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## The Summer of Market Basket: Shareholders vs. Customers, Employees, and Public Interest

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### Introduction

After firing its CEO in the summer of 2014, Market Basket Inc. (“Market Basket”) found itself in a rare situation that exposed the relatively unknown, but potentially disastrous consequences of focusing solely on the short-term increase of shareholder value. In the wake of employees and customers effectively bringing a \$3.7 billion<sup>1</sup> corporation’s operations to a standstill, there is an opportunity to question what boards of directors should consider when making decisions that are in the best interest for the company.<sup>2</sup> The concern for and interest in the “Main Street”

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<sup>1</sup> *Demoulas Super Markets*, FORBES (Oct. 2014), <http://www.forbes.com/companies/demoulas-super-markets/>.

<sup>2</sup> It should be noted that Market Basket is a closely held corporation, and not publically traded. For the breakdown of Market Basket Shareholders prior to August 2015, see *Who Owns Market Basket? A look at the Company’s Shareholders*, BOS. GLOBE, (July 24, 2014), available at <http://www.bostonglobe.com/business/2014/07/24/who-owns-market-basket/IgOkckWN6po8BlqikacjLO/story.html#>.

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understandings<sup>3</sup> may become more relevant to a corporation as it contemplates profit-making strategies. Thus, if the key to corporate success may no longer exclusively be increasing shareholder value, then what is the best approach?

The reactions of many non-shareholder constituents following the contentious decision of Market Basket's board of directors provide an opportunity to examine the necessary elements of corporate profit maximization and the presence of narrative in corporate law. The current landscape of corporate law, corporate governance, and the focus on shareholder value can be analyzed using the events surrounding Market Basket as an illustration of what may happen more regularly in the future if corporations do not adjust their priorities.

### The Market Basket Saga

Market Basket is a corporation formed through a series of franchising stores owned by Demoulas Super Markets, Inc. ("DSM") in 1988.<sup>4</sup> The grocery store has been in the Demoulas family since 1917, and was incorporated under the name Demoulas Super Markets, Inc. in 1955 by George and Telemachus A. Demoulas. Eventually they passed the business down to their eldest sons Arthur S. and Arthur T. At the time the company was incorporated, the shares were held equally between the two families.<sup>5</sup> However, the tension between the two sides of the Demoulas family began early in the business, continued to build, and erupted into a bitter and lengthy lawsuit in 1995.<sup>6</sup>

Significantly, the Supreme Judicial Court of Massachusetts reinforced and expanded upon the

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<sup>3</sup> The rhetorical comparison between Main Street and Wall Street "refers to the financial markets, major financial institutions and big corporations, as well as the high-level employees, managers and executives of those firms" and each is thought to have differing goals and knowledge levels regarding the intricacies of business. *See Main Street*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/mainstreet.asp> (last visited May 11, 2015).

<sup>4</sup> Arthur S. Demoulas v. Demoulas Super Markets, Inc., 1995 WL 476772, \*1-97 (Mass. Super. Ct. Aug. 2, 1995).

<sup>5</sup> *Id.* at \*4.

<sup>6</sup> *Id.* at \*97.

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fiduciary duties of directors and controlling shareholders in a closely held corporation. The Court reinforced the standard deeply rooted in corporate law that shareholders' interests and protection is central to corporate governance and director behavior.<sup>7</sup>

Arthur T. was an officer and director of DSM, as well as the eventual owner of Market Basket.<sup>8</sup> As a result of selling many DSM stores to Market Basket, his side of the family owned 92% of DSM's shares.<sup>9</sup> In 2013, Arthur S. was finally able to persuade enough family members with voting power to vote with him.<sup>10</sup> Consequently, Arthur S.'s family controlled the majority of the votes and ousted Arthur T. from his position as CEO on June 23, 2014.<sup>11</sup> Just a day later, seven long-time executives left the company, and employee rallies and protests began. Surprisingly, customers soon joined the rallies, which grew in size and lasted for six weeks.<sup>12</sup> During this time, the governors of both Massachusetts and New Hampshire became involved, as well as Massachusetts Attorney General Martha Coakley.<sup>13</sup> The effects of the decision by the board of directors to fire Arthur T. was far-reaching, involving high-ranking politicians, prominent legal figures, and numerous legal issues, including labor and corporate law.

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<sup>7</sup> *Id.* at \*96; see also Kenneth J. Mickieqicz and C. Forbes Sargent, *Demoulas v. Demoulas Supermarkets, Inc.: Directors' and Shareholders' Duty of Loyalty in Self-Dealing Transactions Involving Corporate Opportunity*, 42 B. B.J. 16 (1998).

<sup>8</sup> *Demoulas*, 1995 WL 476772, at \*24.

<sup>9</sup> *Id.* at \*24-29.

<sup>10</sup> Hilary Sargent, Adam Vaccaro & Roberto Scalse, *Updated: Two Arthurs, One Basket: The Market Basket Feud in One Chart*, BOSTON.COM (Jul. 22, 2014, 6:03 PM), <http://www.boston.com/business/news/2014/07/22/two-arthurs-one-basket-the-marketbasket-feud-one-chart/FQIUA5aOqm65zu6aUt5efP/story.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Casey Ross, *Market Basket Deal Ends Bitter Feud*, BOS. GLOBE (Aug. 28, 2014), [http://www.bostonglobe.com/2014/08/27/deal-sell-market-basket-arthur-demoulas-has-been-signed/w9cj3I5GjanMthHzXGk1IK/igraphic.html?p1=Article\\_Graphic\\_More](http://www.bostonglobe.com/2014/08/27/deal-sell-market-basket-arthur-demoulas-has-been-signed/w9cj3I5GjanMthHzXGk1IK/igraphic.html?p1=Article_Graphic_More).

<sup>13</sup> Coakley published a letter to the new co-CEOs of Market Basket and board of directors warning them of the legal implications of firing protesting employees. Steve Annear, *Attorney General Tells Market Basket CEOs to Mind the Law*, BOS. MAG. (Jul. 31, 2014, 5:18 PM), <http://www.bostonmagazine.com/news/blog/2014/07/31/attorney-general-martha-coakley-letter-market-basket/>.

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The events following Arthur T.'s dismissal from the company showed just how short-term goals of increasing shareholder value could result in alienating employees and customers, and calls into question the flawlessness of shareholder primacy and trustee theory.<sup>14</sup> What would normally have been a "business-as-usual"<sup>15</sup> incident, Market Basket's firing of Arthur T. set off a chain reaction, virtually announcing its disregard for non-shareholder interests when governing the corporation. The events of the summer included rallies and protests with thousands of employees and customers who refused to cease until Arthur T. was reinstated or, alternatively, allowed to buy out his cousins' stake in the company.<sup>16</sup>

### The Modern Meaning of Maximizing Value

The resolute reaction from employees and customers, and involvement of prominent politicians and local legal figures created a unique and fascinating narrative. Behind the family disagreements and battles over majority control of the board, there were also conflicting ideals concerning the best interests for the company. Arthur T.'s approach resembled that of iconic businessman Henry Ford in that he believed higher wages, widespread bonuses, and face-time with employees and customers were essential to the corporation's success both in the public eye and in regards to increasing shareholder value. In *Dodge v. Ford Motor Co.*,<sup>17</sup> the Dodge brothers, shareholders in Ford's automobile company, sued Ford to enjoin a planned expansion of the

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<sup>14</sup> Shareholder primacy is the notion that shareholders are entitled to the residual income of the corporation, and thus "the board of directors' objective should be to serve the interests of the shareholders by maximizing the value of the stock . . . [and] corporate governance rules should be designed to serve this principal." George W. Dent Jr., *Corporate Governance Without Shareholders: A Cautionary Lesson From Non-Profit Organizations*, 39 DEL. J. CORP. L. 93, 95 (2014). Trustee theory represents one of the theories of formalism in corporate law that supports shareholder interest as central to the goals of the corporation and that dictates all decision-making within the corporation. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1307 (1984).

<sup>15</sup> Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 548 (2007).

<sup>16</sup> Ross, *supra* note 12.

<sup>17</sup> 170 N.W. 668 (Mich. 1919).

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company which would be funded by dividends that the Dodge brothers felt were rightly owed to the shareholders.<sup>18</sup> Ford notoriously lost the case because he attempted to defend his business actions by insisting fervently that the main, if not sole, purpose of Ford was to give back to society rather than to make a profit.<sup>19</sup>

Ford's viewpoint directly contrasted the age-old shareholder primacy method defining corporate law. Although there are clear legal repercussions for directors who violate their fiduciary duties to shareholders, corporations should also have—and may benefit from— some impetus to balance non-shareholder interests as well. Outside of acting in bad faith,<sup>20</sup> concealing material information,<sup>21</sup> or excessive payments to majority shareholders or directors,<sup>22</sup> there is still legal opportunity for a corporation to make decisions in the best interest of the corporation even though they may not be solely in the interest of shareholders.

It may be difficult to argue with any corporate lawyer, theorist, scholar, or businessperson that making a profit should not be one of the main priorities of a corporation.<sup>23</sup> Still, the obvious and calculated weaknesses, as well as the restricted power of shareholders have begged the question for many corporate scholars: why do directors focus almost solely on shareholder interest and value when governing a public corporation?<sup>24</sup> The rationale and benefits of the traditional shareholder primacy model have been undermined for decades, with a minority of critiques suggesting that the

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<sup>18</sup> *Id.* at 671.

<sup>19</sup> *Id.* at 683.

<sup>20</sup> Michael A. Rosenhouse, *Annotation, Majority's Fiduciary Obligation to Minority Shareholder of Close Corporation—Breach and Remedy*, 39 A.L.R. 6th 1, § 6 (2008).

<sup>21</sup> *Id.* at § 8.

<sup>22</sup> *Id.* at § 19.

<sup>23</sup> Stephen J. Lubben, *Separation and Dependence: Explaining Modern Corporate Governance*, 43 SETON HALL L. REV. 893, 894 (2013).

<sup>24</sup> *Id.* at 906.

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short-term shareholder value-driven decision method may not be the best or most profitable.<sup>25</sup> In envisioning the future of corporate America, it would not be realistic or wise if corporations sought to rid the corporate governance structure of director fiduciary duties to shareholders altogether.<sup>26</sup> However, without compromising shareholder interest completely, corporations could—and should—be able to implement goals in the best interest of employees, customers, and general societal concerns as long-term objectives for making profit and increasing shareholder value.

Through the Market Basket events during the summer of 2014, we are left to wonder what the “Main Street” opinion is on corporations. Perhaps, more importantly, we should also be asking ourselves: should corporations care about the answer to that question, and what role does the average person have in the corporate decision-making process? Harvard University Law Professor Gerald Frug explains that, in contrast to the formalist-trustee theory, where shareholder interest is central, pluralist theorists<sup>27</sup> believe that the corporation affects all people.<sup>28</sup> Employees, customers and shareholders alike, make-up the corporation’s constituency and are “the set of interest groups to which corporate management owes allegiance.”<sup>29</sup> The theory of corporate pluralism has manifested recently in a unique business initiative called Impact Investing, which was a model created by a G8 tasks force in 2013.<sup>30</sup> The group analyzed how to accomplish this mission from multiple angles:

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<sup>25</sup> Dent Jr., *supra* note 14, at 95-99; Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 600-603 (1982); Frug, *supra* note 14, at 1305-1311 (1984); Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 42 (2000).

<sup>26</sup> Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 585-587 (2006).

<sup>27</sup> Pluralists seek to influence corporate governance by “inserting interest-group conflict into the process of corporate decision-making itself.” In other words, “[t]hose who controlled the corporation would follow the constituents’ desires because they would be constituent representatives.” Frug, *supra* note 14, at 1359 (footnote omitted).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *Report Findings*, IMPACT INVESTMENT: THE INVISIBLE HEART OF MARKETS (last visited May 11, 2015), <http://www.socialimpactinvestment.org/report-findings.php>; see also *About the Taskforce*, IMPACT INVESTMENT: THE INVISIBLE HEART OF MARKETS (last visited May 11, 2015), <http://www.socialimpactinvestment.org/about.php>.

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government, business, the market participant, and the market steward.<sup>31</sup> Similarly, a new brand of corporations—benefit corporations—have sprung out of the idea that shareholder value can and should be redefined by empowering investors and other socially-conscious influences.<sup>32</sup>

Benefit corporations signal a shift to what the American Bar Association calls an “entity model,” which embraces the idea “that corporations can ‘simultaneously serve the interests of multiple constituencies, and thus [are] ‘tinged with a public purpose.’”<sup>33</sup> Massachusetts is one of twenty-six states that have passed benefit corporation legislation since 2010.<sup>34</sup> There are now forty-two registered benefit corporations in Massachusetts, which have gained the attention of corporate lawyers attempting to predict the full impact of these organizations.<sup>35</sup>

The benefit corporations model encourages the corporation to take initiative and focus on other constituency interests, opening a dialogue that suggests the best interests of the corporation may—but do not have to be—synonymous with maximizing shareholder value.<sup>36</sup> Benefit corporations and their governing statutes employ directors to maximize shareholder *subjective* value,<sup>37</sup> by considering and focusing on employee and customer interests, as well as societal interests. Similarly, Impact Investing calls for making investments into companies, funds, and organizations with the intention of generating “social and environmental impact alongside financial

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<sup>31</sup> *Id.*

<sup>32</sup> Jacob E. Hasler, *Contracting for Good: How Benefit Corporations Empower Investors and Redefine Shareholder Value*, 100 VA. L. REV. 1279, 1313-14 (Oct. 2014).

<sup>33</sup> *Id.* at 1279-80.

<sup>34</sup> *Id.* at 1279 n.1.

<sup>35</sup> BENEFIT CORP INFORMATION CENTER, <http://www.benefitcorp.net/find-a-benefit-corp> (last visited Oct. 20, 2014); see also Sharon C. Lincoln & Adrienne M. Ellman, *Benefit Corporations Have Arrived in Massachusetts*, Business Transactions Newsletter, BOS. BAR ASS'N (Jan. 11, 2013), <http://www.bostonbar.org/sections/business-transactions/business-transactions-newsletter/2013/01/11/benefit-corporations-have-arrived-in-massachusetts>.

<sup>36</sup> Hasler, *supra* note 32, at 1292.

<sup>37</sup> *Id.* at 1317.

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return.”<sup>38</sup> Moreover, the goal of pushing impact investments is to secure the success of “profit-with-purpose” businesses through corporate form, governance, or other legal protections.<sup>39</sup>

### The Legal Narrative of Corporate Law

Michigan State University Law Professor Mae Kuykendall has insistently argued that corporate law has remained absent in the overall narrative stream: “few try to invest the legal form of the modern corporation with narrative interest.”<sup>40</sup> Kuykendall maintains that business dealings “do not create a large story or narratives that demand to be repeated by storytellers.”<sup>41</sup>

The Market Basket story, however, did just that. It revealed that employees and customers could actually have a strong affinity to corporations and use the human element could upset a corporation’s function enough to create a good story. The Market Basket conflict was saturated by a steady stream of media, and revealed just how much employees and customers of the giant grocery store chain were invested in the corporation as stakeholders rather than shareholders. One article written after the dust had settled commented, “It was a little strange to see the story, which captivated Massachusetts to the point that laypeople could recite the percentage of shares owned by Arthur S. Demoulas’s sister-in-law.”<sup>42</sup> The board of directors—and two brand-new CEOs—joined in

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<sup>38</sup> Hasler, *supra* note 32, at 1313-1314. For a list of incorporated benefit corporations organized by state, see BENEFIT CORP INFORMATION CENTER, *supra* note 35.

<sup>39</sup> *About The Taskforce*, IMPACT INVESTMENTS: THE INVISIBLE HEART OF MARKETS (last visited May 11, 2015), <http://www.socialimpactinvestment.org/about.php>.

<sup>40</sup> Kuykendall, *supra* note 15, at 538.

<sup>41</sup> *Id.* at 550.

<sup>42</sup> Adam Vaccaro, *The Academization of Market Basket Has Begun*, BOSTON.COM (Sept. 26, 2014), <http://www.boston.com/business/news/2014/09/26/the-academization-market-basket-began-thursday-night-mit/wGVYSrCBbYE4yrAPIGHiyN/story.html>.

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the narrative, writing a statement asking managers to come back to work, and then as time passed, advertising a job fair in desperate attempts to keep the business running.<sup>43</sup>

With Henry Ford as an exception, for hundreds of years, corporate law and governance has all but erased the human element in corporate affairs.<sup>44</sup> Laws about corporations lack concern for humanity and its role in the corporation.<sup>45</sup> After *Dodge*, a “rich set of texts” accumulated discussing Ford’s “personality, philosophy, and specific statements about his corporate purposes with respect to capital, workers, and consumers.”<sup>46</sup> What is more, the Michigan Supreme Court felt the need to explicitly remind Ford that his company was a business, and thus existed for the sole purpose of increasing shareholder value and creating profit.<sup>47</sup> Ford’s reasons for insisting that his company was not in business solely to make a profit were never clarified in the law, and—until recently—corporate law moved on from Ford’s notion and never looked back. Accordingly, “[i]n the usual corporate case, there is no assertion of personal belief to unmask the depersonalizing premises of the entity.”<sup>48</sup> However, at the root of the Market Basket conflict is a long and very personal family feud that brewed since the company’s inception, but was ignored to keep human emotions out of corporate affairs and governance.

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<sup>43</sup> Adam Vaccaro, *Market Basket CEOs to Employees: Return to Work on August 4*, BOSTON.COM (Sept. 30, 2014), <http://www.boston.com/business/news/2014/07/30/market-basket-ceos-employees-return-work-august/BYNY4wGph9OrGpkhKPsVBN/story.html>.

<sup>44</sup> Kuykendall, *supra* note 15, at 571; *see also* *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919).

<sup>45</sup> *See* Kuykendall, *supra* note 15, at 571-574.

<sup>46</sup> *Id.* at 571.

<sup>47</sup> *See Dodge*, 170 N.W. at 683-84.

<sup>48</sup> Kuykendall, *supra* note 15, at 572.

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## Conclusion

If nothing else, corporate law teaches us that management is always under a legal duty to implement shareholders' wishes rather than their own, and thus to maximize shareholder value.<sup>49</sup> Despite corporate codes and state statutes, however, this ideal has largely been codified through common law in cases such as *Dodge*, where the courts expressly and consistently find that the purpose of a corporation is profit-maximization and the duty to pursue increasing shareholder value at all times.<sup>50</sup> Without a convincing narrative as a tool to reach the public and inspire interest in corporate affairs, there can be no successful challenge to the shareholder-primacy model. The inherent complexities of corporate law, the long-held traditions of encouraging and enforcing directors' fiduciary duties to shareholders, and almost non-existent narratives explaining corporate law to the public have all prevented legal or social challenges to the function of corporations.

The Market Basket story not only presents the opportunity for a narrative in corporate law, but revives a common question surrounding shareholder value: to whom is the board of directors responsible? Regardless of the financial success of corporations for over a century, it is important to question and challenge the board's governance methods. The events surrounding Market Basket in the summer of 2014 exemplified the power of non-shareholder constituents when their interest had

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<sup>49</sup> See Lee, *supra* note 26, at 535.

<sup>50</sup> See generally *Bayer v. Beran*, 49 N.Y.S.2d 2 (Sup. Ct. 1944) (stating that, "The fiduciary must subordinate his individual and private interests to his duty to the corporation whenever the two conflict"); *Zahn v. Transamerica Corp.*, 162 F. 2d 36 (3d Cir. 1947) (where corporate director initiated redemption of Class A stock for his own profit he violated his fiduciary duty to Class A shareholders); *Eisenberg v. Flying Tiger Line, Inc.*, 451 F. 2d 267 (2d Cir. 1971) (finding corporate directors have duty to minority shareholders individually as well as derivatively); *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (holding directors violated fiduciary duty to shareholders where decision to approve merger was not made as informed business judgment, and material facts were not disclosed); *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) (holding that, "board members, owing a well-established fiduciary duty to the corporation, will not be allowed to cause a derivative suit to be dismissed when it would be a breach of their fiduciary duty"); *Kamin v. Am. Express Co.*, 86 Misc. 2d 809 (N.Y. App. Div. 1976) (where shareholders brought action for declaration that certain dividend was waste of corporate funds, court held corporate directors have responsibility to act in good faith even where it may benefit certain shareholders less).

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been compromised, and how an effective corporate law narrative can undermine the seemingly impenetrable shareholder-primacy model that has dominated corporate theory and law.

After two months of continuous protests and legal threats following his removal as CEO of Market Basket, Arthur T. Demoulas paid \$1.5 billion to buy out his cousin's 50.5% share of the company, a victory packed with implications.<sup>51</sup> Consequently, Market Basket can be viewed as a teaching moment for corporate law, posing a warning to corporations blindly following short-term goals to increase shareholder value. A combination of legal and public narrative is crucial to increase corporate accountability and shed light on the possibilities of long-term oriented corporate goals that take into account non-shareholder constituents. Furthermore, this story suggests that paying attention to public interest demands—namely those of other stakeholders besides shareholders—when making decisions can actually improve profit and shareholder value in the long run. While the bottom-line profit-maximizing aspirations of a corporation may not be changing, the methods of how to reach those long-term goals and the breadth of purpose for a corporation may be. Viewing the story of Market Basket as a return to the ideals of the past, and in light of the new benefit corporation and Impact Investing ideals, Henry Ford's risky ambition to look beyond purely shareholders' interests may finally be the "right" approach, and his corporate philosophy may even find a place in the future of corporate decision-making processes.

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<sup>51</sup> Ross, *supra* note 12.

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