IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SCHUFF INTERNATIONAL, INC.	**)**	**CONSOLIDATED**
STOCKHOLDERS LITIGATION	**)**	**C.A. NO. 10323-VCZ**

FAIR VALUE INVESTMENTS INCORPORATED'S BRIEF IN SUPPORT OF OBJECTION TO PROPOSED SETTLEMENT

Robert J. Kriner, Jr. (#2546)
Tiffany J. Cramer (#4998)
CHIMICLES SCHWARTZ KRINER &
DONALDSON-SMITH LLP
2711 Centerville Road, Suite 201
Wilmington, DE 19808
(302) 656-2500

Attorneys for Objector, Fair Value Investments Incorporated

OF COUNSEL:

Daniel W. Krasner
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
New York, New York 10016
(212) 545-4600

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Objector, Fair Value Investments, Incorporated ("FVI"), objects to the proposed Settlement of this consolidated class action for the reasons below.[1] FVI's Objection is supported by seven other stockholders who own an aggregate of more than 130,000 shares of the Company's common stock, representing more than 45% of the Non-Tendered Stockholder shares.[2]

PRELIMINARY STATEMENT

The proposed Settlement is seriously flawed because the Company was dismissed from this action, is not a party to the Settlement Agreement, and does not appear to have been represented during the negotiations leading up to the Settlement. Yet, the Settlement Agreement provides that the Settlement consideration will be paid by the unrepresented Company.[3] Indeed, the settlement

[1] Capitalized terms not otherwise defined herein have the same meanings as in the Stipulation and Agreement of Compromise, Settlement, and Release dated as of November 15, 2019 (the "Settlement Agreement") and paragraph references (¶) are to the paragraphs therein.

[2] These stockholders who have entered Affidavits in support of Fair Value Investments Incorporated's Notice of Intention to Appear and Objection to Proposed Settlement of ("Objection"), being filed contemporaneously herewith are: Douglas Schoenberg (55,733 shares), James Rivest (24,448 shares), Andrew Kaufman (14,986 shares), Cedar Creek Partners, LLC (14,026 shares), Sheila and Joel Pitcoff (10,800 shares), Adam Gross (7,614 shares) and Robert Tera (4,202 shares). *See* Objection Exs. A through G.

[3] It appears that some portion of the consideration is being paid by the Defendants' insurers, but the amount is unclear from the Settlement Agreement, the Notice of Pendency and other publicly available Settlement materials. Neither the Settlement Agreement nor the Settlement Offer to Purchase provides any

papers conceded that the Company will fund its share of the proposed Settlement by borrowing money and adding to its debt burden. Adding insult to injury, the Company is required to pay the Settlement consideration in exchange for a release which includes shareholder derivative claims which belong to the Company itself, thus improperly making the Company use its assets to pay for a release of its own claims. The proposed Settlement must therefore be revised so that none of the consideration is paid by the non-party Company, but rather by the Defendants, principally HC2 which is the primary beneficiary of the wrongful acts alleged in the Complaint.

Further, the proposed release binds Non-Tendered Stockholders, such as FVI, who elect not to participate in the Settlement Tender Offer, as is their right. Non-Tendered Stockholders who elect not to participate in the Settlement Tender Offer would thus receive no consideration in exchange for their release. In fact, because the proposed Settlement requires the non-party Company to use its assets to pay the Settlement consideration, it is partly also at the expense of such Non-Tendered Stockholders.

Because the Settlement contemplates a non-opt-out class, the Class definition must be revised to exclude Non-Tendered Stockholders. Indeed, the Settlement Agreement recognizes that it is problematic to require Non-Tendered

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explanation or breakdown of the Company's use of its assets, including proceeds from its Insurers, to pay the Settlement against the Defendants.

Stockholders to release their claims for no consideration by specifically providing that a termination of the Settlement as to the Non-Tendered Stockholders only would not otherwise impede the Settlement. Alternatively, Non-Tendered Stockholders must be included in the Settlement only if they elect to accept the proposed Settlement Tender Offer.

STATEMENT OF FACTS

I. Background and Procedural History

This is a securities class action challenging the 2014 Tender Offer by the Company's parent, HC2 Holdings, Inc., to buy all of the Company's outstanding shares of common stock that it did not already own and further challenging HC2's decision not to consummate a short-form merger as previously committed after it had acquired 90% of the Company's outstanding shares of common stock. ¶ LL.

In May 2014, HC2 purchased 2,500,000 shares of the Company's common stock from its majority shareholder, which made HC2 the owner of approximately 60% of the Company's outstanding common stock. ¶ A. HC2 purchased additional shares of the Company's stock through a series of transactions in May, June, and July 2014 which raised its ownership interest to approximately 70%. ¶¶ B-C.

On August 11, 2014, HC2 informed the Company that it intended to make a tender offer at $31.50 per share for all outstanding shares of the Company's common stock that it did not already own (the 2014 Tender Offer). ¶ E. The

Company's Board formed a Special Committee to evaluate the 2014 Tender Offer. ¶ F. The Special Committee ultimately took no position on the 2014 Tender Offer. ¶¶ I, K. The 2014 Tender Offer closed on October 6, 2014. ¶ M. The next day, HC2 accepted 721,124 shares of the Company's common stock for purchase, which increased its ownership interest to approximately 88.7%. *Id.* The members of the Special Committee tendered their shares in the 2014 Tender Offer. *Id.* HC2 acquired additional shares of the Company's stock in October 2014 which raised its ownership interest above 90%. ¶ N.

Two shareholder class actions challenging the 2014 Tender Offer were filed in November 2014. ¶¶ O, Q. The actions were consolidated into this action in February 2015. ¶ R. The November 6, 2014 Verified Class Action Complaint of Mark Jacobs was made the operative complaint for the consolidated case ("Operative Complaint") (Transaction ID 563013236).

The parties engaged in discovery and began settlement discussions in December 2016 and continued to litigate the case as intermittent settlement discussions continued. ¶¶ II *et seq.* The parties to this action entered into the proposed Settlement in April 2019. ¶ PP. The Company had previously been dismissed as a defendant in October 2015 and did not participate in any further proceedings. *See* ¶ Y. The Company is not a party to the Settlement Agreement,

did not sign the Settlement Agreement, and does not appear to have been represented in the negotiations leading up to the proposed Settlement.

II. The Proposed Settlement

The proposed settlement contemplates that Tendered Stockholders (*i.e.,* stockholders who tendered their shares of stock in the 2014 Tender Offer) will receive an additional Net Tender Payment of $35.95 for each share of stock they previously tendered in the 2014 Tender Offer. ¶¶ 1 (m), 1(bb), 2(a). The proposed settlement further contemplates that the Company will commence a tender offer (the Settlement Tender Offer) to purchase the shares of stock owned by Non-Tendered Stockholders (*i.e.,* stockholders who elected not to participate in the 2014 Tender Offer, or who have acquired shares after the 2014 events addressed in the Operative Complaint, at any time until November 15, 2019) at approximately $57.56 per share (*i.e.,* the $31.50 per share offered in the 2014 Tender Offer plus the $35.95 per share Net Tender Payment, net of the estimated $9.89 per share deduction if the Court approves Plaintiff's Fee and Expense Award). ¶¶ E, 1(l), 1(z), 2(b), 18; Settlement Br. at 42 n.96.[4] The Settlement Agreement specifically provides that "Non-Tendered Stockholders may participate in the Settlement Tender Offer, or not, at their election." ¶ 2(b). Non-Tendered

[4] References to Plaintiff's Brief in Support of Final Approval of the Proposed Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses, filed January 14, 2020 (Transaction ID 64615870) is cited herein as "Settlement Br."

Stockholders who elect not to participate in the Settlement Tender Offer will remain stockholders in the Company. *See* Settlement Tender Offer Disclosures at 7 ("If you do not tender your Shares in the Offer, you will remain a stockholder of the Company.").

Apart from the serious flaws to the proposed Settlement discussed in detail below, there are rational economic reasons which militate against Non-Tendered Stockholders participating in the Settlement Tender Offer at a price of approximately $57.56 per share. Transactions after the 2014 Tender Offer imply the Company's stock is worth more, perhaps far more. Even at the time of the Tender Offer, the Company's parent, HC2, received a valuation analysis from a third party advisor on March 17, 2015 implying the Company's stock had been worth $68.99 per share as of December 31, 2014. ¶ S. A year later, in December 2015, Defendant HC2 entered into two affiliated-party transactions transferring 81,900 of its shares of the Company's common stock at an implied value of $74.48 per share. ¶ AA. More recently, on February 14, 2018, HC2 sold 20,800 shares of the Company's common stock to an affiliate for $132.21 per share. ¶ NN. The consideration received by HC2 for these sales was based, respectively, upon valuations of the Company performed by Ernst & Young LLP and Duff & Phelps, LLC. *See* Settlement Tender Offer Disclosures at 26. The most recent valuation of the Company by Duff & Phelps as of October 22, 2019 is between $108.64 -

$130.43 per share of common stock. *Id.* at 30. Under the circumstances, it is a perfectly rational decision for Non-Tendered Stockholders (other than Plaintiff who expects to receive a $25,000 Incentive Reward for tendering his shares) not to participate in the Settlement Tender Offer at the $57.56 per share approximate value, as is their right.

Whether or not a Non-Tendered Stockholder participates in the Settlement Tender Offer, she is still part of the Class. The Class is defined as "a non-opt-out class consisting of any and all record and beneficial owners of outstanding shares of [the Company's] common stock who held such stock at any time during the Class Period," *i.e.,* May 12, 2014 through November 15, 2019. ¶¶ 1(c), 1(e). Non-Tendered Stockholders who decline to participate in the Settlement Tender Offer, as is their right, are nevertheless part of the Class for purposes of the proposed Settlement.

The proposed Settlement requires every member of the Class to give the Defendants a release. *See* ¶ 3. The broad release encompasses "any and all manner of claims" the stockholder "asserted or could have asserted based on his, her or its ownership of [the Company's] common stock during the Class Period, whether direct, derivative, individual, class, representative, legal, equitable or of any other type, or in any other capacity, or that [the Company] could have asserted" against the Defendants related in any way to the subject matter of this

action, the 2014 Tender Offer, HC2's decision not to consummate a short-form merger after obtaining 90% ownership of the Company, any allegations in the Complaint, the Settlement Tender Offer, the proposed Settlement, and a number of other matters. ¶ 1(w). This release must be given by all members of the Class, even Non-Tendered Stockholders who decline to participate in the Settlement Tender Offer and therefore receive no consideration for doing so. ¶ 3.

ARGUMENT

The Court of Chancery "play[s] the role of fiduciary in its review of [class] settlements.'" *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1043 (Del. Ch. 2015) (quoting *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 266 (Del. 1990)). A Court may approve a settlement of representative litigation if the settlement consideration is a fair, adequate and reasonable trade for the claims compromised in the settlement, applying its own business judgement. *Id*. at 1064 n.26 (collecting cases describing standard). It is the burden of the proponents of a settlement to demonstrate that that the settlement is fair, reasonable, and in the best interests of the stockholder class. *See In re: Countrywide Corp. S'holders Litig.,* 2009 Del. Ch. LEXIS 44, at *6 (Mar. 31, 2009). The proposed Settlement is unfair, unreasonable and not in the best interests of the Class for the following reasons.

I. The Proposed Settlement Is Not Fair to the Entire Settlement Class

"In a representative action, a trial court has an independent and continuing duty to scrutinize the representative plaintiff to see if she is providing adequate representation and if not, to take appropriate action." *South v. Baker*, 62 A.3d 1, 21 (Del. Ch. 2012).[5] A person who accepts a role as class representative takes on fiduciary duties of care and loyalty to all members of the class. *Sunrise Partners L.P. v. Rouse Properties, Inc.*, 2016 Del. Ch. LEXIS 186, at *14 & n.23 (Dec. 8, 2016); *In re M&F Worldwide Corp. S'holders Litig.*, 799 A.2d 1164, 1174 n.34 (Del. Ch. 2002). These duties require a lead plaintiff or class representative not to elevate its own interests over those of absent class members. *Prezant v. De Angelis*, 636 A.2d 915, 923-24 (Del. 1994). And "a class action settlement [cannot] bind absent class members without a judicial determination that the adequate representation requirement of Rule 23(a)(4) has been satisfied." *Prezant*, 636 A.2d at 924.

In addition, "'[t]he duty owed by class counsel is to the entire class and is not dependent on the special desires of the named plaintiffs.'" *M&F Worldwide*, 799 A.2d at 1174 n.33 (citations omitted). "'[W]hen a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not

[5] "[A]nalysis of adequacy requirements is generally the same under Rules 23 and 23.1" except that in a class action, the Plaintiff must establish adequacy. *Id.* (internal quotation omitted).

allow decisions on behalf of the class to rest exclusively with the named plaintiffs.'" *Id*. at 1174 n.35 (citation omitted).

Here, the defined Class includes all of the Company's stockholders during the Class period, even Non-Tendered Stockholders who choose not to tender their shares in the Settlement Tender Offer. ¶¶ 1(c), 2(b). Non-Tendered Stockholders, of which there are 289,902 shares, (¶ 1(o)), who elect to remain stockholders of the Company, rather than participate in the Settlement Tender Offer, have materially different interests than the rest of the Class with respect to the Settlement, its financing, and the release. The representative Plaintiff has committed to tendering "all of his shares of [the Company's] common stock in the Settlement Tender Offer." ¶ 2(b). Upon doing so, he will cease to be a stockholder in the Company. By contrast, Non-Tendered Stockholders who exercise their right not to participate in the Settlement Tender Offer will remain stockholders of the Company, their investment in which has been diminished by the controller and the Board's causing the Company to use its assets to pay for the proposed Settlement. *Id.* Further, the Plaintiff has requested an incentive award of $25,000 in connection with the proposed Settlement. ¶ 20. If granted, the $25,000 would essentially provide Plaintiff with payment for 434 shares more than the Company stock he owns. *See* ¶ NN. Plaintiff thus does not adequately represent all of the members of the Class. *See generally, Resorts*, 570 A.2d at 264 (allowing non-tendered stockholders to

opt out of settlement where "nontendering shareholders were not adequately represented by the representatives [and] the interests of the [tendering and nontendering] shareholders were not necessarily identical"); *Strategic Asset Mgmt., Inc. v. Nicholson*, 2004 Del. Ch. LEXIS 67, at *4-8 (May 20, 2004) (rejecting a derivative action settlement with benefits accruing to the defendants and an award to the representative plaintiff).

II. The Proposed Settlement Unfairly Holds the Company Responsible for Alleged Malfeasance

Exercising its business judgment, the Court assesses the reasonableness of the benefits that a class or corporation receives from a settlement against the value of what a plaintiff seeks to trade away. *See Activision,* 124 A.3d at 1043. The non-party Company's "give" in this Action significantly outweighs its nonexistent "get."

The purpose of representative actions such as this is to protect the interests of a company and its stockholders to which fiduciary duties are owed "from the misfeasance and mal-feasance of faithless directors and managers." *See id.* at 1045 (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (internal quotation omitted)). Here, the claims seek money damages and disgorgement from defendants HC2 and a majority of the Board, and the proposed Settlement releases these Defendants from liability. ¶¶ 1(s), (w). However, in return for a release of liability against them, HC2 and Defendant Board members give up nothing.

Instead, they have unfairly caused the Company, a non-party to this litigation, to use its assets to pay the Settlement consideration, including by causing it to take on additional debt. *See* ¶¶ 1(f) ("'DBMG Financing' means all aspects of the financing for the DBMG payments in connection with the Settlement and Settlement Tender Offer"), 2(a) ("DBMG shall pay the Net Tender Payment to the Tendered Stockholders … using cash from the DBMG Financing and the Insurers"), 2(b) ("DBMG shall pay the Net Settlement Tender Offer Payment to participating Non-Tendered Stockholders."); Settlement Offer to Purchase at 5 ("The Company has obtained debt financing in an amount necessary to fund the Company's purchase pursuant to the Offer") and 22 (same).[6] Compounding this unfairness, not only is the Company a non-party to this litigation, but it has not participated in this litigation and does not appear to have been independently represented during settlement negotiations.[7]

[6] "Settlement Offer to Purchase" refers to the proposed Offer by DBM Global Inc. to Purchase All Outstanding Shares of its Common Stock, which was filed as Exhibit D to the Settlement Agreement.

[7] As discussed in Section IV below, the great majority of the Board is directly interested in the proposed Settlement and release, which would fund and release their liability at the expense of the Company. The Special Committee does not offer any protection either. The Special Committee was formed to evaluate the 2014 Tender Offer. ¶¶ F, M. There is no special committee formed to evaluate this proposed settlement. The Company is not represented in the proposed Settlement at all.

Aside from the inherent unfairness in holding non-participants responsible for the wrongdoing of others, the proposed settlement provides HC2 and the Board with a host of bad incentives. The Settlement Agreement leaves undecided whether Defendants acted disloyally or not. *See* ¶ UU. If they did, it makes sense that the same wrongdoings would continue, with Defendants putting their interests (including the interests of HC2, as the Company's controlling stockholder), above those of the Company and the Non-Tendered Stockholders who remain shareholders of the Company. Because of this, the proposed Settlement not only unfairly requires the Company to bear the expense of the proposed Settlement, but also comes at the expense of Class Members who exercise their right not to participate in the Settlement Tender Offer and remain stockholders of the Company. *See Countrywide*, 2009 Del. Ch. LEXIS 44, at *37; *Stein v. Blankfein*, 2018 Del. Ch. LEXIS 505, at *11-12 (Oct. 23, 2018). As discussed above, this is of no concern to Plaintiff, who will no longer be a stockholder once he tenders all of his shares in the Settlement Tender Offer as he has committed to do. ¶ 2(b). But it is of great concern to members of the Class who exercise their right to remain stockholders of the Company. The inherent unfairness in holding non-participants responsible for the wrongdoing of others alone, who still maintain control over the non-participant Company alone is sufficient for the Court to reject the Settlement. *See Stein*, 2018 Del. Ch. LEXIS 505, at *11-12.

III. The Release is Unfairly Overbroad

Parties do not have *carte blanche* to release any claims they wish in a settlement agreement. "A settlement can release claims that were not specifically asserted in an action, but can only release claims that are based on the 'same identical factual predicate' or the 'same set of operative facts' as the underlying action." *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006) (citation omitted). "If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action." *Id*. Accordingly, "a release may be overbroad if it could be interpreted to 'encompass any claim that has *some* relationship-however remote or tangential-to any 'fact,' 'act' or conduct 'referred to' in the Action.'" *Id.* (citation omitted). *See In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 898 (Del. Ch. 2016) (requiring release be "narrowly circumscribed"). The proposed Settlement is just this type of overbroad release, improperly releasing claims based on future conduct and claims unrelated to the "same identical factual predicate" or the "same set of operative facts" as the claims actually asserted in this litigation.

A. The Proposed Settlement Seeks Approval of an Intergalactic Release

As an initial matter, the release, which spans an astonishing four pages, include both "unknown" claims and "Unknown Claims" (*see* ¶¶ 1(w), (dd)), two components of intergalactic releases criticized in M&A settlements. *See, e.g. Trulia*, 129 A.3d at 898. The release proposes to give away any claims:

> which now or hereafter, are based upon, arise out of, relate in any way to, or involve, directly or indirectly, or previously were based upon, arose out of, resulted from, were related to or involved, directly or indirectly, any of the actual, alleged, or attempted actions, inactions, conduct, transactions, contracts, occurrence, statements, representations, misrepresentations, omissions, allegations, facts, practices, events, claims, or any other matters, things, or causes whatsoever, or any series thereof, that were, or could have been, alleged, asserted, set forth, claimed, embraced, involved, or referred to in, or related to, directly or indirectly, in whole or in part: [the Action and the subject matter of this Action].

¶ 1(w). Read literally, this extends well beyond the "operative facts" by providing that Defendants are released from all liability that were or "referred to in" or related "indirectly" to the claims that Plaintiffs actually pursued. Thus, Defendants are released from claims that currently exist but were not part of the operative facts. This overbroad language alone is sufficient for the Court to reject the Settlement. *See UniSuper*, 898 A.2d at 347.

B. The Proposed Settlement in this Class Action Unfairly Releases All Derivative Claims

Further, and independently, the Settlement also cannot be approved because from the standpoint of the Company, the "give" – the Company being required to pay for the settlement of an action to which it is not even a party and to release also any claims against Defendants by the Company (or any Non-Tendered Stockholder, derivatively on its behalf) arising out of this Action or the proposed Settlement, which claims belong to the Company itself – is not justified by any

"get" at all.[8] Where, as here, a "release will prevent the [derivative] claims from *ever* being litigated. . . it [is not] reasonable to approve a settlement that effectively resolves direct claims belonging to the Plaintiff in return for voiding potentially-meritorious monetary causes of action belonging to the Company." *Stein*, 2018 Del. Ch. LEXIS 505, at **11-12.

C. The Proposed Settlement Unfairly Releases All Claims Related to the Proposed Settlement

The release also proposes to give away any claims:

> which now or hereafter, are based on … any of the actual, alleged, or attempted actions, inactions, conduct, transactions, contracts, occurrences, statements, representations, misrepresentations, omissions, allegations, facts, practices, events, claims, or any other matters, things, or causes whatsoever, or any series thereof, that were, or could have been, alleged, asserted, set forth, claimed, embraced, involved, or referred to in, or related to, directly or indirectly, in whole or in part … [the Settlement, the Settlement Tender Offer, and the DBMG Financing].

¶ 1(w). Aside from the unfairly overbroad language, discussed above, as written, this language impermissibly releases future conduct – e.g., conduct in connection with the implementation or rejection of the proposed Settlement Tender Offer, which necessarily will take place in the future, the implementation or amendment

[8] The fact that the release also includes claims against the Company is immaterial because this action arises out of the 2014 Tender Offer which was not a tender offer by the Company. Rather, the 2014 Tender Offer was made by the Company's controller, HC2. ¶ E. Moreover, the Company would not have been voluntarily dismissed from this action in 2015, *see* ¶ Y, if there were any bona fide claims against it.

of the DBMG Financing, or in connection with the Settlement, all of which will include acts taking place in the future[9] – and unfairly forecloses any meritorious claims that are "based on a common set of tangential facts, as opposed to operative or core facts"[10] – e.g., fiduciary duty claims concerning the controller and the Board's conduct in connection with Settlement Tender Offer, the DBMG Financing, the Settlement itself, and the process leading thereto.

Non-Tendered Stockholders who choose to remain invested in the Company necessarily have further interest in the assets of the surviving entity. However, if the Court were to approve the proposed Settlement, these Non-Tendered Stockholders (directly and derivatively on behalf of the Company) would have no recourse and would be prevented from asserting meritorious claims arising from facts concerning the subject matters that were not presented to the Court by Plaintiff or Defendants and that may only be discovered in the future. This unfairly over-broad release of claims independently precludes approval of the proposed Settlement. *See UniSuper*, 898 A.2d at 348 (rejecting settlement of class action where the release language was "overly broad in that it attempts to release claims arising from an event that has not yet happened").

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[9] *See UniSuper*, 898 A.2d at 348 ("The rule in Delaware is that a release cannot apply to future conduct. Defendants cite no authority for the proposition that there is an exception for future conduct arising out of, or contemplated by, the settlement itself.").

[10] *Id.* at 347.

IV. The Proposed Settlement Constitutes Unfair Self-Dealing by the Company's Controller and Board at the Expense of the Company and the Class

This action brought claims against the Company's controller and the Board in connection with the 2014 Tender Offer by HC2 and the anticipated short-form merger. *See* Operative Complaint. The proposed Settlement releases class and derivative claims relating not only to this conduct and transactions, but also to the Settlement Tender Offer by the Company that is funded by the Company. ¶ 1(w). It further releases the controller and Board from liability for all class and derivative claims against them. *Id.*

A majority of the current Board directly benefits at the direct expense of the Company and Class members who choose not to participate in the Settlement Tender Offer. The Board currently has seven directors. *See* Settlement Tender Offer Disclosures at 18. Four of them are defendants in this action: Falcone, Roach, Hill and Yagoda. *Id.* Further, directors Falcone, Sena and Stahl are officers of the Company's controller, HC2. *Id.*

Thus, six of the seven directors have a direct, personal interest in the proposed Settlement, which releases HC2 and the Board from any liability at the expense of the Company and members of the Class who elect stockholders of the Company. As noted above such stockholders are not adequately represented in the proposed Settlement and the Company is not represented *at all*.

V. The Proposed Settlement is Unfairly Coercive

A. The Proposed Settlement Fails to Provide Equitable Reinforcements

It is well-recognized under Delaware law, that there is potential for coercion and unfairness posed by tender offers brought by and for the benefit of controlling stockholders.[11] *In re Pure Res. S'holders Litig.*, 808 A.2d 421, 445 (Del. Ch. 2002); *In re CNX Gas Corp. S'holders Litig.*, 2010 Del. Ch. LEXIS 139, at **19-20 (July 5, 2010) (quoting *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1116 (Del. 1994)). Because of this, without certain equitable reinforcements, such as a non-waivable majority of the minority tender condition and a negotiation and recommendation by a special committee of the terms of a tender offer, such a tender offer will be found to be coercive. *Pure*, 808 A.2d at 445-47; *In re CNX Gas*, 4 A.3d at 413 ; *M&F Worldwide*, 88 A.3d at 645.

There is no question that the Proposed Settlement does not provide these equitable protections. The tender offer was not negotiated and recommended by a special committee of purportedly independent Board members. *See* ¶¶ MM, OO, PP, RR. Additionally, the Settlement Offer to Purchase includes no non-waivable

[11] While it is the Company that is technically offering to purchase the Non-Tendered Stockholders' shares, as discussed more fully above, HC2, as controlling shareholder, has used its control over the Company, a non-party to this litigation, to issue a tender offer in order to obtain a broad release of claims against HC2. The standards set forth in *Pure*, *CNX*, and *M&F Worldwide*, are therefore applicable to the Proposed Settlement.

majority of the minority tender condition.[12] *Compare* Ex. D at 33 *with* 2014 Offer to Purchase at 16.[13]

B. The Proposed Settlement Provides Non-Tendered Stockholders with a Prisoner's Dilemma

Without any equitable protections, Non-Tendered Stockholders are faced with the "prisoner's dilemma" of accepting an unfair price for their shares or remain shareholders of a Company, with reduced value, due to its assets being used to fund the proposed Settlement, no recourse to protect their investment in the Company (due to the proposed Settlement's unfairly broad releases), with a controlling stockholder with power to cut dividends or force a merger at a lower price, and with even more thinly traded shares with little hope of liquidity. *See Pure*, 808 A.2d at 442.

Plaintiff characterizes the Proposed Settlement as offering Non-Tendered Stockholders the option of tendering their shares for $67.45 per share or, "at their

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[12] The Settlement Offer to Purchase makes clear that HC2 has no present intention of conducting a second-step merger under Section 253 following the offer or at any time in the foreseeable future and that appraisal rights will not be made available to Non-Tendered Stockholders (Settlement Agreement Ex. D at 3), which can also render a tender offer unfairly coercive. *See Pure*, 808 A.2d at 445.

[13] "2014 Offer to Purchase" refers to the Offer to Purchase All Outstanding Shares of Common Stock of Schuff International, Inc. at $31.50 Per Share, Net in Cash by HC2 Holdings, Inc., dated August 21, 2014, which was attached as Exhibit 11 to the Transmittal Affidavit of Seth D. Rigrodsky, Esquire, in Support of the Proposed Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses (Transaction ID 64621609).

election, [to] retain their Schuff stock ….” Settlement Br. at 14-15. However, the Settlement Agreement recognizes that the $67.45 per share price provided by the proposed Settlement for Non-Tendered Stockholders, is net of fees and expenses (including the fees awarded to Plaintiff and his counsel), and may be reduced by $9.89 per share if the Court approves Plaintiff’s Fee and Expense Award. § 18; Settlement Br. at 42 n.96. Thus, Non-Tendered Stockholders are stuck with the option of tendering their shares for $57.56 per share, which is a discount not only to Duff & Phelps’ most recent per-share values ranging between $108.64 and $130.43 per share of common stock as of September 30, 2019, but even to Schuff’s implied per-share value of $68.99 per share as of December 31, 2014, which was also based on a third party valuation at the time. *See* Settlement Tender Offer Disclosures at 26.

Further, the proposed Settlement fails to account for the Non-Tendered Stockholders’ lost opportunities of appraisal had HC2 not failed to complete the Section 253 merger after the Tender Offer closed. Under the terms of the Tender Offer, appraisal rights would be available in connection with the Section 253 merger following the close of the Tender Offer, pursuant to which Non-Tendered Stockholders would be entitled, through an appraisal proceeding before the Delaware Court of Chancery, to receive payment of the “fair value” of their shares, “together with … interest from the effective date of the Merger through the date of

payment of the judgment … compounded quarterly and [] accru[ing] at 5% over the Federal Reserve Board's discount rate …." (2014 Offer to Purchase at 17). The Company's own third party advisor valued the Company at $68.99 per share contemporaneously with the completion of the Tender Offer – which is above both the $67.45 per share number Plaintiff touts, and the potential Net Tendered Payment of $57.56. Assuming, but not conceding, the validity of this valuation, Non-Tendered Stockholders seeking appraisal would have been entitled to not only the higher price, but the compounded interest.[14]

C. The Proposed Settlement Puts Non-Tendered Stockholders at an Informational Disadvantage

In making the choice whether to tender into the Settlement Tender Offer, Non-Tendered Stockholders are at an informational disadvantage. In support of

[14] Plaintiff argues that the $17.16 per share in dividends the Non-Tendered Stockholders received from October 2014 through the five years this Action has been litigated, provided a return exceeding the rates of return on short-term debt investments in an attempt to support the $57.56 Net Settlement Tender Offer Payment as fair. Settlement Br. at 15. Together with the $57.56 Net Settlement Tender Offer Payment, Non-Tendered Shareholders would have in the aggregate received $74.72 per share through the five years this Action had been litigated. However, had HC2 completed a short form merger as it had promised, and the Non-Tendered Stockholders had been permitted to seek appraisal and coordinated their appraisal proceeding with this action (as is the usual practice in this Court), even using the $68.99 per share price provided by Schuff's own third party advisor as of December 2014 (which Objector does not concede is a fair price) and applying a simple 5% interest rate (without the addition of the Federal Reserve Board's discount rate, to which they would have been entitled), compounded quarterly for five years, Non-Tendered Shareholders would have been entitled to upwards of $88.45per share – or $13.73 per share more than what is nominally offered, even taking into account the dividends paid over the past five years .

the Settlement Tender Offer, the Offer to Tender lists as exhibits Company valuations provided quarterly by third party advisors for the period as of December 31, 2014, through September 30, 2019, these exhibits are to be provided in a Virtual Data Room, together with certain Company financial information and projections ("Evaluation Materials"). Settlement Offer to Purchase at 37-38.

However, before accessing the Virtual Data Room, a Class Member, including Non-Tendered Stockholders, must agree (i) to be bound by unfairly stringent confidentiality provisions ("Confidentiality Agreement") and (ii) must further agree to an unfairly overbroad waiver and release with respect to an extensive list of fiduciaries and third parties ("Waiver"). Settlement Offer to Purchase at 17, 37; Cramer Aff. Ex. 1.[15]

First, the Confidentiality Agreement makes clear that:

> You and your Representatives shall keep such Evaluation material confidential in accordance with the terms of this agreement and use the Evaluation Material solely for the purpose of evaluating the Settlement and/or whether to tender your Shares in connection with the Settlement Tender Offer and shall not disclose Evaluation Material to any other person except as required by law, regulation, stock exchange requirement, or legal or judicial process [which is described as "including, without limitation, by deposition, interrogatory, request for documents, subpoena, civil investigative demand, or similar processes"]….

[15] The Conditions of Access – Confidentiality Agreement and Release to the Virtual Data Room in Connection with the Settlement Offer to Purchase is attached as Exhibit 1 to the Transmittal Affidavit of Tiffany J. Cramer in Support of Fair Value Investments Incorporated's Brief in Support of Objection to Proposed Settlement ("Cramer Aff.").

Cramer Aff. Ex. 1 ¶3. This language makes clear that nothing contained in the Evaluation Materials may be disclosed in any way to those not included in "You and your Representatives" unless it non-disclosure would subject a Non-Tendered Stockholder to court discipline. Put another way, once a Non-Tendered Stockholder obtains access to the Evaluation Materials, regardless of what breach of fiduciary duty, malfeasance or other misconduct may become apparent, they are precluded from disclosing the Evaluation Materials in any way to seek recourse. This is so whether or not the Settlement Agreement's unfairly broad release applies.

Second, while the Settlement Offer to purchase misleadingly describes the Waiver as an "agree[ment] to waive and release the Consultants whose documents are described under 'Index to Exhibits to Offer to Purchase' from any claims of liability arising from the valuation presentations obtained by HC2 described in this Offer to Purchase," the Waiver extends far more broadly. *Compare* Settlement Offer to Purchase at 17, 37 *with* Cramer Aff. Ex. 1 ¶7. Instead, the Waiver provides:

> For the avoidance of doubt, you and your Representative are expressly, knowingly, and unconditionally waiving and releasing any claims, known or unknown, against the Company, HC2, EY, D&P Deutsche Bank, and their respective affiliates, directors, officers, employees, attorneys, advisors, and consultants relating to the Evaluation Materia, any Summaries of the Evaluation Material, or any

> statements by Defendants (or their attorneys) in judicial proceedings regarding the Evaluation Material.

As an initial matter, the Waiver impermissibly releases "unknown claims." *See supra*. The Waiver also forces the Non-Tendered Stockholders waive any right they might have to bring suit against these advisors for their part in reviewing, evaluating or creating these valuation and financial materials (including with respect to their conduct during the past five years), as well as unfairness or malfeasance in connection with the proposed Settlement. Further, the waiver expands the already unfairly overbroad release in the Settlement Agreement to shield the Defendants, who owe fiduciary duties to the Company and the Non-Tendered Stockholders, from conduct that is far outside of the already unfairly overbroad release in the Settlement Agreement. Thus, even were Non-Tendered Stockholders excluded from or able to opt-out of the proposed Settlement (or even if the proposed Settlement's Release was amended to be more restricted) in order to not release valuable derivative claims and/or claims in connection with the proposed Settlement, the Waiver provides the Defendants with not only a backup release with respect to the claims subject to the release in the Settlement Agreement, but also to claims that extend beyond it.

The Non-Tendered Stockholders are therefore at a further unfair informational disadvantage because, not only does the proposed Settlement waive any claims they might have in connection with the Settlement Tender Offer, but

the stringent Confidentiality Agreement and the Waiver they must agree to in order to view the Data Room Materials and fairly evaluate whether to tender their shares and the proposed Settlement itself, foreclose them from all recourse.

VI. Non-Tendered Stockholders Should be Carved Out or Allowed to Opt Out

The proposed Settlement does not contain a provision that permits members of the proposed Class who are Non-Tendered Stockholders to opt-out. *See* ¶¶ 1(c), 6. Under Delaware law, the settlement of an action that is primarily for money damages must include a provision that permits members of the proposed class to opt-out. *In re Phila. Stock Exchange, Inc.*, 945 A.2d 1123, 1137 (Del. 2008) (citing *Phillips Petroleum Co. v. Shutts*, 474 U.S. 797 (1985)); *Nottingham Partners v. Dana*, 564 A.2d 1089, at 1094-1101 (Del. 1989). The proposed Settlement provides for cash payments to Tendered Stockholders and Non-Tendered Stockholders who tender their shares in the Settlement Tender Offer. Accordingly, where class certification is proper under Delaware Court of Chancery Rule 23(b)(3), constitutional due process concerns require that proposed class members be afforded the opportunity to opt-out of the settlement. *Nottingham*, 564 A.2d at 1094-1101. An opt-out provision is not necessary if a class action is certified under Rule 23(b)(2). *Id*. Subdivision (b)(2), however, "is limited to actions where injunctive or declaratory relief with respect to the class is the

exclusive or *predominant* final result sought." *Id.* (quotation omitted) (emphasis in original).

Plaintiff seeks class certification under Rule 23(b)(1) and (b)(2). While the Operative Complaint supposedly sought equitable relief such as "Rescinding the buyout and setting it aside," (Operative Compl. at Prayer for Relief(A)), and the Amended Complaint[16] belatedly sought equitable relief such as "Enjoining and estopping Defendants" (Amended Compl. at Prayer for Relief(A)), the Plaintiff never made any motion for injunctive relief.

Even if the class is certifiable under Rule 23(b)(1) or (b)(2), the Court still has the discretion to grant an opt-out right in the proposed Settlement. *Nottingham*, 564 A.2d at 1101. In exercising this discretion, the Court "must balance the equities of the defendants' desire to resolve all claims in a single proceeding against the individuals' interest in having their own day in Court." *Id.* The Court must examine "the reasonableness of the give and the get, or what the class members receive in exchange for ending the litigation." *See Trulia,* 129 A.3d at 891 (internal quotations omitted). This is done on a case by case basis. *Id.* at 898. "If the court finds that [any member of the] class would receive small or inadequate consideration in exchange for surrendering a facially credible claim, it

[16] "Amended Complaint" refers to the Verified Consolidated Amended Class Action Complaint filed in this Action. (Transaction ID 64615870).

may reject the proposed settlement." *Off v. Ross*, 2008 Del. Ch. LEXIS 175, at *38 (Nov. 26, 2008).

The proposed Settlement is simply unworkable for Non-Tendered Stockholders who decline to participate in the Settlement Tender Offer. They receive no consideration, yet are forced to release all of their claims. Instead of a "give and get" for these Non-Tendered Stockholders, it's all taking and no giving: their claims are taken by the release, and they are given less than nothing because, among other things, the Settlement is being paid using the assets of the Company of which they remain stockholders.

Because Non-Tendered Stockholders cannot be compelled to tender their shares in the Settlement Tender Offer, Non-Tendered Stockholders should be excluded from the Class, or at least allowed to opt out of the proposed Settlement. Indeed, Section 11(g) of the Settlement Agreement, which specifically provides that termination of the Settlement as to only the Non-Tendered Stockholders does not otherwise impede the rest of the Settlement, clearly contemplates excluding such Non-Tendered Stockholders from the Settlement. The Court should do so, either by carving them out of the Class or allowing them to opt out.

VII. The Court Should Retain Jurisdiction to Hear an Application for Fees and Expenses From Objector

Finally, FVI respectfully asks the Court to retain jurisdiction to permit Objector to submit a petition for an award of attorneys' fees and expenses should

Objector believe the circumstances warrant it. This Court has granted such awards when objectors have aided the Court or benefitted a class through their efforts. *See, e.g.*, *In re Riverbed Tech., Inc. S'holders Litig.*, 2015 Del. Ch. LEXIS 296, at *6-9 (Dec. 2, 2015).

CONCLUSION

For the foregoing reasons, FVI respectfully requests that the Court decline to approve the Proposed Settlement or, at a minimum, permit FVI and other Non-Tendered Stockholders to opt-out of the Proposed Settlement.

Dated: January 24, 2020

OF COUNSEL:

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Daniel W. Krasner
270 Madison Avenue
New York, New York 10016
(212) 545-4600

CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP

By: */s/ Robert J. Kriner, Jr.*
Robert J. Kriner, Jr. (#2546)
Tiffany J. Cramer (#4998)
2711 Centerville Road, Suite 201
Wilmington, DE 19808
(302) 656-2500

Attorneys for Objector, Fair Value Investments Incorporated

WORDS: 7,027

CERTIFICATE OF SERVICE

I, Tiffany J. Cramer, hereby certify that on January 24, 2020, I caused a copy of the foregoing to be filed and served upon the following counsel of record via File & Serve*Xpress*:

Seth D. Rigrodsky
Brian D. Long
Gina M. Serra
RIGRODSKY & LONG, P.A.
300 Delaware Avenue, Suite 1220
Wilmington, DE 19801

Kevin G. Abrams
J. Peter Shindel, Jr.
Mathhew L. Miller
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807

Kelly A. Terribile
Steven T. Margolin
GREENBERG TRAURIG, LLP
1007 North Orange Street, Suite 1200
Wilmington, DE 19801

Peter B. Ladig
Elizabeth A. Powers
BAYARD, P.A.
600 North King Street, Suite 400
Wilmington, DE 19801

Kurt M. Heyman
Aaron M. Nelson
HEYMAN ENERIO GATTUSO & HIRZEL LLP
300 Delaware Avenue, Suite 200
Wilmington, DE 19801

/s/ Tiffany J. Cramer
Tiffany J. Cramer (#4998)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SCHUFF INTERNATIONAL, INC.)	**CONSOLIDATED**
STOCKHOLDERS LITIGATION)	**C.A. NO. 10323-VCZ**

TRANSMITTAL AFFIDAVIT OF TIFFANY J. CRAMER SUBMITTED IN SUPPORT OF FAIR VALUE INVESTMENTS INCORPORATED'S BRIEF IN SUPPORT OF OBJECTION TO PROPOSED SETTLEMENT

STATE OF Delaware)
: ss.:
COUNTY OF New Castle)

Tiffany J. Cramer, being duly sworn, does hereby state as follows:

1. I am Senior Counsel at the firm of Chimicles Schwartz Kriner & Donaldson-Smith LLP and am admitted to practice law in the State of Delaware. I am one of Objector Fair Value Investments Incorporated's attorneys in this Action.

2. I submit this Transmittal Affidavit in Support of Fair Value Investments Incorporated's Brief in Support of Objection to Proposed Settlement.

3. Attached hereto are true and correct copies of the following documents:

Exhibit	Description
1	Conditions of Access to the Virtual Data Room in Connection with Settlement Offer to Purchase - Confidentiality Agreement and Release

DATED: January 24, 2020

CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP

Tiffany J. Cramer (#4998)
2711 Centerville Road
Suite 201
Wilmington, Delaware 19808
(302) 656-2500

Attorneys for Objector, Fair Value Investments Incorporated

SWORN TO AND SUBSCRIBED before me this 24 th day of January, 2020

NOTARY PUBLIC

STACEY A. BRODOWSKI
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires Jan. 30, 2021

My Commission Expires: 1/30/2021

CERTIFICATE OF SERVICE

I, Tiffany J. Cramer, hereby certify that on January 24, 2020, I caused a copy of the foregoing to be filed and served upon the following counsel of record via File & Serve*Xpress*:

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Wilmington, DE 19807

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Steven T. Margolin
GREENBERG TRAURIG, LLP
1007 North Orange Street, Suite 1200
Wilmington, DE 19801

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BAYARD, P.A.
600 North King Street, Suite 400
Wilmington, DE 19801

Kurt M. Heyman
Aaron M. Nelson
HEYMAN ENERIO GATTUSO & HIRZEL LLP
300 Delaware Avenue, Suite 200
Wilmington, DE 19801

/s/ Tiffany J. Cramer
Tiffany J. Cramer (#4998)

EXHIBIT 1

Conditions of Access - Confidentiality Agreement and Release

You are about to enter a virtual data room (the "Virtual Data Room") that contains confidential information regarding DBM Global, Inc., a Delaware corporation (the "Company"). This Virtual Data Room is provided in connection with the settlement (the "Settlement") of the action in the Delaware Court of Chancery captioned ***Schuff International, Inc. Stockholders Litigation***, Consol. C.A. No. 10323-VCZ (the "Action"), and in connection with the "Settlement Tender Offer" (as such term is defined in the Stipulation and Agreement of Compromise, Settlement, and Release filed in the Action on November 15, 2019 (the "Settlement Stipulation")) in which the Company is offering to purchase all of the outstanding shares of its common stock, par value $0.001 per share (the "Shares") held by "Non-Tendered Stockholders" (as such term is defined in the Settlement Stipulation and the Offer to Purchase for the Settlement Tender Offer (the "Offer to Purchase")). Because the price offered in the Settlement Tender Offer is not intended to reflect the fair value of the Shares in an appraisal proceeding pursuant to Section 262 of the Delaware General Corporation Law or the fair market value of the Shares in a sale of the Company to a third party, certain (i) financial statements and financial projections of the Company and (ii) valuation materials related to the Company developed by Ernst & Young LLP ("EY"), Duff & Phelps, LLC ("D&P"), and Deutsche Bank Securities Inc. ("Deutsche Bank"), (each of EY, D&P, and Deutsche Bank, a "Consultant") for HC2 Holdings, Inc. ("HC2"), the owner of approximately 92.5% of the Shares, are being made available as Exhibits in the

Virtual Data Room to (i) assist "Class Members" (as that term is defined in the Settlement Stipulation and Offer to Purchase) in evaluating the Settlement and (ii) the Non-Tendered Stockholders in evaluating the Settlement Tender Offer.

BEFORE ACCESSING EXHIBITS IN THE VIRTUAL DATA ROOM YOU MUST READ, ACKNOWLEDGE AND AGREE TO THE TERMS AND CONDITIONS APPLICABLE TO THE EXHIBITS YOU ARE ATTEMPTING TO ACCESS. BY CLICKING ON THE "I AGREE" BUTTON TO EACH CATEGORY OF EXHIBIT, YOU EXPRESSLY ACKNOWLEDGE AND AGREE TO THE TERMS AND CONDITIONS APPLICABLE TO ACCESSING THE EXHIBITS IN THAT CATEGORY.

Terms and Conditions to Access Consultant Documents

BY CLICKING ON THE "I AGREE" BUTTON TO ACCESS EXHIBITS PREPARED BY EY, D&P, AND DEUTSCHE BANK, YOU EXPRESSLY ACKNOWLEDGE AND AGREE WITH THE COMPANY AS FOLLOWS:

1. You are a Class Member or an accountant or financial, tax, or legal advisor ("Representative") of a Class Member.

2. You and your Representatives shall treat as confidential any information concerning the Company or any of its affiliates (including, without limitation, HC2) that has been or may be furnished to you in the Virtual Data Room, and all summaries, analyses, compilations, reports, forecasts, studies, extracts, notes, and other materials and portions thereof prepared by you or any of your Representatives that contain, reflect, incorporate, derive from, or are based, in whole or in part, on such information, including, without limitation, those stored in electronic format (herein collectively referred to as the "Evaluation Material"). Each Exhibit contained in the Virtual Data Room is Evaluation

Material. The Exhibits contained in this section of the Virtual Data Room are the confidential and proprietary information of HC2, EY, D&P, and/or Deutsche Bank.

3. You and your Representatives shall keep such Evaluation Material confidential in accordance with the terms of this agreement and use the Evaluation Material solely for the purpose of evaluating the Settlement and/or whether to tender your Shares in connection with the Settlement Tender Offer and shall not disclose Evaluation Material to any other person except as required by law, regulation, stock exchange requirement, or legal or judicial process, in each case subject to compliance with paragraph 4, and except that you may disclose Evaluation Material to your Representatives who need to know such Evaluation Material for the purpose of evaluating the Settlement and/or whether you should tender your Shares in connection with the Settlement Tender Offer if such Representatives (i) obtain a unique User ID and Password to the Virtual Data Room and (ii) acknowledge and agree to hold such Evaluation Material in accordance with the terms of this agreement by clicking the "I Agree" button below. You shall undertake reasonable precautions to safeguard and protect the confidentiality of the Evaluation Material and to prevent your Representatives from prohibited or unauthorized disclosure or use of the Evaluation Material. As used in this agreement, "person" shall be broadly interpreted to include, without limitation, the media and any corporation, partnership, group, individual, or other entity.

4. In the event that you or any of your Representatives are required by applicable law, regulation, stock exchange requirement, or legal or judicial process (including, without limitation, by deposition, interrogatory, request for documents, subpoena, civil investigative demand, or similar process) to disclose any Evaluation Material, you and your

Representatives shall provide the Company, HC2, and the Consultant that created the Evaluation Material with prompt prior written notice of such requirement to enable the Company, HC2, or the Consultant that created the Evaluation Material to seek an appropriate protective order or other remedy, and you shall consult and reasonably cooperate with the Company to resist or narrow the scope of such requirement or legal process. If a protective order or other remedy is not obtained, the terms and conditions herein are not waived by the Company, HC2, and the Consultant that created the Evaluation Material, and disclosure of Evaluation Material is legally required, you or such of your Representatives, as applicable, (i) may disclose such information only to the extent legally required to be disclosed based upon the advice of legal counsel, (ii) shall give advance notice to the Company, HC2, and the Consultant that created the Evaluation Material of the information to be disclosed as far in advance as is practicable, and (iii) shall use reasonable efforts to ensure that all Evaluation Material disclosed shall be afforded confidential treatment. Any notice required by this paragraph shall be provided to: (a) in the case of the Company, Scott Sherman (Scott.Sherman@DBMGlobal.com); (b) in the case of HC2, Joseph Ferraro (jferraro@hc2.com); (c) in the case of EY, Kris Shirley (Kris.Shirley1@ey.com) (d) in the case of D&P, Scott M. Ahmad (sahmad@winston.com) of Winston & Strawn LLP; and (e) in the case of Deutsche Bank, Randi Enison (Randi.enison@db.com).

5. The Evaluation Material in the Virtual Data Room is in "view-mode" only. You will not attempt to download, scan, copy, photograph, print, hand-write, or otherwise capture or reproduce any of the Evaluation Material in the Virtual Data Room. The Virtual Data Room may not be accessed from any non-secure network, such as from an internet café or any other place where the public has

access. You will not attempt to circumvent any of the security features of the Virtual Data Room or website, and will not enable or allow any other person to access the Virtual Data Room using your unique User ID and password.

6. You and your Representatives understand that the Settlement Stipulation or its exhibits may contain summaries, discussions, or characterizations ("Summaries") of Evaluation Material. Evaluation Material may also be discussed by the defendants in the Action ("Defendants") (or their attorneys) in judicial proceedings in the Action. You and your Representatives acknowledge and agree that the Consultants neither authored nor reviewed any Summaries, or statements by Defendants (or their attorneys) in judicial proceedings regarding the Evaluation Material, and therefore the Consultants are not liable for any such Summaries or statements.

7. None of the Company, HC2, EY, D&P, Deutsche Bank, or their respective affiliates, directors, officers, employees, attorneys, advisors, or consultants makes any representations or warranties, express or implied, with respect to the forecasts, financial projections, or other forward-looking information included in the Virtual Data Room. You acknowledge and agree that you have read and consulted the cautionary statements set forth in the "Certain Financial Projections of the Company" sub-section and the "Cautionary Statement Regarding Forward Looking Statements" section of the Offer to Purchase. Moreover, the Evaluation Material created by EY, D&P, and Deutsche Bank was not created to be used in connection with the Settlement or the Settlement Tender Offer and instead was created for the specific purposes and using the specific assumptions reflected in those Exhibits. **None of the Company, HC2, EY, D&P, Deutsche Bank, or their respective affiliates, directors, officers, employees, advisors, attorneys, or**

consultants assumes any responsibility or has any liability in contract, tort, breach of statutory duty, equity, or otherwise for or in respect of any direct, indirect, incidental, consequential, or exemplary loss or damage whatsoever, or for any equitable or injunctive remedies, to you or any of your Representatives arising or resulting from your review of the Evaluation Material created by EY, D&P, and Deutsche Bank, any Summaries of the Evaluation Material, or any statements by Defendants (or their attorneys) in judicial proceedings regarding the Evaluation Material. For the avoidance of doubt, you and your Representatives are expressly, knowingly, and unconditionally waiving and releasing any claims, known or unknown, against the Company, HC2, EY, D&P Deutsche Bank, and their respective affiliates, directors, officers, employees, attorneys, advisors, and consultants relating to the Evaluation Material, any Summaries of the Evaluation Material, or any statements by Defendants (or their attorneys) in judicial proceedings regarding the Evaluation Material. You and your Representatives also are expressly, knowingly, and unconditionally waiving any rights under California Civil Code Section 1542, or any law or principle of common law of the United States or any state of the United States or territory of the United States, or other jurisdiction, which is similar, comparable, or equivalent to California Civil Code Section 1542, which provides: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY."

8. Promptly after 5:00 p.m., New York City time, on the scheduled Expiration

Date of the Settlement Tender Offer, the Company shall terminate your and your Representatives' access to the Virtual Data Room, unless the Settlement Tender Offer is otherwise extended by the Company, in which case, the Company shall terminate your and your Representatives' access to the Virtual Data Room at 5:00 p.m., New York City time, on the subsequent Expiration Date.

9. This agreement and any disputes arising out of or relating in any way to this agreement, whether in contract, tort, or otherwise, shall be governed by, and construed in accordance with, the laws of the State of Delaware, without regard to conflict of laws principles. By accepting this agreement, you (a) irrevocably submit to the personal jurisdiction of any state or federal court sitting in the State of Delaware, as well as to the jurisdiction of all courts to which an appeal may be taken from such courts, in any suit, action, or proceeding arising out of or relating to this agreement, (b) agree that all claims in respect of such suit, action, or proceeding shall be brought, heard, and determined exclusively in the Delaware Court of Chancery (provided, however, that, in the event that subject matter jurisdiction is unavailable in that court, then all such claims shall be brought, heard, and determined exclusively in any other state or federal court sitting in the State of Delaware), (c) agree that you shall not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from such court, (d) agree not to bring any suit, action, or proceeding arising out of or relating to this agreement in any other court, (e) expressly waive and agree not to plead or to make any claim that any such suit, action, or proceeding is subject (in whole or in part) to a jury trial, (f) expressly waive any defense of inconvenient forum to the maintenance of any suit, action, or proceeding brought in accordance with this paragraph, and (g) expressly waive any bond, surety, or other security that might be required of any other party with respect to any such

suit, action, or proceeding, including, without limitation, an appeal thereof.

10. This agreement shall inure to the benefit of HC2, EY, D&P, and Deutsche Bank as express third-party beneficiaries. You acknowledge and agree that the Company, HC2, EY, D&P, and Deutsche Bank would be irreparably injured by a breach of this agreement and that monetary remedies would be inadequate to protect them against any actual or threatened breach of this agreement. Accordingly, you agree that the Company, HC2, EY, D&P, and Deutsche Bank shall be entitled to an injunction or injunctions (without the proof of actual damages) to prevent breaches or threatened breaches of this agreement and/or to compel specific performance of this agreement, and that neither you nor your Representatives shall oppose the granting of such relief. You also agree that you and your Representatives shall waive any requirement for the security or posting of any bond in connection with any such remedy. Such remedies shall not be deemed to be the exclusive remedy for actual or threatened breaches of this agreement but shall be in addition to all other remedies available at law or in equity to the Company, HC2, EY, D&P, and Deutsche Bank. You further agree that you and your Representatives shall cooperate fully in any attempt by the Company, HC2, EY, D&P, or Deutsche Bank to obtain any remedy or relief, at law or in equity, for actual or threatened breaches of this agreement by you or your Representatives. You further acknowledge and agree that no failure or delay by the Company, HC2, EY, D&P, or Deutsche Bank in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power, or privilege hereunder.

11. If any provision of this agreement shall, for any reason, be adjudged by any court of competent jurisdiction to be

invalid or unenforceable, such judgment shall not affect, impair, or invalidate the remainder of this agreement but shall be confined in its operation to the provision of this agreement directly involved in the controversy in which such judgment shall have been rendered.

12. This agreement contains the entire agreement between you and the Company concerning the Evaluation Material and your use of the Virtual Data Room, and no modification of this agreement or waiver of the terms and conditions hereof shall be binding upon either party, unless approved in writing by the other party. Any purported assignment of this agreement by you without the prior written consent of the Company shall be void.

13. If you are not prepared to review the Evaluation Material upon the terms and conditions set forth herein, you must return to the previous page. Clicking the "I Agree" button will constitute your agreement to be bound by these terms and conditions.