Securities Regulation Daily Wrap Up, FIDUCIARY DUTIES—Del. Ch.: Shareholders adequately informed in uncoerced sale, (Oct. 4, 2017)

Securities Regulation Daily Wrap Up

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By Gregory Kane, J.D., M.B.A.

A shareholder suit against the directors of a grocery store chain for breach of fiduciary duty related to the effective sale of the chain to a private equity group was dismissed. Although the process began with an unannounced meeting between a private equity firm and the founder and largest stock owner, the board followed an open and transparent process including an auction that led to an informed vote by shareholders to move forward with the founder's preferred partner (*Morrison v. Berry*, September 28, 2017, Glasscock, S.).

Apollo bid. Plaintiff was a stockholder in The Fresh Market, a Delaware corporation that owned a grocery store chain. The founder and director who, with his son, owned nearly 10 percent of the outstanding stock, had a meeting with private equity firm Apollo Management to discuss a takeover of the business without informing the board. After reaching a preliminary agreement with the founder, Apollo made an unsolicited offer to the board. The founder recused himself from the sale process. The board, eight independent directors, created a special committee to consider the offer and alternatives which resulted in the hiring of J.P. Morgan Securities LLC to run a three-month auction during which the board received five indications of interest and several offers.

Ultimately, Apollo was the successful bidder and the board approved their offer. The role of the founder was disclosed to the board and the shareholders prior to the vote. Plaintiff claims that the tender was uninformed and that the board breached its fiduciary duty to shareholders by not fully disclosing the methodology used for evaluating the purchase price and for not adequately disclosing the founder's role in the sale.

Purchase price. J.P. Morgan provided a fairness opinion on the purchase price and found it fair when performing a DCF analysis with management projections. The projections and J.P. Morgan's analysis were adequately described in disclosures to stock holders.

Founder's role. The founder's role in early discussions with Apollo was disclosed, including in SEC fillings. While the founder may not have been initially forthcoming to the directors about his discussions with Apollo, by the time of the auction, his actions and his preference for Apollo were adequately disclosed to the board and to stockholders—prior to the shareholder vote. Under the *Corwin* doctrine, there is little utility in reviewing a corporate merger which is the process of an uncoerced and fully informed vote of the stockholders. As there was no lack of disclosure in evaluating the price or in the role of the founder, the voters were adequately informed. The claim was dismissed.

The case is No. 12808-VCG.

Attorneys: Joel E. Friedlander (Friedlander & Gorris, P.A.) for Elizabeth Morrison. Rudolf Koch (Richards, Layton & Finger, P.A.) for Ray Berry.

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