about his lack of knowledge of

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Brett Berry's work with Apollo on his father's behalf and thereby make it easier for the Board to initiate a sale process.

Brett Berry also argues for dismissal based on lack of personal jurisdiction. Brett Berry claims to have no connection to the filing in Delaware of the Certificate of Merger, which, if filed by a co-conspirator in furtherance of a conspiracy, can be the predicate for exercising personal jurisdiction over all co-conspirators. (Berry Defs.' Br. at 15; A249) The Certificate of Merger was signed by Richard Anicetti, Chief Executive Officer of Fresh Market. (AR18)

Brett Berry's argument fails because Anicetti participated in the conspiracy to bring about the sale of Fresh Market to Apollo for less than fair value. Apollo's original proposal of October 1, 2015 stressed that "when Apollo makes money, the management team makes money." (A151 ¶45) Five months later, in March 2016, after sole bidder Apollo made its "best and final offer" of $28.50 per share, which was significantly below the valuation ranges implied by management's plans and projections, Anicetti argued for downward departures from those plans and projections. (A170 ¶92) He falsely told the Strategic Transaction Committee that the projections were "an optimistic scenario if every element of the plan went according to estimates from both an execution and timetable standpoint." (A170

¶93) In fact, the projections incorporated a "15% overall risk adjustment, with different initiatives receiving different risk weighting based on likelihood of achievability." (*Id.*) That false statement helped deliver Fresh Market to Apollo, for the mutual benefit of himself, Ray Berry, and Brett Berry, as co-investors in the privately held company.

III. THE COMPLAINT STATES A CLAIM AGAINST THE DIRECTOR DEFENDANTS FOR BREACH OF THE DUTY OF LOYALTY

In the sale of control context, a board of directors bears a "situational duty… to take reasonable steps to attain the best value reasonably available to the stockholders." *RBC Capital Markets*,129 A.3d at 857 "[T]he paradigmatic context for a good *Revlon* claim . . . is when a supine board under the sway of an overweening CEO bent on a certain direction, tilts the sales process for reasons inimical to the stockholders' desire for the best price." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005).

A personal interest in the sale of the corporation to a particular bidder at a particular time can give rise to an unexculpated claim for breach of *Revlon* obligations. *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 255-59 (Del. Ch. 2014), *aff'd sub nom.*, *RBC Capital Markets*, 129 A.3d 816. Ray Berry's ability to roll over his equity stake at Apollo's buyout price is such a personal interest. (*See* Pl's. Br. at 28 & n.5) So is Anicetti's entitlement to over $9 million in change-of-control benefits (A174 ¶104), and his prospect of receiving new equity from Apollo at the buyout price (A151 ¶ 45; Pl's. Br. at 12-13).

A claim for breach of the duty of loyalty is also stated if the "pleaded facts evidenc[e] the remaining directors' 'indifference to their duty to protect the interests of the corporation and its minority stockholders.'" *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 981 (Del. Ch. 2000) (quoting *Strassburger v. Earley*, 752 A.2d 557, 581 (Del. Ch. 2000)). Acquiescence to the selfish interests of a founder can be a basis for an outside director's personal liability.[4]

The Director Defendants acquiesced to pressure from Ray Berry and others to sell Fresh Market at a time and in a manner that aided Ray Berry and Apollo. In several instances, the outside directors chose a questionable course of action favored by Ray Berry:

[4] *See, e.g.*, *Casey v. Moffett*, C.A. No. 12554-VCL, tr. at 42 (Del. Ch. Mar. 31, 2017) ("when you have this constellation of multiple, well-pled threads all contributing and leading to a decision that at least at this point appears to have been more favorable to the founder and long-time leader than one might think properly motivated fiduciaries would have reached, then, again, for pleading stage purposes, I think this survives the 23.1 motion"); *N.J. Carpenters Pension Fund v. InfoGroup, Inc.*, 2011 WL 4825888, at *11 (Del. Ch. Sept. 30, 2011, revised Oct. 6, 2011) ("one may reasonably infer from these allegations that Gupta sought to intimidate the Board Defendants, and in doing so, dominate them, so that they would capitulate to his demands to sell the Company"); *In re Barnes & Noble S'holders Deriv. Litig.*, C.A. No. 4813-VCS, tr. at 156 (Del. Ch. Oct. 21, 2010) ("Would these directors have approved this transaction in this form if the owner of College Bookstores was anyone in the world other than Len Riggio?").

- On October 15, 2015, two weeks after Apollo delivered a buyout proposal that referred to an "exclusive partnership" with Ray Berry and Brett Berry, the directors accepted Ray Berry's representations about his lack of an "arrangement or agreement" or "exclusive" working relationship with Apollo, and lack of awareness of conversations between Brett Berry and Apollo, without demanding that Ray Berry ask Brett Berry about such conversations and disclose them, and without taking a confrontational posture about Ray Berry's failure to timely inform the Board that he was seeking to acquire the Company[5] or the Berrys' failure to file a Schedule 13D. (Pl's. Br. at 13, 15-16, 20 & n.3)
- On October 20, 2015, less than two months after the Company hired Anicetti as the new CEO, the Company publicly announced a review of strategic alternatives, including a potential sale. (A77; A149 ¶39)
- On December 3, 2015, several days after receiving a November 28 email from Ray Berry's counsel admitting to oral agreements with

[5] The Board could not have agreed in good faith to Anicetti's outsized single-trigger change-of-control benefits, which incentivized him to push for a quick sale, had Ray Berry been candid with the Board at that time about his efforts to take the Company private. (A174-75 ¶104)

Apollo and containing a threat that Ray Berry might sell his shares if the Company was not sold, the Strategic Transaction Committee initiated a sale process premised on Ray Berry's supposed willingness to discuss an equity rollover with the winning bidder. (Pl's. Br. at 18-23)

- On February 18, 2016, the Strategic Transaction Committee determined that rollover discussions would not be permitted until material terms were negotiated with the winning bidder, a restriction that left prospective bidders other than Apollo in the dark about the prospects for an equity rollover, at a time of tightness in the leveraged loan market, which disadvantaged bidders who needed to plan on buying out all of Fresh Market's stockholders, including the Berrys. (*Id.* at 25-26)
- On March 11, 2016, the Board agreed to sell the Company to Apollo for $28.50 per share, well below the $33.75 to $42.25 per share range implied by management projections, without questioning management protestations about the supposed optimistic nature of the projections—protestations that were at odds with a 15% discount built into the

projections when they were accepted by the Board on December 1, 2015. (*Id.* at 22, 27-28)

The Director Defendants covered up their acquiescence by filing a materially misleading Schedule 14D-9. The cover-up is itself disloyal. *See In re Tyson Foods Inc. Consol. S'holder Litig.*, 919 A.2d 563, 597-98 (Del. Ch. 2007) ("where there is reason to believe that the board lacked good faith in approving a disclosure, the violation implicates the duty of loyalty"). Various omissions in the Schedule 14D-9 conceal the Director Defendants' acquiescence to pressure at a time of temporary vulnerability for the Company:

- The Schedule 14D-9's description of Ray Berry's statements at the October 15 board meeting omits (a) his false denial of any arrangement or agreement with Apollo, (b) his protestation of ignorance of any conversations between Apollo and Brett Berry, and (c) his stated belief that no private equity firm other than Apollo had experience in the food retail industry such that he would be comfortable engaging in an equity rollover. (A31; A75-76)
- The Schedule 14D-9's description of Ray Berry's counsel's email of November 28 omits (a) the e-mail's admission that Ray Berry agreed

"in October" to roll over his equity interest in the event Apollo acquired Fresh Market, (b) Ray Berry's belief that Apollo is "uniquely qualified to generate value," and (c) Ray Berry's threat to "give serious consideration to selling his stock" if the Company is not sold. (A40; A78)

- The Schedule 14D-9 omits mention of Neuberger Berman's correspondence and meeting urging Board consideration of a sale of the Company. (A26)

This series of omissions cannot be accepted at the pleading stage as mere oversights. The Director Defendants wanted to avoid the embarrassment of disclosing how they failed to stand up to Ray Berry's lies and coercion, and failed to stand behind the strategic plan of Fresh Market's newly hired (and soon co-opted) CEO.

IV. *CORWIN* IS INAPPLICABLE

The Director Defendants deny the existence of any material omissions. Their arguments fail.

A. Omissions Respecting Apollo

The Director Defendants rely heavily on Apollo's public disclosures for the proposition that Ray Berry's involvement with Apollo was fully disclosed. (Dir. Defs.' Br. at 18-23, 30) Specifically, the Director Defendants contend that stockholders could rely on the accuracy of Apollo's disclosures respecting its letters of October 1 and October 15, which put forward acquisition proposals made in "exclusive partnership" with Ray Berry and Brett Berry. (*Id.* at 19, 21) The Director Defendants also refer to Fresh Market's disclosure of an October 16 news report speculating that Ray Berry had agreed to work with Apollo. (*Id.* at 22)

The problem with the Director Defendants' argument is that Fresh Market disclosed the exact opposite about its own assessment of the situation—that on October 20, Fresh Market sent a letter to Apollo stating that "TFM had confirmed with Ray Berry that he did not have an arrangement with Apollo to work together on an exclusive basis with respect to a potential transaction." (A77) Fresh Market

told its stockholders not to believe Apollo's characterizations or the news report's speculations, upon which the Director Defendants now seek to rely.

The Schedule 14D-9 omits the breadth of Ray Berry's denials. According to the Board minutes of October 15, Ray Berry denied that he had "committed to any participation in a transaction with Apollo," denied "working with Apollo on an exclusive basis," stated that he "had no arrangement or agreement with Apollo," and "reiterated that he had not committed to any transaction with Apollo" and "was not part of any arrangement with Apollo regarding a transaction with the Corporation." (A31)

The Schedule 14D-9 omits Ray Berry's retraction and admission respecting his true relationship with Apollo as of October 1 and October 15. Ray Berry's counsel's email of November 28 admits that Ray Berry "agreed, ***as he did in October***, that in the event Apollo agreed on a transaction with TFM, he would roll his equity interest over in the surviving entity." (A40 (emphasis added)) The Director Defendants ignore the highlighted clause (Dir. Defs.' Br. at 31-32), which refers to a conditional rollover agreement at the time of Apollo's proposals of October 1 and October 15. Also undisclosed is Ray Berry's expressed view on October 15 "that he was not aware of any other potential private equity buyer that

had experience in the food retail industry with whom he would be comfortable engaging in an equity rollover." (A31)

The Director Defendants argue that "any favoritism Ray Berry harbored for Apollo was not material to the stockholders." (Dir. Defs.' Br. at 24) They rely on a case in which it was disclosed that a Chairman of the Board waived a consulting agreement fee when negotiating a sale of the company, but his reason for the waiver and his alleged willingness to waive for unknown potential bidders was not disclosed. The Court of Chancery reasoned that the Chairman'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). It did not create a *per se* rule that selfishly motivated favoritism toward an acquiror is always immaterial as a matter of law.

Here, a sales process was initiated in the face of the Board's knowledge that Ray Berry favored Apollo. That undisclosed knowledge of favoritism is material, because it calls into question the reasonableness and good faith of any sale process predicated on Ray Berry's supposed open-mindedness in considering partnering with any private equity firm willing to outbid Apollo.

A major theme of the Schedule 14D-9 is that Ray Berry was willing to discuss an equity rollover with any potentially interested party. (Pl.'s Br. at 29-30) The Director Defendants rely on the same disclosures. (Dir. Defs.' Br. at 25-26, 30) Those disclosures create a misleading impression about Ray Berry's state of mind and agenda. Ray Berry twice told the Board (on October 15 and November 28) that he lacked confidence in any private equity firm other than Apollo. (A31; A40) Given those undisclosed statements, his undisclosed October oral agreement with Apollo, his undisclosed lies about that agreement, and the economic reality that a competing overbid would diminish Ray Berry's upside as a rollover investor, it was misleading for the Schedule 14D-9 to create the impression that Ray Berry was open-minded about partnering with competing bidders. *See, e.g.*, *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996) ("The law of partial disclosure is . . . clear: '[O]nce defendants travel[] down the road of partial disclosure . . . they . . . [have] an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.'" (citation omitted)).

Ray Berry's undisclosed favoritism toward Apollo doomed the sale process. Tightness in the leveraged loan market disadvantaged bidders who did not have an equity rollover partner. (Pl.'s Br. at 26) By prohibiting prospective bidders from

talking to Ray Berry during the sale process, the Board prevented them from testing his willingness to partner. The Schedule 14D-9 conceals how Ray Berry's favoritism helps explain why no competing bids emerged.

B. Omissions Respecting Threats to Corporate Strategy

According to the Director Defendants, Ray Berry's undisclosed threat on November 28—"If the Fresh Market remains public, Mr. Berry will give serious consideration to selling his stock when permitted . . ." (A40)—"in no way altered the Board's independent judgment or the outcome of the process[.]" (Dir. Defs.' Br. at 35) That contention cannot be credited. On December 1, the Board discussed Ray Berry's threat (A47) and reached a consensus that evening that the Company should solicit acquisition proposals (A51). The sole final bid to emerge from the sale process was Apollo's winning bid. (A93)

The Director Defendants similarly contend that "there is no basis . . . to suppose that reasonable stockholders would consider Ray Berry's full statement from November 28 . . . significant to their decision-making months later." (Dir. Defs.' Br. at 35) That contention cannot be accepted. The Schedule 14D-9 devotes four-and-a-half pages to the period leading up to the December 1-2, 2015 board meeting. (A75-78) One paragraph of the Schedule 14D-9 is devoted to

summarizing selected portions of Ray Berry's counsel's email of November 28, which contains only three substantive paragraphs. (A40; A78) Edited out of the Schedule 14D-9 was Ray Berry's urging that the Company be sold and his threat to sell his stake if the Company remained public. (*Id.*) Contrary to the Director Defendants' suggestion (Dir. Defs.' Br. at 34), full disclosure of a coercive transaction can inspire stockholder opposition. *See ACP Master, Ltd*, 2017 WL 3421142, at *9 (discussing how public announcement of proposed transactions perceived as inadequate, coercive, and dilutive led to activism by dissident stockholders to vote against transaction).

Ray Berry's threat dovetailed with pressure exerted by major stockholder Neuberger Berman LLC, which wrote a letter on October 8, 2015 urging a "comprehensive strategic review" and questioning "whether remaining in the doubting public marketplace is the best strategy." (A27) The Director Defendants rely on the Court of Chancery's acceptance of the Schedule 14D-9's mischaracterization of the Board's assessment of the situation. (Dir. Defs.' Br. at 36) The Schedule 14D-9 stated that the Board was concerned that "TFM could become the subject of shareholder pressure and communications." (A76) The board minutes expressly referred to the Neuberger Berman LLC letter of October 8

and "other inbound communications from shareholders" and expressed concern about "continued shareholder pressure, continued shareholder communications." (A32) Concealing extant shareholder pressure and communications is not a "tell me more" disclosure claim. (Dir. Defs.' Br. at 36)

C. Omissions Respecting Financial Disclosures

The Director Defendants provide no explanation for how it is not materially misleading for the Schedule 14D-9 to repeatedly invoke execution risk as the rationale for generating downward scenarios that make substantial cuts to management's projections without also disclosing that the projections already included a 15% overall adjustment for execution risk. *See, e.g.*, *Zirn*, 681 A.2d at 1058 (holding that it is materially misleading "to provide stockholders with only a one-sided" view of a key valuation issue when "[o]ne curative statement could have" resulted in "a balanced and truthful account"). The Director Defendants simply ignore how the Schedule 14D-9 makes execution risk respecting management's projections a central theme and discloses the downward scenarios were "developed to illustrate and quantify [execution] risks." (Pl.'s Br. at 41 (quoting A90); *see* A78; A86; A88; A91; A93; A96; A104)

The Director Defendants advance new explanations for the downward adjustments. According to the Director Defendants, slashing the projections was necessary "in light of disappointing Q4 FY2015 and Q1 FY2016 results (which fell well below the November 17 Management Case)." (Dir. Defs.' Br. at 39) Yet, Q4 FY2015 earnings matched management's projections and beat the market consensus by $0.03 per share. (*Compare* A48 (plan EPS of $1.53) *with* B104 ("EPS of $1.53 per share beat consensus by $0.03 per share")) Forecasted Q1 2016 earnings were largely on track, with a projected $0.01 earnings miss on $0.37 earnings. (AR12; A43)

The Director Defendants also argue that the projection cuts were necessitated by "continuing difficulty in macroeconomic trends in the specialty food retail industry." (Dir. Defs.' Br. at 37-38) In fact, one of the "recurring positive themes" from bidders was "positive sector tailwinds." (AR7 & AR9)

The Director Defendants contend that "the Company was under no obligation to disclose every such input applied in the development of the November 17 Management Case." (Dir. Defs.' Br. at 39) But the 15% risk adjustment was the *only* input expressly described in the December 1 board minutes. (A45)

The Director Defendants offer no persuasive explanation why the Schedule 14D-9 disclosed JP Morgan's downward sensitivities from the November 2015 projections without also disclosing JP Morgan's contemporaneous upward sensitivity. *See, e.g.*, *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977) (holding defendants violated their disclosure obligations by disclosing a "floor" valuation without also disclosing a "ceiling" valuation). They contend that the sensitivities were "stale" (Dir. Defs.' Br. at 41), but that is no reason to disclose only the downward sensitivities. Moreover, the upward sensitivity was not stale, given its consistency with the following subsequent bidder feedback: "tremendous upside potential with the operational turnaround plan." (AR7 & AR9)

CONCLUSION

For all the foregoing reasons and those stated in the opening brief, Appellant Plaintiff-Below Elizabeth Morrison respectfully requests reversal of the decision of the Court of Chancery.

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