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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: December 26, 2017 No. 445, 2017 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 12808-VCG

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDING

This appeal challenges the Vice Chancellor's application of *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015). The Vice Chancellor's ruling, if not reversed, undermines the integrity of the rule that *Corwin* "applies only to fully informed, uncoerced stockholder votes …. [I]f troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked." *Id.* at 312.

The $1.36 billion sale of regional specialty grocery retailer The Fresh Market, Inc. ("Fresh Market," "TFM," or the "Company") to an affiliate of Apollo Global Management, LLC ("Apollo") was a post-*Corwin* management buyout. On April 22, 2016, prior to the closing of Apollo's tender offer, plaintiff-below appellant Elizabeth Morrison filed suit against Fresh Market pursuant to 8 *Del. C.* § 220. The Section 220 documents revealed that the Board acquiesced to predation by Company founder, Chairman of the Board, and former CEO Ray Berry, and covered it up in a materially misleading Schedule 14D-9. Morrison used the documents she obtained in that action to file this post-closing class action on October 6, 2016.

Ray Berry and his son, former CEO and former Vice Chairman of the Board Brett Berry (collectively, the "Berrys"), owned 9.8% of Fresh Market's common stock in the aggregate. The Berrys agreed to work exclusively with Apollo and roll over their equity. The Berrys' goal was to induce the Board to put Fresh Market up for sale, and for the Berrys and Apollo to buy the Company at the lowest possible price. Operating in the shadow of stockholder activism and a leak, Ray Berry lied to the Board about his agreement with Apollo and threatened to sell his stake. The Board discovered that Ray Berry had lied to them but nonetheless put Fresh Market up for sale at a time and in a manner that allowed Apollo to prevail.

More specifically, in the summer of 2015, when the Board was hiring a new CEO to replace the CEO fired by the Board months earlier, the Berrys saw a buying opportunity. They spoke to several private equity firms and agreed to work with Apollo, due to Apollo's recent, massive success buying, taking public, and exiting from another regional specialty grocery retailer, Sprouts Farmers Market ("Sprouts").

On October 1, 2015, Apollo submitted a non-public proposal to buy Fresh Market. The proposal stated that Apollo was working exclusively with the Berrys.

The Berrys agreed to roll over their equity stake if the Board approved a negotiated sale to Apollo.

On October 8, following weeks of Board-level communication, significant institutional stockholder Neuberger Berman LLC sent the Board a non-public letter urging consideration of a sale of the Company.

At the October 15 board meeting, Ray Berry denied having any arrangement or agreement with Apollo. He claimed to be unaware of the substance of conversations Brett Berry was having with Apollo. Ray Berry did acknowledge favoring Apollo, stating "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 Board created a Strategic Transaction Committee. Following a news report that Ray Berry was working exclusively with Apollo, the Company sent Apollo a letter stating that the Company had confirmed with Ray Berry that he had no arrangement to work exclusively with Apollo.

On November 25, Apollo delivered a new non-public proposal stating that Apollo was working with the Berrys to buy Fresh Market. Three days later, Ray Berry's counsel admitted in an email to the Company that Ray Berry had orally

agreed with Apollo, "as he did in October," to roll over his equity if Apollo bought Fresh Market. The email attested to Ray Berry's belief that Apollo was "uniquely qualified to generate value because of its recent success in TFM's space with the acquisition of Sprouts." (A40) The email also contained a threat: "If The Fresh Market remains public, Mr. Berry will give serious consideration to selling his stock when permitted as he does not believe TFM is well positioned to prosper as a public company and he can do better with his investment dollars elsewhere." (*Id.*)

The Board initiated a sale process and forbade all bidders from talking to the Berrys. The sale process was doomed not to generate competing bids. The Board's decision to require competing bidders to lock in a price without being able to confirm whether the Berrys would rollover gave Apollo a huge advantage, because the leveraged finance markets "were in an extremely challenging state, with … lack of receptivity in the market to new issuances other than from the most highly rated credits." (A166 ¶ 85) Apollo could price its bid and obtain debt financing at a lower leverage ratio than its competitors, because only Apollo knew that the Berrys would roll over their equity. Only Apollo submitted a definitive proposal.

Fresh Market's Schedule 14D-9 omitted the following facts relating to the Board's decision to put Fresh Market up for sale:

- at the October 15 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;
- 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 Fresh Market, (iii) 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;
- stockholder activist Neuberger Berman LLC privately urged the Board to consider a sale of the Company;
- a stated rationale for the Board's authorization of a sale process was that "the market would not give the Corporation the time and patience necessary to effectuate the [strategic plan developed by the Company's newly hired CEO]." (A50)

There exists a substantial likelihood that a reasonable investor would have considered disclosure of these facts important in deciding whether to tender. Disclosure would have given stockholders reason to conclude that (i) Ray Berry acted in bad faith to engineer an acquisition at the lowest possible price, (ii) the Board was coerced, and (iii) the Board's decision to undertake a sale process that depended on the willingness of a competing private equity firm to outbid Apollo and then persuade the Berrys to roll over their equity was unreasonable and/or not made in good faith.

Fresh Market's Schedule 14D-9 misleadingly cast excessive doubt on management projections that yielded a present value range of $33.75 to $42.75 per share, well above the tender offer price of $28.50. The Schedule 14D-9 propagates a lie by management at a March 10, 2016 meeting of the Strategic Transaction Committee (when management was incentivized to support Apollo's bid) that management 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, as management had correctly told the Board three months earlier, the projections contained "a 15% overall risk adjustment, with different

initiatives receiving different risk weighting based on likelihood of achievability." (*Id.*)

The Company disclosed that the Strategic Transaction Committee believed that management's projections did not reflect "the risks relating to TFM's ability to execute on its strategic plan" (A86), but omitted that the Board had been advised that the projections contained a 15% overall risk adjustment. The Schedule 14D-9 also misleadingly disclosed that the Board received downwardly adjusted projection scenarios reflecting potential shortfalls in revenue and gross margin without disclosing that the Board also received an upwardly adjusted case sensitivity.

All defendants moved to dismiss. The Vice Chancellor's letter opinion granted dismissal on *Corwin* grounds and was dismissive in tone. The Vice Chancellor wrote that this was an "exemplary case" for dismissal under *Corwin*, one of Plaintiff's arguments was a "non sequitur," another was "self-defeating," and only one non-disclosure "comes close to materiality." Let Op. at 3, 7-8. The Vice Chancellor ruled that management's projections were "adequately described," Ray Berry's conduct and relationship with Apollo was "adequately disclosed," and that the disclosure of stockholder activism was "adequate." *Id*. at 5, 8, 9.

The portions of the Schedule 14D-9 cited by the Vice Chancellor made no mention of Ray Berry's oral agreement in October to roll over his equity with Apollo, his lie to the Board that no such agreement existed, or his unique confidence in Apollo. Let. Op. at 7 & n.47. The Vice Chancellor confused how Ray Berry's October agreement with Apollo was disclosed *to the Board* on November 28, but was never disclosed *to the stockholders*. *Id.* at 7-8. According to the Vice Chancellor, Ray Berry's undisclosed threat to sell his stake is immaterial because disclosure "would not have made investors less likely to tender." *Id.* at 8-9.

This reasoning stands *Corwin* on its head. Plaintiff pled how the founder/Chairman lied to the Board and coerced the Board into initiating a sale process at the time of an acute information asymmetry between insiders and the public about the Company's prospects, when the Board was vulnerable to stockholder activism. Ray Berry's lie, his threat, and his alignment with Apollo induced the Board to forbid bidders from talking to the Berrys, which had the predictable effect of discouraging bids and delivering the Company to Apollo at an unfair price. The Board's failure to disclose these "troubling facts" rules out the defense of stockholder ratification.

SUMMARY OF ARGUMENT

1. Under *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015), the business judgment rule "applies only to fully informed, uncoerced stockholder votes[.]" This is a case in which "material information undermining the integrity or financial fairness of the transaction" was undisclosed, precluding stockholder ratification. *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 898-99 (Del. Ch. 1999), *quoted in Corwin*, 125 A.3d at 312 n.27. The Schedule 14D-9 failed to disclose material information about the integrity of the management buyout, including the founder/Chairman's lie to the Board about his October 2015 oral agreement to roll over his equity with Apollo, his November 2015 threat to sell his stake if the Company was not sold, and the simultaneous pressure of stockholder activism. The Schedule 14D-9 also misleadingly cast excessive doubt on management projections that yielded a present value range ($33.75 to $42.75 per share) well above the tender offer price ($28.50).

STATEMENT OF FACTS

A. Fresh Market and the Berry Family

Fresh Market is a specialty grocery retailer founded by Ray Berry in 1982. It was controlled by the Berry family until the end of 2012, following an initial public offering in 2010, and a subsequent offering by the family. (A137 ¶ 3, A148 ¶ 36) Fresh Market operated 186 stores in 27 States. (A148 ¶ 35)

Defendant Ray Berry served as CEO of the Company until 2007, and he retained the title of Chairman of the Board thereafter. (*Id.*) Defendant Brett Berry is the son of Ray Berry. Brett Berry served as Vice Chairman of the Board, President, and CEO of Fresh Market prior to the events at issue here. (A147 ¶ 34) Ray Berry and Brett Berry owned in the aggregate 9.8% of Fresh Market's outstanding shares at all relevant times. (A137 ¶ 3; A59; A62)

Ray Berry's son-in-law, non-party Michael Barry, a former Chief Financial Officer and former Vice Chairman of the Board, separately owned over 6% of the Company's outstanding shares. (A137 ¶ 3)

B. The Board Fires the CEO for Unknown Reasons

On January 11, 2015, the Ray Berry-led Board terminated Fresh Market's then-CEO for undisclosed reasons. (A148 ¶ 38) On the prior business day, the

Company's shares had traded as high as $40.83 per share, up 21.5% since the beginning of July 2014. (*Id.* ¶ 37)

Under eight months of interim leadership, the Company's stock price plummeted, reaching a low of $18.70 in late August 2015. (*Id.* ¶ 38) On September 1, 2015, Fresh Market announced that the Board had hired Richard Anicetti as the new CEO. Anicetti was viewed as a strong leader who could help turn around the Company's business. He had served as a consultant and interim portfolio-company CEO for private equity giant Ares. (A149 ¶ 39)

C. The Berrys Select a Private Equity Partner to Bid for Fresh Market

During the summer of 2015, simultaneous with Fresh Market's Board's search for a new CEO, Ray Berry reached out to several private equity firms with the goal of partnering to buy Fresh Market. (*Id.* ¶ 40)

Ray Berry spoke to Apollo senior partner Andrew Jhawar, a long-time acquaintance. (*Id.* ¶ 41) The prospect of teaming up with Apollo was attractive to Ray Berry. Apollo had made more than ten times its investment when exiting from

its purchase of regional specialty grocery retailer Sprouts. (A173 ¶ 102; A138 ¶ 5; A36)[1]

To give himself plausible deniability about the level of detail of his dealings with Apollo, Ray Berry told Jhawar to contact his son, Brett Berry, "to explore various structural alternatives for an equity rollover transaction[,]" which they did. (A149 ¶ 41; A150 ¶ 42-43; A129) The Berrys agreed to roll over their equity in Fresh Market in the event Apollo bought the Company. (A141 ¶ 13; A40)

Teaming up with the Berrys was attractive to Apollo. If substantial stockholders roll over their existing equity stakes, a private equity firm needs less debt to buy out the remaining stockholders, increasing the potential returns to the equity investors (including the rollover stockholders). (A173 ¶ 102) Obtaining insights from former CEOs and the current Chairman of Fresh Market, free from the restrictions of a board-supervised sale process, also conferred informational and tactical benefits on Apollo. If Fresh Market's Board agreed to a sale process and Apollo's first-mover advantages dissuaded competitors from bidding, then Apollo could buy Fresh Market at a lower price than in an auction. Apollo's co-

[1] *See also* Ryan Dezember, *Huge Profits in Aisle Five: Apollo's Exit from Sprouts Well-Timed*, WALL ST. J. (May 7, 2015 1:28 pm ET), https://blogs.wsj.com/moneybeat/2015/05/07/huge-profits-in-aisle-five-apollos-exit-from-sprouts-looking-well-timed/.

investors (*i.e.*, the Berrys and Company senior management) would similarly benefit.[2]

On October 1, 2015, Apollo delivered an unsolicited proposal to acquire the Company for $30 per share. The proposal stated that Apollo had "discussed with Ray Berry and Brett Berry the opportunity for them to rollover their equity stake in a transaction with Apollo," and that "Apollo and the Berrys will be working together in an exclusive partnership as it relates to a transaction with The Fresh Market." (A150 ¶ 44)

Apollo's proposal stressed that if Apollo acquired the Company, "the newly appointed Chief Executive Officer of The Fresh Market will have increased time and more resources to drive many of these initiatives as a private company under Apollo's ownership." (A151 ¶ 45) A supporting presentation emphasized that Apollo's practice is to ensure that "[i]ncentives are aligned between Apollo and our management team partners – when Apollo makes money, the management team makes money." (*Id.*)

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[2] *See generally* Guhan Subramanian, *Deal Process Design in Management Buyouts*, 130 HARV. L. REV. 591 (2016) (identifying factors that create an un-level playing field between an insider-affiliated bidder and potential third-party bidders).

D. In the Face of Stockholder Activist Pressure, and Ray Berry's False Denial of an Exclusivity Deal, the Board Creates a Strategic Transaction Committee

The Apollo/Berrys acquisition proposal arrived when the Board was facing stockholder activism from Neuberger Berman LLC, which claimed to own 1.6 million Fresh Market shares (3.4% of the total outstanding). (A26; *see* A59)

On August 24, 2015, Neuberger Berman requested a conference call with the Lead Independent Director, defendant Richard Noll, for the purpose of expressing its belief that "urgent action is necessary to restore credibility and prevent further damage to this asset base." (A26) Noll spoke to Neuberger Berman on September 28, 2015. (*Id.*) Neuberger Berman wrote a follow-up letter on October 8, to highlight key takeaways from the conference call. Neuberger Berman noted that as of October 8, only 6 out of 25 analyst opinions rated Fresh Market as a "buy," and short interest in the stock stood at 17% of the total public float. (*Id.* at n.1) The letter recommended immediate consideration of a sale of the Company:

> [W]e question whether being out of the public eye would allow the company to take the appropriate long term view without jeopardizing its cost of capital[.] Said differently, we wonder whether remaining in the doubting public marketplace is the best strategy when the private markets could be open and available, with the potential to offer the best risk-adjusted returns for all shareholders and the best long-term prospects for the Company as a whole.

> In closing, ***we believe it is now time*** for The Fresh Market's Board of Directors (the "Board") ***to initiate a comprehensive strategic review*** …. Furthermore, we believe you should consider in that review hiring outside financial advisors, ***to assess***: (i) ***a sale of the Company***, (ii) possible strategic partnerships, joint ventures, or alliances, or (iii) other possible internal investments or external transactions

(A27 (emphasis added))

In advance of the October 15, 2015 Board meeting, Fresh Market's General Counsel, Scott Duggan, spoke with Ray Berry regarding Apollo's statement that Apollo was working exclusively with the Berrys. (A30) The minutes of the Board meeting purport to summarize the substance of that conversation. The minutes suggest that Duggan's purpose was to obtain denials of an exclusive relationship between Ray Berry and Apollo, so that the Board could proceed with a sale process, rather than ascertain facts about why Apollo described its relationship with the Berrys as exclusive.

According to the minutes, Ray Berry "confirmed" certain points for Duggan:

> (1) … Mr. Berry told Apollo … he would consider an equity rollover depending on the terms ….
>
> (2) Mr. Berry was not involved in Apollo's formulation of its proposal.
>
> (3) Mr. Berry had not committed to any participation in a transaction with Apollo or anybody else.

(4) Mr. Berry was not working with Apollo on an exclusive basis, and he had no arrangement or agreement with respect to any transaction with the Corporation.

(5) Mr. Berry was not aware of any conversations that may or may not have occurred with Apollo and Brett Berry.

(A31) There is no record of Duggan asking Ray Berry to find out and disclose what Brett Berry and Apollo had discussed.

According to the October 15 Board minutes, Ray Berry "confirmed" the above-listed points for the Board. In response to a question about Ray Berry's willingness to participate in an equity rollover with a firm other than Apollo, Ray Berry stated "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." (*Id.*)

The Board discussed how the Company's new CEO, Anicetti, needed time to oversee development of long-term forecasts and a strategic plan. (A32) The Board also discussed the letter from Neuberger Berman and "other inbound communications from shareholders," and "expressed concern that the Corporation could be the subject of continued shareholder pressure," as well as the possibility "that Apollo might take action to increase the pressure on the Board, including by

potentially making its proposal public." (*Id.*) The Board created a Strategic Transaction Committee empowered to, among other things, negotiate the sale of the Company. (A32-34)

E. Fresh Market Publicly Announces a Strategic Review and Privately (and Falsely) Disputes a Public Report that Apollo Was Working with Ray Berry

On October 15, the same day as the Board meeting, Apollo sent a follow-up letter to Fresh Market about impending public reporting of Apollo's proposal:

> [It has] come to [Apollo's] direct attention that there are rumors in the marketplace and that the national news outlets are actively seeking information about a possible transaction. This reinforces our desire to engage in discussions as soon as possible in order for you to manage the process in a calm and deliberative manner.

(A155 ¶ 55)

The following day, October 16, in an article entitled "Exclusive: Fresh Market founder explores bid for company," *Reuters* reported:

> Fresh Market Inc founder and board chairman Ray Berry is exploring a bid to take the U.S. specialty grocery retailer private with the help of a private equity firm, according to people familiar with the matter.
>
> Berry, who has a 4.1 percent stake in the company, has reached out to several buyout firms, seeking a private equity partner in order to put together an offer for Fresh Market, the people said this week.

> Private equity firm Apollo Global Management LLC has already agreed to work with Berry on the potential offer for Fresh Market, the people said.

(A154 ¶ 54) The article stated that Ray Berry's son-in-law, former CFO Michael Barry, was "considering rolling his 6.4 percent stake in the deal." (*Id.*)

On October 20, Fresh Market responded in two ways. *First*, it issued a press release announcing that it was conducting a strategic review that could result in a sale of the Company. (A77) *Second*, it sent a private letter to Apollo stating that Fresh Market "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." (*Id.*; *see* A156 ¶ 58)

On October 21, Apollo withdrew its proposal. (*Id.* ¶ 60)

F. After Ray Berry Is Revealed to the Board as a Liar and Predator, the Board Initiates a Sale Process

A month later, on November 25, 2015, Apollo sent a letter reaffirming its prior proposal to buy Fresh Market for $30 per share. Apollo's letter stated that the proposal was made "together with Ray and Brett Berry." (A36)

Company counsel asked Ray Berry's counsel to determine if Apollo's letter reflected any arrangement between Apollo and the Berrys. (A158 ¶ 66) On November 28, Ray Berry's counsel sent an email admitting that Ray Berry and

Apollo were operating pursuant to an agreement, and that they had entered into an agreement in October (notwithstanding Ray Berry's prior denials):

> Since 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 (emphasis added))

Ray Berry's counsel's email reemphasized a point made by Ray Berry on October 15 that he lacked sufficient confidence in any other private equity firm to justify rolling over his equity, in the event a competing firm topped Apollo's bid:

> Should Apollo not be successful in its bid, ***Mr. Berry*** would consider rolling his equity interest over in connection with an acquisition of TFM by another buy-out firm that successfully bids for the company, provided he has confidence in its ability to properly oversee the company. As he mentioned to the board of directors in October, however, he ***believes that Apollo is uniquely qualified to generate value because of its recent success in TFM's space with the acquisition of Sprouts***….

(*Id.* (emphasis added))

Ray Berry's counsel's email also conveyed a threat: "If The Fresh Market remains public, Mr. Berry will give serious consideration to selling his stock when permitted as he does not believe TFM is well positioned to prosper as a public

company and he can do better with his investment dollars elsewhere." (*Id.*) If the Chairman/founder sold his stake, Fresh Market's stock price could be expected to drop, which could be expected to lead to further stockholder activism. The effect would be magnified if other Berry family members sold their stakes.

The Board did not react to this news by taking a confrontational posture toward Ray Berry.[3] At a December 1-2, 2015 meeting, the Board discussed Ray Berry's counsel's email and the pressure the Board was under to pursue a sales process. The Board discussed that "Ray Berry, who was a large shareholder, wanted the Corporation to pursue a sale," as well as a recent conversation "with Neuberger Berman, which wanted the Corporation to pursue a sales process." (A44) The Board decided to conduct a market canvass and granted authority over that process to the Strategic Transaction Committee. (A52) Rather than confront Ray Berry, the Board took a significant step toward the outcome he desired.

[3] The Company possessed ammunition to oppose Ray Berry. Neither the Berrys nor Apollo had filed a Schedule 13D respecting their agreement to work together on a going-private transaction that would involve the rollover of the Berrys' equity, despite recent SEC prosecutorial activity against violators of §13(d) in connection with going-private transactions. (A141 ¶ 14) *See also* Philip Richter, *SEC Broadens Focus on and Requirements for 13D Amendment Disclosure*, HARV. L. SCH. F. CORP. GOV. & FIN. REG. (May 5, 2015), https://corpgov.law.harvard.edu/2015/05/05/sec-broadens-focus-on-and-requirements-for-13d-amendment-disclosure/ ("The SEC recently announced settlements of charges against insiders relating to three different going private transactions.").

The Board minutes for the meeting make explicit reference to Ray Berry's counsel's email, note that it was read aloud in its entirety and later circulated to the Board, and purport to summarize it. (A47) The Board minutes make no reference to the revelation that Ray Berry's counsel's email of November 28 contradicted Ray Berry's October 15 denial of having any agreement or arrangement with Apollo. The Board minutes do acknowledge Berry's threat: "Mr. Berry's counsel also relayed Mr. Berry's view that if the Corporation remains public, Mr. Berry will give serious consideration to selling his stock, and the email explained the rationale for that perspective." (A47)

The Board minutes itemize twelve "factors and perspectives" upon which the Board made its determination to launch a sale process. (A50) In reality, the combination of Ray Berry's threat, Apollo's bid, a leak to *Reuters*, and the activism of Neuberger Berman had pushed the Board into a sale process. None of that is mentioned in the twelve "factors and perspectives." The closest itemized factor was potential future stockholder pressure:

> That the market would not give the Corporation the time and patience necessary to effectuate the plan, and there was ***significant risk of shareholder pressure*** in the face of declining results over the next few

> years, which could have a further adverse impact on the Corporation's business[.]

(*Id.* (emphasis added))

Over a period of several weeks, Fresh Market's management team, overseen by the Strategic Transaction Committee, had worked with McKinsey to develop a strategic plan and had also prepared a financial forecast. (A156 ¶ 62) A stated purpose of the December 1 Board meeting was to review the strategic plan and the long-range forecast. (A42)

Management presented several long-term "stabilization and growth initiatives" that were "effectively a turnaround plan." (A45) Management presented a forecast based on implementation of those initiatives:

> [The CFO] reviewed the projected P&L with the Board that formed the basis of these projections. [The CFO] said that in preparing the projections, management had applied a 15% overall risk adjustment, with different initiatives receiving different risk weighting based on likelihood of achievability.

(*Id.*) "The Board endorsed the initiatives identified, and gave suggestions to management on how to refine certain of the initiatives, and how to prioritize implementation." (A46) "Subject to any adjustments based upon review [of] the forecast following the meeting, the Board concurred with the long-term strategic plan and projections presented to them." (*Id.*)

J.P. Morgan Securities LLC ("JP Morgan") presented preliminary valuation analyses based on the management projections. JP Morgan's discounted cash flow analysis generated a valuation range of $34.50 to $44.00 per share. (A161 ¶ 73) The Board was advised that "it would be reasonable to expect that a financial sponsor might pay something in the $30/share range." (A49)

G. The Sale Process

The Strategic Transaction Committee's sale process was premised on the dual fictions that (i) the Berrys were open-minded about working with potential financial sponsors other than Apollo, and (ii) financial sponsors other than Apollo would lock in a price and all other material transaction terms without having first sounded out the Berrys about their willingness to roll over their equity. On December 3, 2015, the Strategic Transaction Committee's counsel contacted Ray Berry's counsel to confirm that: (a) Ray Berry was willing to discuss an equity rollover with any potentially interested party that the Board selected as a winning bidder; (b) Ray Berry would agree not to engage in any discussions regarding an equity rollover with any potentially interested party until authorized to do so by Fresh Market; and (c) JP Morgan could confirm this framework to all potentially interested parties. (A162 ¶ 76)

Restricting potential bidders from gauging the probability of working with members of the Berry family cemented Apollo's first-mover advantage. The Berrys and Apollo already had agreed to work together, and the Berrys were incentivized not to create price competition for Apollo. (A141 ¶ 15; A142 ¶ 16)

On December 9, 2015, Apollo and the Company entered into a confidentiality agreement that prohibited Apollo from having any discussions with potential sources of equity financing, including rollover stockholders, without prior authorization by the Company. (A163 ¶ 77) Despite having agreed not to communicate, Apollo and Ray Berry continued to have prohibited conversations. (*Id.* ¶ 78)

Ray Berry also continued to pressure the Board. On December 22, 2015, Anicetti reported to the other directors a conversation during which Ray Berry criticized the Board for not having immediately engaged in discussions with Apollo and complained about the duration of the Board's proposed process. (*Id.* ¶ 79)

On January 12, 2016, JP Morgan sent a process letter to potential bidders informing them that Ray Berry would be open to discussing a potential rollover of his shares at a time authorized by Fresh Market. (A164 ¶ 80)

At a January 21, 2016 meeting of the Strategic Transaction Committee, the Company's general counsel reported on conversation between himself and Ray Berry during which Ray Berry "confirmed that he had not spoken to any potential participant or anyone at the Company about the process." (A165 ¶ 82) That statement was false. Ray Berry continued to speak with Apollo's principal, Jhawar, "from time to time throughout the period." (*Id.*)

On the January 25, 2016 deadline, Apollo submitted an indication of interest at $31.25 per share. (*Id.* ¶ 84) Four other parties submitted indications of interest at lower prices. (A81) JP Morgan received negative feedback from interested parties who did not submit bids because they were "[h]esitant to participate in [an] auction without a unique 'angle.'" (A165-66 ¶ 84)

One interested strategic party, The Kroger Company, stated that it was "interested in having Mr. Berry reinvest in the transaction." (*Id.*) At least one other private equity bidder indicated a similar sentiment. (*Id.*) Apollo was the only bidder that expressly indicated that its funding of the equity amount would be decreased by the amount of the Berrys' rollover. (*Id.*)

On February 18, 2016, the Strategic Transaction Committee determined that rollover discussions would be permitted only after final bids had been received,

and after the Board had agreed on price and other material terms with the winning bidder. (A166 ¶ 86) As a practical matter, given the challenging state of the leveraged loan market, the Board's requirement that all bidders other than Apollo lock in a price and deal terms without being able to discuss a rollover with the Berrys all but ensured that the sale process would not generate a competing final bid. (A166 ¶ 85; A167 ¶ 88; A173 ¶ 102; A141-42 ¶ 107)[4]

A bid deadline of March 14, 2016, was communicated to the potential bidders, but Apollo prevailed on the Strategic Transaction Committee for permission to submit a bid earlier. (A167 ¶ 87) No other party submitted a definitive proposal. (A142 ¶ 17)

On March 8, 2016, Apollo submitted a definitive proposal at $27.25 per share, a drop of $4.00 per share. (A167-68 ¶ 88) Apollo indicated that it wanted to discuss an equity rollover before announcement of a transaction. (A168 ¶ 89) The Strategic Transaction Committee determined that an improved offer was

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[4] *See also* James Fontanella-Khan and Eric Platt, *Buyout firms lose leverage with backers*, FIN. TIMES (Jan. 21, 2016), https://www.ft.com/content/3ace5424-bfdc-11e5-9fdb-87b8d15baec2 ("The leveraged finance markets ... are extremely tight right now due to a large backlog coupled with a high degree of volatility.… It is difficult getting previously financed deals funded and very difficult to get new leveraged deals financed.… Deals will have to be tweaked in terms of structure. Equity contributions will have to go higher to bring down these funding costs.") (internal quotations omitted).

needed to justify discussions with Ray Berry about a potential equity rollover. (A169 ¶ 90) On March 9, 2016, Apollo submitted a "best and final" offer at $28.50 per share. (*Id.* ¶ 91) Later that morning, the Strategic Transaction Committee determined that Apollo would be allowed to engage in a chaperoned, "introductory" discussion with members of the Berry family about a potential equity rollover, without any mention of price terms. (A142¶ 17; A169 ¶ 91; A89)

When the Strategic Transaction Committee met on March 10, 2016 to discuss Apollo's "best and final" offer, the CEO Anicetti and the CFO argued for downward departures from management's plan and projections. (A170 ¶ 92) These conflicted senior managers 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." (*Id.* ¶ 93) In fact, as noted above, the projections incorporated a "15% overall risk adjustment, with different initiatives receiving different risk weighting based on likelihood of achievability." (*Id.*)

JP Morgan performed new valuation analyses based on assumptions (a) that the Company's sales would underperform significantly; (b) that margin would be significantly worse than anticipated; and (c) that both sales and margin would be

significantly worse than anticipated. (A170-71 ¶ 95) JP Morgan also increased its discount rates by 0.5% and increased the equity risk premium by 0.75%. (A171 ¶ 96) JP Morgan's DCF analysis based on the original management projections and the new discount rates implied a value range of $33.75 to $42.25 per share. (*Id.* ¶ 97)

On March 11, 2016, the Board agreed to sell the Company to Apollo for $28.50 per share. (A172 ¶ 99) JP Morgan justified the lower price by using three sets of downside scenarios for its analysis. Anicetti told the Board that the three downside scenarios were necessary to "provide dimension" to the "risks embedded in the Corporation's strategic plan," without mentioning that the initial projections incorporated a 15% risk discount. (*Id.* ¶ 99)

Apollo and the rollover stockholders entered into a rollover, contribution and exchange agreement and a support agreement the next day, March 12, 2016. (*Id.* ¶ 100) Under the terms of the agreements, the Berrys' equity ownership would increase from approximately 9.8% to approximately 20.0% upon consummation of the merger. (A59, A62)[5]

[5] The Berrys' rollover shares represented approximately 9.8% of the 47,049,217 total shares outstanding, and at the merger price of $28.50 per share, their shares were worth $131.4 million. (A59) $131.4 million represents approximately 20.0%

The merger agreement provided for a 21-day “go-shop” period. No bidders emerged during the go-shop period. (A178 ¶ 115)

H. The False and Misleading 14D-9

A major theme of Fresh Market’s Schedule 14D-9 is that Ray Berry was open-minded in considering an equity rollover with potential financial sponsors, or other options, such as selling his shares in a Board-approved transaction. The Schedule 14D-9 discloses that: (i) Ray Berry disclaimed on October 5, 2015, that he was working on an exclusive basis with Apollo; (ii) Ray Berry advised the Board on October 15 about “his desire to possibly rollover his equity in any Board-supported transaction” or “sell his shares to any potential purchaser for cash in a Board-supported transaction”; (iii) Fresh Market wrote to Apollo on October 20, 2015, to say that Ray Berry had disclaimed that he was working on an exclusive basis with Apollo; (iv) Ray Berry’s counsel maintained on November 28, 2015, that Ray Berry would “consider rolling his equity interest over” if a different firm acquired Fresh Market; (v) on December 3, 2015, Ray Berry confirmed his willingness to discuss an equity rollover with any potentially interested party; and

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of the total equity financing of $656 million. (A62) If the merger price was higher, more equity financing would be needed, which would lower the percentage ownership attributable to the Berrys’ rollover shares.

(vi) on March 9, 2016, the Berrys held "chaperoned" "[i]ntroductory conversations" with Apollo about a potential equity rollover. (A75-79, A89) Relatedly, Fresh Market disclosed that a reason why the Board recommended the challenged transaction was the presence of "restrictions," and the absence of "negotiations," during the sale process respecting a potential equity rollover by the Berrys. (A94)

These statements are misleading, because the drafters of the Schedule 14D-9 carefully omitted facts suggesting that an equity rollover by the Berrys into an acquisition by Apollo was Ray Berry's true goal, which he had been zealously pursuing for months. The Schedule 14D-9 purports to summarize statements by Ray Berry at the October 15 board meeting (A75-76), but says nothing about the following sentences in the board minutes:

> (4) Mr. Berry … had no arrangement or agreement with Apollo with respect to any transaction with the Corporation.
>
> (5) Mr. Berry was not aware of any conversations that may or may not have occurred with Apollo and Brett Berry.
>
> Mr. Berry confirmed these matters for the Board. Mr. Zoubek asked Mr. Berry if he would be willing to participate in an equity rollover with another party were the Corporation to engage in a sale transaction with a party other than Apollo. Mr. Berry said 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)

Similarly, the Schedule 14D-9 purports to summarize a November 28 email by Ray Berry's counsel (A78), but says nothing about the following portions of that email:

- that Ray Berry agreed "in October" to roll over his equity interest in the event Apollo acquired Fresh Market;
- the conditional nature of Ray Berry's willingness to roll over his equity if a firm other than Apollo acquires Fresh Market:

  > ", provided he has confidence in its ability to properly oversee the company. As he mentioned to the board of directors in October, however, he believes that Apollo is uniquely qualified to generate value because of its recent success in TFM's space with the acquisition of Sprouts."

- Ray Berry's threat: "If The Fresh Market remains public, Mr. Berry will give serious consideration to selling his stock when permitted as he does not believe TFM is well positioned to prosper as a public company and he can do better with his investment dollars elsewhere."

(A40)

The Schedule 14D-9 says nothing about the stockholder activism Fresh Market's Board was subject to when deciding to initiate a sale process. There is no mention of Neuberger Berman's correspondence and meeting urging Board

consideration of a sale of the Company. (A26) In summarizing the October 15 Board meeting, the Schedule 14D-9 states that Fresh Market "could become the subject of shareholder pressure." (A76). The board minutes actually expressed concern about "continued shareholder pressure." (A32)

Additionally, the Schedule 14D-9 omits material facts respecting the reasonableness of management's projections and the valuation range derived from those projections. The Schedule 14D-9 discloses that the Strategic Transaction Committee believed that management's projections did not reflect "the risks relating to TFM's ability to execute on its strategic plan" in explaining the creation of three lower sets of projections. (A86) The filing omits that the Board had been advised that the original projections already contained a 15% overall risk adjustment. The Schedule 14D-9 repeatedly discloses that at the time the Board approved management's projections it received sensitivities projecting lower revenue growth and lower gross margins. (A78, A104) The filing omits that sensitivities received by the Board also included an upside scenario projecting higher revenue growth and higher gross margins. (A185 ¶ 127)

ARGUMENT

THE COURT OF CHANCERY ERRED IN HOLDING THAT THE CHALLENGE TO THE MANAGEMENT BUYOUT WAS SUBJECT TO DISMISSAL UNDER *CORWIN*

A. Question Presented

Did the Court of Chancery commit reversible error in determining that Fresh Market's Schedule 14D-9 disclosed all material facts? (A180-A185 ¶¶ 118-28; A228-41)

B. Scope of Review

An appeal from a decision granting a motion to dismiss is reviewed *de novo*. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 252 (Del. 2017).

C. Merits of Argument

Stockholder ratification "applies only to fully informed, uncoerced stockholder votes, and if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked." *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304, 312 (Del. 2015). "The burden to prove that the vote was fair, uncoerced, and fully informed falls squarely on the board." *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 899 (Del. Ch. 1999), *quoted in Corwin*, 125 A.3d at 312 n.27.

The test for materiality is as follows:

> For an omission to be material, there must be 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. Stated another way, omitted facts are material if there is a substantial likelihood that a reasonable stockholder would consider them important in deciding how to vote. Materiality does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote, only that such reasonably available information would have impacted upon a stockholder's voting decision. But omitted facts are not material simply because they might be helpful.

RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 859 (Del. 2015) (internal quotations and footnotes omitted). A vote is also not fully informed if non-material facts are disclosed in a manner that creates a "materially misleading impression":

> It is well settled that when fiduciaries undertake to describe events, they must do so in a balanced and accurate fashion, which does not create a materially misleading impression. The disclosure of even a non-material fact can, in some instances, trigger an obligation to disclose additional, otherwise non-material facts in order to prevent the initial disclosure from materially misleading the stockholders.

Pfeffer v. Redstone, 965 A.2d 676, 689 (Del. 2009) (internal quotation omitted).

"Whether disclosures are adequate is a mixed question of law and fact, requiring an assessment of the inferences a reasonable shareholder would draw and

significance of those inferences to the individual shareholder." *RBC Capital Markets*, 129 A.3d at 858-59 (internal quotation omitted). At the motion to dismiss stage, the "substantial likelihood" test for materiality is evaluated through the lens of the "reasonably conceivable" standard for stating a claim. *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *8 (Del. Ch. Apr. 11, 2017); *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *10 (Del. Ch. June 30, 2014).

Various categories of facts can be material. *Corwin* refers to "troubling facts regarding director behavior," as well as "objective facts regarding the board's interests, [the buyer's] interests, and the negotiation process." 125 A.3d at 312. *Huizenga* refers to "information undermining the integrity or financial fairness of the transaction." 751 A.2d at 898-99, *quoted in Corwin*, 125 A.3d at 312 n.27. In *City of Miami General Employees' and Sanitations Employees' Retirement Trust v. Comstock*, 158 A.3d 885, 2017 WL 1093185 (Del. Mar. 23, 2017) (Order), this Court evaluated materiality in terms of whether it could be inferred that a financially superior outcome was reasonably available.

1. Omissions Respecting Ray Berry's Agenda and Its Impact on the Board and the Sale Process

A recent law review article by a leading scholar identifies key factors in

management buyouts that can deter third-party bids, lowering the buyout price. Guhan Subramanian, *Deal Process Design in Management Buyouts*, 130 HARV. L. REV. 591 (2016). A critical factor identified by Subramanian is the "net-buyer/net-seller distinction." *Id.* at 626. If insiders at the target company are net sellers (*i.e.*, if they are selling their shares as part of the company's sale), they will favor a higher price. Insiders who are rolling over their shares are net buyers. As net buyers, rollover insiders have a strong financial incentivize to lie about their willingness to support alternative bidders:

> 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.

Id. at 625.

Here, Fresh Market's Schedule 14D-9 concealed the Berrys' agenda as committed net buyers. Ray Berry wanted to roll over his significant equity with Apollo, which meant inducing the Board to commence a sale process and discouraging third-party overbids. The Schedule 14D-9 omitted facts that would have revealed Ray Berry's real agenda and its impact on the Board's decision making and the sale process.

Ray Berry agreed with Apollo at the outset to roll over his equity if Apollo bought the Company. (A40) That agreement was undisclosed. Ray Berry falsely denied the existence of that agreement in a conversation with the Company's General Counsel, and then again at the October 15 Board meeting. (A30-31) Those lies were undisclosed. Ray Berry twice stated Apollo was the only private equity firm in which he had confidence. (A31; A40) Those statements were undisclosed. Ray Berry threatened to sell his stake if the Company remained public. (*Id.*) That threat was undisclosed.

The Schedule 14D-9 omitted disclosure of how and why the Board acquiesced to the agenda of the Berrys and Apollo. It omits how the Board learned on November 28 that Ray Berry had lied to them on October 15. (*Compare* A31 *with* A40) Again, it omits Ray Berry's threat on November 28 to sell his stake if Fresh Market remained public. (A40) It omits how the Board was under pressure from Neuberger Berman to put the Company up for sale. (*See* A26-28; A32)

These omitted facts about how the Board knew of and acquiesced to Ray Berry's lies and bullying help explain the Board's undisclosed rationale for forbidding potential bidders from talking to Ray Berry during the sale process.

The Board did not trust Ray Berry not to discourage competing bids.[6] This concern, if disclosed, would have raised questions about the good faith and reasonableness of the Board's decision to undertake a sale process, whether that decision was the product of coercion, and the robustness of a sale process that forbid everyone from talking to the Berrys and yielded one definitive proposal from Apollo. Best practice in a management buyout is for a Board to insist on chaperoned, insider cooperation with interested bidders. Subramanian, *supra*, at 639-41.

The Vice Chancellor dismissed plaintiff's allegations about omissions respecting the integrity of the sale process as "a non sequitur," "gloss," and a "self-defeating argument." Let. Op. at 7. None of those characterizations is appropriate.

The supposed non sequitur is as follows: "If the Board, the participants in the auction, and the stockholders were uninformed of the true commitment between

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[6] How insiders will interact with potential buyers is a recognized subject of concern. *See In re Rural Metro Corp. S'holder Litig.*, 88 A.3d 54, 65 (Del. Ch. 2014) ("Shackelton and Davis believed that during his presentations to the Consortium, DiMino's body language conveyed his preference that the Company remain independent."); *In re Netsmart Technologies, Inc. S'holder Litig.*, 924 A.2d 171, 189 (Del. Ch. 2007) ("Given its lack of participation in this process, the Special Committee had virtually no insight into how consistent management was in its body language about Netsmart's prospects to the various private equity firms in the bidding process.").

Berry and Apollo, that undisclosed fact cannot have chilled the auction." *Id*. Plaintiffs did not allege that the Board and the auction participants were uninformed. The Board learned that Ray Berry had lied to them about not having an agreement with Apollo. (A40) The Board knew that Ray Berry uniquely favored Apollo. (A31; A40) The Board had reason to suspect discussions between Apollo and Brett Berry. (A30-31) The article in *Reuters* 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. (A154-55 ¶ 54; A166-67 ¶ 86) That was enough to chill bidding. Stockholders were not told the facts about the underlying wrongdoing and the Boards' acquiescence to it.

Those underlying facts are not "gloss." Let. Op. at 7. As discussed above, Ray Berry's full involvement with Apollo was not disclosed to the stockholders. The Vice Chancellor erroneously cites paragraph 124 of the Complaint, which summarizes Ray Berry's counsel's November 28, 2015 email to the Board's counsel (A40), for the proposition that the facts revealing Ray Berry's prior lie to the Board "should have been equally clear to the stockholders themselves." Let. Op. at 7-8. The stockholders were never told about Ray Berry's prior agreement with Apollo, his lies about that agreement, or his unique confidence in Apollo.

Ray Berry's undisclosed threat to sell his stake in the event the Company remained public prompted the Board to solicit bids for the Company. The Vice Chancellor concluded that "certainly" disclosure of Berry's threat "would not have made investors less likely to tender." Let. Op. at 8-9. That is not the operative test. There is a substantial likelihood that a reasonable stockholder would consider the threat important in deciding how to vote. Disclosure of the threat could make investors *more likely to tender*, because they would fear the consequences of Ray Berry following through on his threat. Tendering due to coercion from a disclosed threat would itself preclude stockholder ratification under *Corwin*. Alternatively, disclosure of the threat could make investors *less likely to tender*, because they could conclude that Berry's threat reflected his agenda and his conviction in the long-term value of the Company.

2. Omissions Respecting the Projections

Two omissions "undermining the … financial fairness of the transaction," *Huizenga*, 751 A.2d at 898, are straightforward. Both omissions, if disclosed, would reveal management's lie that its projections were "an optimistic scenario if every element of the plan went according to estimates from both an execution and timetable standpoint." (A170 ¶ 93)

First, the Schedule 14D-9 omits how management had evaluated the risks relating to the execution to the strategic plan, built those risks into the projections, and disclosed that methodology to the Board. Specifically, the Schedule 14D-9 contains the following disclosure about a meeting of the Strategic Transaction Committee on March 10, 2016, the day after Apollo delivered its "best and final" offer of $28.50 per share:

> Management reviewed with the Strategic Transaction Committee the risks relating to TFM's ability to execute on its strategic plan and reviewed with the Strategic Transaction Committee three additional projection scenarios (which we refer to as the "**Additional Scenario Information**") which management had developed to illustrate and quantify these risks.

(A90) The Schedule 14D-9 omits that, on December 1, 2015, the Board had been informed by the CFO that "management had applied a 15% overall risk adjustment, with different initiatives receiving different risk weighting based on likelihood of achievability." (A45)

Second, the Schedule 14D-9 misleadingly describes the sensitivities provided to the Board at the time it approved management's projections by disclosing that the Board received downward sensitivities without disclosing the Board also received an upward sensitivity. The Schedule 14D-9 twice discloses the existence of downward sensitivities to the management projections:

> At the [December 1 and 2] meeting, … TFM's management and J.P. Morgan also reviewed sensitivities to the November 17 Management Case in the event that revenue or gross margin fell short of what was reflected in the November 17 Management Case.
> …
> At the time that the Board reviewed and authorized the use of the November 17 Management Case in December 2015, the Board also received certain sensitivity information regarding different assumptions as to revenue and gross margin in the event that TFM was not able to execute on its strategic plan or the timing of certain initiatives contained in the strategic plan was later than anticipated.

(A78, A104) Both discussions of the December sensitivities omit that the Board also received an upward sensitivity, which projected higher revenue growth and higher gross margins. (A185 ¶ 127) The existence of this undisclosed upwardly adjusted scenario illustrates how management believed that its November 17 projections accurately reflected risk in execution, and that both upward and downward scenarios were created as sensitivities reflecting uncertainty in both directions. The Schedule 14D-9 creates the materially misleading impression that the management case projections of November 17, 2015 were unduly optimistic and did not account for risks in execution, as management later falsely told the Strategic Transaction Committee.

At the conclusion of the sale process, management was incentivized to support approval of the sale of the Company at a price ($28.50 per share)

significantly less than the valuation range implied by the November 17, 2015 management projections ($33.75 to $42.75 per share). If Fresh Market succeeded as a private company, management would profit from new equity pegged at the buyout price of $28.50 per share.

The Vice Chancellor erred in ruling that "nothing indicates that the management projections or J.P. Morgan's analysis are anything other than their best estimates." Let. Op. at 5 (footnotes omitted). The problem with the Schedule 14D-9 is that it misleadingly suggests that the November 17, 2015 management projections and the correlative $33.75 to $42.75 per share valuation range are *not* best estimates and do *not* appropriately account for risk.

CONCLUSION

For all the foregoing reasons, Appellant Plaintiff-Below Elizabeth Morrison respectfully requests reversal of the decision of the Court of Chancery.

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