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Case No. 2020-0275-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT TERA, Plaintiff, v. HC2 HOLDINGS, INC., a Delaware Corporation, PHILIP A. FALCONE, WARREN H. GFELLER, ROBERT V. LEFFLER, JR., LEE S. HILLMAN, and JULIE TOTMAN SPRINGER, Defendants.	)	C.A. No. 2020- _____-____

PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY AND SETTING A PROMPT INJUNCTION HEARING

1. Plaintiff Robert Tera ("Plaintiff") hereby moves the Court to enter the attached [Proposed] Order Expediting Proceedings and Setting a Prompt Hearing for Injunctive Relief. The grounds for this motion follow.

I. INTRODUCTION

2. This case arises from a pending consent solicitation to replace an incumbent board of directors. By statute, the consent solicitation will expire sixty days from delivery of the first consent. 8 *Del. C.* §228(c). Immediate judicial intervention is warranted because the incumbent board is actively using the threat of a financially crippling forced redemption of two series of preferred securities as a

weapon to ensure they maintain their seats, while misleading investors about the terms of the preferred securities.

3. Delaware's law surrounding "Proxy Puts" like those at issue here is well-developed.[1] An incumbent board cannot mislead its own investors about the nature of the Proxy Puts in their debt agreement (or, as in this case, preferred securities certificates). Nor can it refuse to defuse the financial harm from triggering the Proxy Puts when the board itself has the unilateral ability to simply "approve" the nomination of the competing slate for the limited purposes of avoiding a redemption or similar triggering event.

4. As detailed in Plaintiff's Complaint, the Proxy Puts in the Company's Series A and Series A-2 Preferred Share Certificates of Designations (together, the "Certificates of Designation" or "Certificates") are plainly the "approvable" variety. Thus, there would be no "Change of Control" for purposes of forced redemption as long as the nomination of the stockholder's proposed replacement directors (the "Dissident Director Nominees") is "approved." *See* Section II.B below.

[1] *See generally San Antonio Fire & Pol. Pension Fund v. Amylin Pharms.*, 983 A.2d 304 (Del. Ch. 2009) ("Amylin I"); *San Antonio Fire & Pol. Pension Fund v. Bradbury*, C.A. No. 4446-VCN (Del. Ch. Oct. 28, 2010); ("Amylin II"); *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013); *Pontiac General Empls. Ret. Sys. v. Ballantine*, No. 9789-VCL (Del. Ch. Oct. 14, 2014) (Transcript).

5. Delaware law makes clear that incumbent directors remain free to oppose a dissident slate of directors even after "approving" their nomination solely to avoid the financial calamity of a forced redemption of the preferred shares. That incumbent directors cannot use the threat of massive financial harm to deter a vote to change the board's composition should be self-evident. Indeed, when adopting the *Blasius* "compelling justification" standard of review, the Delaware Supreme Court stated:

> Action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and shareholder majority. This is not . . . a question that a court may leave to the agent finally to decide so long as he does so honestly and competently; that is, it may not be left to the agent's business judgment.[2]

6. Thus, incumbents are not permitted to withhold their approval of stockholder nominees for Proxy Put purposes unless the dissident nominees are reasonably perceived to be corporate looters or criminals. The proposed replacement directors here all have professional backgrounds without any hint that these individuals are justifiably perceived as corporate looters or criminals.

7. As described in Section II.D below, the Consent Revocation Statement issued by the target board conceals that the Proxy Puts are approvable, and therefore mislead investors into thinking that support for the insurgent slate makes a forced

[2] *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003) (*quoting Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659-60 (Del. Ch. 1988)).

redemption event inevitable. Thus, expedited injunctive relief is warranted for this independent reason.

8. As explained herein, this Court should grant expedition of this matter, authorize limited accelerated discovery, and set a prompt hearing—well in advance of the May 12, 2020 Consent Solicitation expiration—to consider granting the precise relief granted by then-Vice Chancellor Strine in *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013). Specifically, the incumbents should be barred from soliciting or using any of the revocation statements they may obtain unless and until they make honest disclosures and approve the insurgent slate solely for the purpose of defusing the threat of the Proxy Puts.

II. FACTUAL BACKGROUND

A. The HC2 Board Embeds Proxy Puts in the Certificates of Designation Governing the Company's Preferred Stock

9. Under Section 6(c) of the Certificates of Designation, a "Change of Control" would require the Company to make an offer to redeem the then-outstanding Preferred Stock.

10. The Certificates of Designation define "Change of Control" and "Continuing Directors as follows:

> "Change of Control" means . . . ***(iv) the first day on which a majority of the members of the Board are not Continuing Directors***. . . .
>
> * * *

> "Continuing Directors" means, as of any date of determination, (x) any member of the Board who (1) was a member of such Board on the Original Issue Date or (2) ***was nominated for election or elected to the Board … with the approval of … a majority of those members of the Board that were both "Continuing Directors" and Independent Directors at the time of such nomination or election*** or (y) any Preferred Elected Director.

(Emphasis added).

11. Thus, unless a majority of the Company's independent directors approve the nomination or election of the Dissident Director Nominees, a successful proxy or consent solicitation to replace a majority of the HC2 Holdings, Inc. ("HC2") board of directors (the "Board") would trigger the redemption of the Preferred Stock.

B. HC2 Stockholders Seek Changes at the Company

12. Starting in January 2020, several activist stockholders issued public letters (a) expressing dissatisfaction with the massive value destruction that has occurred under the incumbent Board's watch, and (b) urging serious changes at the Company.

13. On February 18, 2020, MG Capital and Percy Rockdale disseminated a public letter identifying six candidates they were nominating to the HC2 Board (the "Dissident Director Nominees") at the Company's next director election.

14. On March 13, 2020, MG Capital/Percy Rockdale filed a preliminary consent solicitation statement (the "Consent Solicitation") with the SEC seeking, *inter alia*, to replace the six incumbent Board members with the Dissident Director

Nominees. All six Dissident Director Nominees have impressive academic and professional credentials, and there is certainly no indication that any of them are individuals of ill-repute, known looters or criminals. Compl. ¶54.

C. The Incumbent Board Files a False and Misleading Consent Revocation Statement

15. On March 20, 2020, the incumbent Board filed its preliminary Consent Revocation Statement with the SEC recommending that HC2 stockholders oppose MG Capital and Percy Rockdale's Consent Solicitation. In the Consent Revocation Statement, the Board pointed to the Proxy Puts in an attempt to threaten HC2 stockholders to oppose the election of the Dissident Director Nominees:

> ***In the event that the Removal Proposal and the Election Proposal are approved, and the Percy Rockdale Nominees are elected to the Board, the Company may be required to make an offer to redeem the Preferred Stock ….*** As of December 31, 2019, ***the total amount that would be required to be offered to the holders of the Preferred Stock, including the Preferred Stock owned by Continental, was approximately $27 million, and the Company may not have sufficient proceeds or the financing available to fund the offer to redeem the Preferred Stock. In such instance, the Company cannot assure stockholders that it would be able to obtain the financing to fund the offer to redeem all of the Preferred Stock on commercially reasonable terms, if at all***.

(Emphasis added).

16. The Board concealed that it has the power to "approve" the nomination or election of the Dissident Director Nominees for the limited purpose of not triggering the redemption of $27 million in Preferred Stock, which redemption the Board suggests the Company may not have the financial resources to effectuate.

17. On April 3, 2020, MG Capital and Percy Rockdale filed their definitive Consent Solicitation statement with the SEC. Later that same day, the Board filed its definitive Consent Revocation Statement with the SEC.

18. While the preliminary Consent Revocation Statement informed stockholders that redemption of the Preferred Stock "may be required" if they support the Dissident Director Nominees, the definitive Consent Revocation Statement adopted a threatening stance, asserting that the Company "shall be required" to redeem the Preferred Stock. Furthermore, the Board threatened stockholders with an expanded (illusory) parade of horribles in the event the Dissident Director Nominees were elected, including that the holders of Preferred Stock could effectively claim certain non-cash assets of the Company and obtain a judgment against the Company.

D. The Board Refuses to "Approve" the Dissident Nominees for the Limited Purpose of Disabling the Proxy Puts

19. Despite the passage of approximately seven weeks since MG Capital and Percy Rockdale first revealed the identity of the Dissident Director Nominees on February 18, 2020, the Board has still not "approved" those nominees for the limited purpose of nullifying the purportedly catastrophic effects of the Proxy Puts. Indeed, none of the Board's public statements provide any indication that the Board is even considering "approving" the Dissident Director Nominees for this limited purpose.

III. ARGUMENT

A. Applicable Standards for Expedition

20. Expedited proceedings will be granted when a "plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury." *Giammargo v. Snapple Beverage Corp*., 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994). This Court has defined a "colorable claim" as "essentially a nonfrivolous cause of action." *Reserves Dev. Corp. v. Wilmington Trust Co*., 2008 WL 4951057, at *2 (Del. Ch. Nov. 7, 2008). Plaintiff easily satisfies the standard for expedition.

B. Plaintiff Has Alleged a Colorable Claim That Defendants' Refusal to Disable the Proxy Puts Is a Breach of Duty

1. Delaware Law Pertaining to Proxy Puts

21. That Delaware law protects the right of stockholders to vote to elect their chosen directors—free from improper threats of harm at the hands of incumbents—is beyond doubt.[3]

22. As applied to this case, the law regarding the use of Proxy Puts (both before and during an election contest) should not be subject to serious dispute.

23. In *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc*., 983 A.2d 304, 307 (Del. Ch. 2009) ("Amylin 1"), Vice

[3] *See Liquid Audio*, 813 A.2d at 1127.

Chancellor Lamb recognized that Proxy Puts "can operate as improper entrenchment devices that coerce stockholders into voting only for persons approved by the incumbent board." The Court observed that an acceleration provision with such "an eviscerating effect on the stockholder franchise would raise grave concerns." *Id.* at 315.

24. A few years later, in *Kallick*, then-Chancellor Strine held that "[s]uch contracts are dangerous," placing the burden on the incumbent board to explain its actions that allowed a Proxy Put to threaten the stockholder base with financial harm based on a decision to vote to remove the incumbents. 68 A.3d at 259. Notably, in *Kallick*, the Court granted precisely the injunctive relief being sought in this instance. *Id.* at 264.

2. HC2's Certificates Plainly Provide the Board with Broad Power to "Approve" Dissident Nominees, Thus Avoiding Redemption

25. The Certificates permit a forced redemption upon a "Change of Control," which (in pertinent part) is triggered on "***(iv) the first day on which a majority of the members of the Board are not Continuing Directors***…." Compl. ¶36 (emphasis added). The critical language creating the right to approve the Dissident Director Nominees appears in the Certificates' definition of "Continuing Directors," effectively immunizing directors who were "***nominated for election or elected to the Board … with the approval of … a majority of those members of the***

Board that were both "Continuing Directors" and Independent Directors at the time of such nomination or election…." *Id.* (emphasis added).

26. Thus, unless a majority of the Company's independent directors approve the nomination or election of the new directors, a successful proxy or consent solicitation to replace a majority of the Board could trigger the redemption of the Preferred Stock.

3. The Incumbent Board's Refusal to Disable the Proxy Puts is a Breach of Duty

27. The Dissident Director Nominees have respectable professional backgrounds and there is no indication that any of them—much less a majority of them—are corporate looters, known criminals, or otherwise pose such a threat to the corporation as to warrant undermining the stockholder franchise. Compl. ¶54.

28. The Board has had over seven weeks to assess the Dissident Director Nominees, investigate their backgrounds, and determine whether there is any good faith basis to prefer a costly and financially harmful redemption of the preferred shares over respecting the basic tenets of the stockholder franchise. Compl. ¶62.

29. Without explaining any basis for refusing to approve the Dissident Director Nominees—indeed, without even disclosing that the Board has the power to so-approve their nominations—the Board has chosen instead to highlight the financial calamity that would befall the Company's stockholders if they choose to exercise their franchise rights to elect new directors.

30. In short, there is a more than colorable basis to infer that the Board's refusal to allow a fair election constitutes a breach of fiduciary duty.

4. The Individual Defendants Have Breached their Duties of Disclosure

31. It is well-established that directors of Delaware corporations "have a duty to disclose the facts material to their stockholders' decisions to vote on a [corporate transaction]." *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 110 (Del. Ch. 2007).

32. Despite disclosing to stockholders the purportedly severe consequences of electing the Dissident Director Nominees in light of the Proxy Puts, the incumbent Board has failed to disclose the patently material fact that the Board may approve the Dissident Director Nominees' nomination for the limited purpose of nullifying those consequences. Without that material information, stockholders are under the false impression that the Board is powerless to defuse the redemption right, ensuring that their consideration of the Consent Solicitation occurs under the coercive pressure of the Proxy Puts.

33. The incumbent Board members' failure to disclose its ability to approve the nomination of the Dissident Director Nominees clearly violates their fiduciary duty to "'provide a balanced, truthful account of all matters disclosed in the communications with shareholders.'" *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999) (quoting *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998)).

34. The incumbent Board is also breaching its disclosure obligations by falsely representing to stockholders that electing the Dissident Director Nominees will trigger a "Change of Control"—and mandatory redemption of the Preferred Stock—under the Certificates of Designation because it will lead to a "person or group … obtain[ing] the power (whether or not exercised) to elect a majority of the members of the Board." That simply is not true. Election of the Dissident Director Nominees will not somehow transfer stockholders' voting franchise to MG Capital and Percy Rockdale. Rather, the power to elect a majority of the members of the Board would plainly remain with those possessing the voting power to actually elect members—*i.e.*, HC2 stockholders.

C. HC2 Stockholders Will Suffer Irreparable Harm Absent Expedition

35. Plaintiff and HC2's public stockholders face a "sufficient threat of irreparable injury" to justify expedited proceedings. *In re Keurig Green Mountain Inc.*, C.A. No. 11815-CB (Tr. at 45) (Del. Ch. Feb. 2, 2016) (TRANSCRIPT) (Exhibit A).

36. Absent expedited relief, Plaintiff and the class will be denied their right to evaluate whether to elect the Dissident Director Nominees (a) free from the coercive threat of the Proxy Puts, and (b) on a fully-informed basis. Although Plaintiff is not required to demonstrate irreparable injury at this stage, these circumstances sufficiently establish that element. *See, e.g., In re Netsmart Techs.,*

924 A.2d 171, 207 (Del. Ch. 2007) (finding "a threat of irreparable injury to exist when it appears stockholders may make an important voting decision on inadequate disclosures"); *see also Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051,1062 (Del. Ch. 1987) (stockholders' right to an informed, uncoerced decision requires relief; not a substitutional damages remedy).

37. Indeed, in light of the above-mentioned concerns and under highly analogous circumstances, the *SandRidge* Court found a sufficient prospect of irreparable harm to grant expedited proceedings and set an injunction hearing in advance of the consent solicitation's deadline. 68 A.3d at 245. The same outcome is warranted here.

D. Plaintiff's Discovery Requests Are Narrowly Focused on Establishing Whether Defendants Can Justify Their Public Disclosures and Their Thwarting of the Stockholder Franchise

38. Plaintiff believes that the current record objectively supports the requested relief, but Plaintiff seeks discovery in order to understand the possible justifications the Board may raise. Therefore, concurrently with this motion, Plaintiff has served Defendants with five narrowly-tailored document requests.

39. Plaintiff believes that the record will show that the Board has not identified workable alternatives to triggering the Proxy Puts in the Certificates of Designation and cannot state legitimate bases not to approve the Dissident Director Nominees to defuse the Proxy Puts. Depending on what the discovery record

reveals, Plaintiff seeks permission from the Court to take a deposition, but remains hopeful that no depositions will be necessary.

IV. CONCLUSION

40. Plaintiff respectfully asks the Court to grant an Order expediting proceedings and setting a hearing date for injunctive relief.

Dated: April 10, 2020

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ *Gregory V. Varallo*
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3061

Counsel for Plaintiff

WORDS: 2,885

OF COUNSEL:

Mark Lebovitch
Jacqueline Y. Ma
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

FRIEDMAN OSTER & TEJTEL PLLC
Jeremy S. Friedman
David F.E. Tejtel
493 Bedford Center Road, Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

Counsel for Plaintiff

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT TERA, Plaintiff, v. HC2 HOLDINGS, INC., a Delaware Corporation, PHILIP A. FALCONE, WARREN H. GFELLER, ROBERT V. LEFFLER, JR., LEE S. HILLMAN, and JULIE TOTMAN SPRINGER, Defendants.	)	C.A. No. 2020- _____-____

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY AND SETTING A PROMPT INJUNCTION HEARING

WHEREAS, Plaintiff filed his Verified Class Action Complaint Seeking Injunctive and Equitable Relief on April 10, 2020;

WHEREAS, Plaintiff filed his Motion for Expedited Discovery and Setting a Prompt Injunction Hearing (the "Motion to Expedite") on April 10, 2020;

WHEREAS, the Court has considered the Motion to Expedite, the Verified Class Action Complaint Seeking Injunctive and Equitable Relief and supporting materials, and the briefs and arguments submitted by the parties and has found good cause for issuance of this Order;

IT IS HEREBY ORDERED this ___ day of _____, 2020, that:

1. The Motion to Expedite is GRANTED;
2. Plaintiff shall have leave to conduct one or more depositions in support of the motion for preliminary injunction;
3. Defendants shall produce documents responsive to Plaintiff's requests for production no later than April ___, 2020;
4. Plaintiff's motion for preliminary injunction shall be heard on _____, __, 2020, at __:__ _.m.

_____
Vice Chancellor

Exhibit A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE KEURIG GREEN MOUNTAIN, INC. STOCKHOLDERS LITIGATION : Civil Action : No. 11815-CB

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, February 2, 2016
10:05 a.m.

- - -

BEFORE: HON. ANDRE G. BOUCHARD, Chancellor.

- - -

ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR EXPEDITED PROCEEDINGS and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

APPEARANCES:

SETH D. RIGRODSKY, ESQ.
Rigrodsky & Long, P.A.
-and-
DONALD J. ENRIGHT, ESQ.
of the District of Columbia Bar
Levi & Korsinsky, LLP
for Plaintiffs

WILLIAM M. LAFFERTY, ESQ.
SUSAN WOOD WAESCO, ESQ.
ALEXANDRA M. CUMINGS, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
JAMES W. DUCAYET, ESQ.
NILOFER I. UMAR, ESQ.
of the Illinois Bar
Sidley Austin LLP
for Defendants Keurig Green Mountain, Inc., Barbara D. Carlini, John D. Hayes, Brian P. Kelley, A.D. David Mackay, Michael J. Mardy, Hinda Miller, David E. Moran, Jose Octavil Reyes Lagunes, Susan Saltzbart Kilsby, Robert A. Steele, and Norman H. Wesley

BRADLEY R. ARONSTAM, ESQ.
Ross Aronstam & Moritz, LLP
-and-
JOHN A. NEUWIRTH, ESQ.
of the New York Bar
Weil, Gotshal & Manges, LLP
-and-
CHRISTINE T. DI GUGLIELMO, ESQ.
Weil, Gotshal & Manges, LLP
for Defendants Acorn Holdings B.V., Maple Holdings Acquisition Corp, JAB Holdings B.V., and JAB Holding Company

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I have nothing further.

THE COURT: All right. Thank you.

Mr. Aronstam, I overlooked you when I went back to Mr. Enright. I assume there's nothing your side wanted to add to this?

MR. ARONSTAM: That's correct, Your Honor. Thank you.

THE COURT: And, Mr. Ducayet, I don't know if you had any last words. I'll give you an opportunity if you wish, but don't feel obligated.

MR. DUCAYET: Your Honor, I'll take the hint.

THE COURT: Okay. Very good.

I had sketched out in my mind how this might come out, and I didn't hear anything that changed it dramatically, so I'll give you my ruling now.

Before the Court is the plaintiffs' motion to expedite proceedings in a consolidated class action challenging the proposed purchase of Keurig Green Mountain, Inc. by JAB Holdings B.V. and its wholly owned subsidiaries, Acorn Holdings B.V. and Maple Holdings Acquisition Corp., for $92 in cash per share of Keurig. Keurig's board intends to submit the

transaction to a stockholder vote on February 24, 2016. For reasons that I'm going to explain, I'm granting the motion for expedited proceedings in a manner I'll explain.

First of all, the legal standard. To obtain expedited proceedings, plaintiff must show good cause for expedition. To show good cause, the plaintiff must articulate a sufficiently colorable claim and a sufficient threat of irreparable harm in order to justify the burden and expense that expedition poses on the defendants and on the Court. In support of their motion for expedition here, plaintiffs advance two arguments, one based on a challenge to the deal process and the second based on a single disclosure claim. In my view, the disclosure claim is the one that merits expedition.

Plaintiffs allege that the proxy fails to disclose, or misleadingly discloses, discussions that they contend must have occurred pertaining to the possible continued employment of Keurig's officers, directors, or employees in connection with the transaction with JAB, in particular concerning senior members of Keurig's management, which would include its CEO, Brian Kelley, who was on Keurig's board.