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Case No. 2020-0275-JRS

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| ROBERT TERA,<br><br>Plaintiff,<br><br>v.<br><br>HC2 HOLDINGS, INC., a Delaware Corporation, PHILIP A. FALCONE, WARREN H. GFELLER, ROBERT V. LEFFLER, JR., LEE S. HILLMAN, and JULIE TOTMAN SPRINGER,<br><br>Defendants. | ) | C.A. No. 2020-0275-JRS |

**AMENDED VERIFIED CLASS ACTION COMPLAINT SEEKING INJUNCTIVE AND EQUITABLE RELIEF**

Plaintiff Robert Tera ("Plaintiff"), on behalf of himself and all other similarly situated public stockholders of HC2 Holdings, Inc. ("HC2" or the "Company"), brings the following Amended Verified Class Action Complaint Seeking Injunctive and Equitable Relief (the "Complaint") against the Company and current members of the Company's board of directors (the "Board")—specifically, Philip A. Falcone ("Falcone"), Warren H. Gfeller ("Gfeller"), Robert V. Leffler, Jr. ("Leffler"), Lee S. Hillman ("Hillman"), and Julie Totman Springer ("Springer")—for breach of fiduciary duty (the "Action").

The allegations of the Complaint are based on the knowledge of Plaintiff as to himself and on information and belief as to all other matters, including the investigation of counsel and review of publicly available information.

## I. NATURE OF THE ACTION

1. This Action concerns an ongoing solicitation of written consents to remove and replace the entire Board of the Company. Simultaneously, the Company is seeking revocations of written consents through an affirmatively misleading revocation statement. Through that consent revocation statement (together with any amendments and/or supplements thereto, the "Consent Revocation Statement"), the Board is actively misusing and misrepresenting the proxy put provisions in the Company's preferred stock instruments to coerce stockholders into refusing to give a written consent or revoking consents already given. Immediate relief from the Court is necessary to allow a fair and informed exercise of the stockholder franchise.

2. Certain types of agency problems are inherent in the corporate form and tend to repeat themselves no matter how Delaware corporate law develops. Other types of agency costs can and should be conclusively eliminated when the law squarely addresses an issue and makes clear that particular conduct is proscribed. The self-interested abuse of so-called "Approvable Proxy Put" provisions giving rise to this Action should have been a thing of the past. This Action shows it is not.

3. In 2009, "[i]n keeping with this state's public policy of stringent policing of the fairness of corporate elections, this court's decision in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals* made clear that a board deciding whether to approve directors for the purposes of a Proxy Put could not act consistently with its fiduciary duties by simply failing to approve any director candidates who ran against the incumbent slate." *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 246 (Del. Ch. 2013) (citing *Amylin Pharmaceuticals*, 983 A.2d 304 (Del. Ch. 2009).

4. In 2013, in *Kallick v. Sandridge Energy, Inc.*, this Court faced a target board that: (i) failed to disclose a proxy put exemption which allowed the board to defuse the risk of debt acceleration upon a change of board membership by "approving" the nomination of the dissent director candidates; and (ii) then refused to grant such "approval" while continuing to oppose the election of those individuals. *See* 68 A.3d 242. In response, this Court enjoined the incumbent board "from soliciting consent revocations, voting any proxies it received from the consent revocations, and impeding TPG's consent solicitation in any way until the incumbent board has approved the TPG slate. The equities here weigh heavily in favor of the stockholders' right to make a free, uncoerced choice." *Id.* at 247.

5. In 2015, this Court in *Pontiac General Employees Retirement System v. Ballantine*, No. 9789-VCL (Del. Ch. Oct. 14, 2014) (Transcript) elaborated on the

harm from proxy puts, stating that a non-approvable "Dead Hand" proxy put would "have a chilling effect on, among other things, potential proxy contests" because stockholders "would have the Sword of Damocles hanging over them, when they were deciding what to do with respect to a proxy contest."

6. Against this backdrop and other judicial rulings making clear the limits of director discretion in adopting and employing proxy puts as an entrenchment device, the HC2 Board's manipulation of "Approvable Proxy Put" provisions in two series of preferred stock certificates of designation is plainly disloyal, irreconcilable with clear Delaware law, and warrants immediate injunctive relief.

7. In 2015, the Board approved two Certificates of Designation for the Company's Series A and Series A-2 Convertible Participating Preferred Stock (together, the "Certificates of Designation")—both of which contain an Approvable Proxy Put.

8. As described *infra*, HC2 has performed miserably since Falcone, a former hedge fund manager who was barred from the securities industry for five years as a result of a settlement of securities fraud charges levied against him, made a large investment in the Company and became its Chairman and Chief Executive Officer ("CEO").

9. Not surprisingly, other stockholders have become frustrated with the Company's performance, with two separate investors—Percy Rockdale LLC

("Percy Rockdale") and MG Capital Management Ltd. ("MG Capital")—deciding to nominate a director slate to replace the incumbent members of the Board. On March 13, 2020 Percy Rockdale and MG Capital filed a preliminary consent solicitation seeking to solicit sufficient written consents to replace the incumbent directors.

10. In response, the HC2 Board is both misleading the electorate about the nature of the Company's proxy put obligations and acting in bad faith by refusing to permit a free and fair election.

11. Specifically, until Plaintiff initiated this Action, the Board's Consent Revocation Statement urging HC2 stockholders to refuse to grant consents and to revoke any consents already provided concealed the Board's power to unilaterally eliminate the risk of a default event triggering redemption of the preferred shares. Instead, the Board warned stockholders in an April 3, 2020 Consent Revocation Statement:

> [The Company] ***shall be required***, unless a waiver is obtained from a majority of holders of the Preferred Stock, to make an offer to redeem the Preferred Stock at a price per share of Preferred Stock . . . ***for which [redemption] the Company does not have cash legally available*** out of the remaining assets of the Company legally available . . . . In addition, if the Company fails to redeem the Preferred Stock in accordance with the terms of the Certificates of Designation, the holders of the Preferred Stock could obtain a judgment against the Company, and the Company may not have the proceeds or financing available to satisfy such judgment.

(Emphasis added).

12. This disclosure was misleading. Under the terms of the Proxy Put, the Board plainly has (and had) the ability to approve the nomination of the competing directors for purposes of defusing the threat of a redemption event, even as the Board can continue to oppose their actual election by stockholders.

13. Importantly, the HC2 Board's conduct can no longer be written off to mere ignorance or mistake. ***First***, Skadden, Arps, Slate, Meagher & Flom LLP, and Cadwalader, Wickersham & Taft LLP—two of the world's most sophisticated M&A law firms—are advising the Board.

14. ***Second***, as described below, when caught red-handed by Plaintiff's filing of the original complaint in this Action, the Board and its advisors adopted a cynical ploy to evade judicial accountability while preserving the coercive effects of threatening financial calamity if investors vote for the dissident director slate.

15. Specifically, after Plaintiff filed this Action, the Board "approved" the competing directors for the purpose of disabling the Proxy Put. Instead of fighting the consent solicitation on the merits alone, however, the Board continued to undermine the stockholder franchise by claiming in supplemental filings that the election of MG Capital and Percy Rockdale's nominees could nonetheless constitute a change of control giving rise to a default event that could trigger a forced redemption. The Board further misleads investors by indicating that it would be

reasonable for the preferred stockholders to argue that a waiver of this change of control provision by preferred stockholders is necessary.

16. The Board's interpretation of the Proxy Put is plainly incorrect. Further, for a corporate board to publicly disseminate a strained interpretation of their own company's documents that is so counter to the company's best interests is disloyal.

17. Through this Action, Plaintiff seeks (a) a declaration to immediately cure the stockholder coercion caused by the Board's false disclosures and invalidate any consent revocations received by the Board unless and until it issues a truthful and non-coercive consent revocation statement, and (b) an order enjoining the Board from further interfering with MG Capital and Percy Rockdale's consent solicitation and with the stockholder franchise.

18. Stockholders have a fundamental right to exercise their franchise based on the merits of the competing director slates, without facing an illegitimate "thumb on the scales" from the continued threat of illusory financial harm if stockholders vote for the competing director slate.

## II. PARTIES

19. Plaintiff is a stockholder of HC2 and has owned HC2 common stock at all material times alleged in the Complaint.

20. Defendant HC2 is a Delaware corporation with its executive offices in New York, New York. HC2's common stock trades on the New York Stock Exchange under the ticker symbol "HCHC." HC2 is a diversified holding company with an array of operating subsidiaries across eight reportable segments, including construction, marine services, energy, telecommunications, life sciences, broadcasting and insurance.

21. Defendant Falcone has served as a director of HC2 since January 2014, and as President and Chief Executive Officer ("CEO") since May 2014 and is a director of several of HC2's subsidiaries. Falcone previously served as Chairman of the Board from May 2014 until 2020. As described in more detail below, pursuant to a settlement of charges of fraud brought by the U.S. Securities and Exchange Commission ("SEC"), Falcone had been barred from working in the securities industry.

22. Defendant Gfeller has served as a director of the Company since June 2016 and as interim Chairman of the Board since April 2020. Gfeller was a director of Global Marine Holdings, LLC, a majority-owned subsidiary of HC2 from June 2018 until its sale in February 2020.

23. Defendant Leffler has served as a director of HC2 since September 2014 and served as lead independent director from June 2016 through February 2020.

24. Defendant Hillman has served as a director of the Company since June 2016.

25. Defendant Springer has served as a director of the Company since February 2020.

26. The defendants listed in ¶¶ 17-21 above are collectively referred to herein as the "Individual Defendants" or the "Board."

27. Each Individual Defendant owed and owes the Company and its stockholders fiduciary obligations of care, candor, good faith, and loyalty and was and is required to: (i) use his or her ability to control and manage the Company in a fair, just, and equitable manner; (ii) act in furtherance of the best interests of the Company and its stockholders; (iii) govern the Company in such a manner as to heed the expressed views of its public stockholders; (iv) refrain from abusing his or her position of control; and (v) not favor his or her personal interests, or any third persons' interests, at the expense of the Company and its public stockholders.

## III. SUBSTANTIVE ALLEGATIONS

### A. Background on HC2's Business and Involvement with Falcone

28. In June 2012, the SEC filed fraud charges against Falcone and his hedge fund Harbinger Capital Partners ("Harbinger") for misappropriation of client assets, market manipulation, and betraying their clients. The SEC alleged that:

a. Falcone fraudulently obtained $113.2 million from the Harbinger Special Situations Fund and misappropriated the proceeds to pay his personal taxes;

b. Falcone and two Harbinger investment managers manipulated the price and availability of a series of distressed high-yield bonds by engaging in an illegal "short squeeze";

c. Falcone and Harbinger secretly offered and granted favorable redemption and liquidity rights to certain strategically important investors in exchange for those investors' consent to restrict redemption rights of other fund investors, and concealed the arrangement from the fund's directors and investors; and

d. Harbinger engaged in illegal trades in connection with the purchase of common stock in three public offerings after having sold the same securities short during a restricted period.

29. In the press release announcing the charges, Robert Khuzami, the then-Director of the SEC's Division of Enforcement, stated:

> Today's charges read like the final exam in a graduate school course in how to operate a hedge fund unlawfully. Clients and market participants alike were victimized as Falcone unscrupulously used fund assets to pay his personal taxes, manipulated the market for certain bonds, favored some clients at the expense of others, and violated trading rules intended to prohibit manipulative short sales.In August 2013, Falcone and the SEC entered into a settlement to resolve the charges against Falcone. Pursuant to the settlement, Falcone was barred from the securities industry from five years, Falcone and Harbinger were forced to pay more than $18 million in fines and Falcone and Harbinger were forced to admit certain wrongdoing.

30. Commenting on the settlement, Andrew Ceresney, a Co-Director of the SEC's Division of Enforcement, stated: "Falcone and Harbinger engaged in serious

misconduct that harmed investors, and their admissions leave no doubt that they violated federal securities law."

31. Falcone hired the law firm of Dontzin Nagy & Fleissig ("Dontzin") to help negotiate the SEC settlement. Despite Dontzin's work securing a settlement that did not result in a lifetime ban from the securities industry and Falcone's recognition in an August 2013 email that Dontzin did a "super job," Falcone refused to pay the majority of Dontzin's fees. In March 2020, Manhattan State Supreme Court Justice Arthur Engoron ruled that Falcone was obligated to pay at least $13.7 million in unpaid legal fees and interest to Dontzin. In addition, Justice Engoron granted Dontzin's motion to freeze Falcone's assets.

32. At the time of the 2013 SEC settlement, Falcone and Harbinger controlled a publicly-traded holding company named Harbinger Group Inc. ("HRG"). In January 2014, HRG acquired a 40% stake in Primus Telecommunications Group, Inc. ("Primus") and in April 2014, Primus was renamed HC2 Holdings, Inc. In May 2014, Falcone became HC2's President, CEO and Board Chairman.

## B. The HC2 Board Embeds Proxy Puts in the Certificate of Designations Governing the Company's Preferred Stock

33. On May 29, 2014, HC2 entered into a securities purchase agreement with affiliates of Hudson Bay Capital Management, Benefit Street Partners LLC and DG Capital Management (collectively, the "Series A Purchasers"), pursuant to

which the Company agreed to sell an aggregate of (i) 30,000 shares of Series A Convertible Participating Preferred Stock of the Company (the "Series A Preferred Stock") to the Series A Purchasers at a purchase price of $1,000 per share, and (ii) 1,500,000 shares of the Company's common stock at a purchase price of $4.00 per share, resulting in aggregate gross proceeds to the Company of $36 million.

34. The Series A Preferred Stock was initially convertible at $4.25 per share, subject to adjustment from time to time for various corporate transactions. The terms of the Series A Preferred Stock also included a quarterly cash dividend at an annualized rate of 7.5%, and a cumulative quarterly pay-in-kind ("PIK") dividend at an annualized rate of 4%, which would be increased to 7.25% upon the occurrence of certain events and would be reduced to 2% or 0% if HC2 achieved specified rates of growth measured by net asset value ("NAV").

35. On January 5, 2015, HC2 entered into a securities purchase agreement with certain investors (collectively, the "Series A-2 Purchasers"), pursuant to which the Company agreed to sell an aggregate of 14,000 shares of Series A-2 Convertible Participating Preferred Stock of the Company (the "Series A-2 Preferred Stock," and together with the Series A Preferred Stock, the "Preferred Stock") to the Series A-2 Purchasers at a purchase price of $1,000 per share, resulting in aggregate gross proceeds to the Company of $14 million.

36. The Series A-2 Preferred Stock was initially convertible at $8.25 per share, subject to adjustment from time to time for various corporate transactions. The terms of the Series A-2 Preferred Stock also included a quarterly cash dividend at an annualized rate of 7.5%, and a cumulative quarterly PIK dividend at an annualized rate of 4%, which would be increased to 7.25% upon the occurrence of certain events and would be reduced to 2% or 0% if HC2 achieved specified rates of growth measured by NAV.

37. The certificates of designation governing the Preferred Stock (the "Certificates of Designation") each contain proxy puts that serve to insulate HC2's incumbent directors from potential proxy or consent solicitations.

38. Specifically, pursuant to Section 6(c) of the Certificates of Designation:

> If a Change of Control occurs, each Holder shall have the right to require the Company to redeem its Preferred Shares pursuant to a Change of Control Offer, which Change of Control Offer shall be made by the Company in accordance with Section 6(c)(ii). In such Change of Control Offer, the Company will offer a payment (such payment, a "Change of Control Payment") in cash per Preferred Share equal to the greater of: (i) the sum of (A) the Specified Percentage of the Accrued Value, plus (B) all accrued and unpaid Dividends (including, without limitation, accrued and unpaid Cash Dividends and accrued and unpaid Accreting Dividends for the then current Dividend Period), if any, on such share to the extent not included in the Accrued Value and (ii) an amount equal to the amount the Holder of such Preferred Share would have received in connection with such Change of Control had such Holder converted such Preferred Share into Common Stock (or Reference Property, to the extent applicable) immediately prior thereto (such greater amount, the "Change of Control Payment Amount").

39. In other words, in the event of a "Change of Control" at HC2, the Company is required to make an offer to redeem the then-outstanding Preferred Stock at a price per share equal to the greater of (a) the accrued value of the Preferred Stock, plus any accrued and unpaid dividends; and (b) the value that would be received if the Preferred Stock were converted into HC2 common stock.

40. The Certificates of Designation define "Change of Control" as follows:

> "Change of Control" means (i) a sale of all or substantially all of the consolidated assets of the Company (including by way of any reorganization, merger, consolidation or other similar transaction or a sale of Equity Securities issued by Subsidiaries of the Company), (ii) a direct or indirect acquisition of Beneficial Ownership of Voting Power of the Company by any Person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) by means of any transaction or series of transactions (including any reorganization, merger, consolidation, joint venture, share transfer, share exchange, share issuance, reclassification or other similar transaction), pursuant to which the stockholders of the Company immediately preceding such transaction or transactions collectively own, following the consummation of such transaction or transactions, less than fifty percent (50%) of the Voting Power of the Company or other surviving entity (or parent thereof), as the case may be, (iii) the obtaining by any Person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) of the power (whether or not exercised), other than pursuant to a revocable proxy in favor of the Company's proposed slate of directors in respect of an annual meeting or other meeting related to the election of directors, to elect a majority of the members of the Board or more than fifty percent (50% of the Voting Power of the Company; provided, that this clause (iii) will not trigger a Change of Control as a result of the HRG Affiliates or any person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) in which the HRG Affiliates own a majority of the voting power (the "HRG Change of Control Group") obtaining Beneficial Ownership of more than fifty percent (50%) of the Voting Power of the Company if and only if the Public Float Hurdle is satisfied at all times during which the

> HRG Change of Control Group has the power to elect a majority of the Board or Beneficial Ownership of more than fifty percent (50%) of the Voting Power of the Company, or ***(iv) the first day on which a majority of the members of the Board are not Continuing Directors***; provided, that, for the avoidance of doubt, change in the ownership of HRG (without the occurrence of the events listed in (i) through (iv) above) shall not constitute, in and of itself, a Change of Control.

(Emphasis added).

41. The Certificates of Designation define "Continuing Directors" as follows:

> "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 by any HRG Affiliates, or with the approval of either the Holders or 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).

42. 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.

## C. The HC2 Board Presides Over Massive Value Destruction at HC2

43. On November 20, 2018, the Company issued $470 million in senior secured notes at a considerable interest rate of 11.5%, despite having a market capitalization of only just over $100 million.

44. In a searing January 2020 letter, Percy Rockdale and MG Capital called these levels of debt "inappropriate" given the "high holding company expense structure and the illiquid nature of its holdings."

45. While levering up the Company, Falcone has extracted stockholder value for personal gain. From 2014 to2018, Falcone—an individual banned for five years from the securities industry with several civil judgments outstanding against him—has extracted over $50 million in cash and stock compensation, which is flagrantly excessive given that the Company's market capitalization is just over $100 million.

46. In addition to granting Falcone excessive executive compensation, in 2015, the Company also gifted Falcone's personal investment advisory firm, Harbinger, a four-year investment services agreement that assures the Harbinger $4 million per year in fees. In other words, according to Percy Rockdale, as of the Company's January 2020 market capitalization, "nearly 4% of the value of HC2 is being siphoned through this back-door arrangement to the CEO's advisory company each year."

47. The arrangement between the Company and Harbinger appears to flout Falcone's 2013 settlement agreement with the SEC that prevents Falcone from taking on any new advisory clients and banned him from the investment and securities industry.

48. While Falcone has used the Company as his personal piggy bank, HC2 itself has suffered. From the time Falcone joined the Board in 2014 until 2018, the Company's share price declined more than 35%, even as the S&P 500 returned over 101%. Measurement with lower time horizons also reflects poorly on Falcone and the Board's leadership: the Company's share price declined 65.56% over a three year total shareholder return ("TSR") horizon, versus a positive S&P 500 return of 53.16% and a positive average return of 13.77% among HC2's 2019 proxy peer group.

49. Over a five-year TSR horizon, the Company's share price declined 71.97%, as compared to an S&P 500 return of 80.79% and a 2019 proxy peer group average return of 31.29%.

50. Qualified managers have also fled the Company. At least by mid-2019, at least one HC2 executive, Louis Libin, left HC2 Holdings after only a year to return to Sinclair Broadcast Group in rumored frustration over lack of funding at the Company. The Radio and Television Business Report noted that in mid-2019 the Company failed to close on five deals, valued at more than $17 million, forcing HC2 to relinquish escrows and pay extension penalties.

51. In short, over the last few years the Board has allowed management to destroy or divert tens—if not hundreds—of millions of dollars of shareholder value.

## D. Multiple HC2 Stockholders Call for Changes at the Company

52. On October 8, 2019, news outlet *The Deal* reported that the Shareholder Forum, a New York based research fund, had disclosed the results of a survey that had sought input from all Company shareholders with authorized electronic reporting who owned 100 or more shares of HC2 stock. That survey found that "only 24% of polled HC2 investors had confidence in the current board and executives, while 68% of [polled] shareholders supported adding at least some new directors to HC2's five-person board."[1] Responses from significant shareholders (owning over 100,000 shares) showed a "much stronger two-thirds level support for replacing all or most of the board."[2]

53. One of stockholders' primary concerns was the manageability of the Company's debt load. The same survey found that 70% of respondents wished HC2 to defer investments in new ventures until debt was reduced to "manageable levels of cost and risk."[3]

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[1] Ronald Orol, *Activist Target: HC2 Holdings*, THE DEAL, Oct. 8, 2019, *available at* http://www.shareholderforum.com/access/Library/20191008_Deal.htm.

[2] *Id.*

[3] *Id.*

54. Starting in January 2020, several activist shareholders issued public letters expressing dissatisfaction with the status quo and urging serious changes at the Company.

55. On January 27, Percy Rockdale MG Capital, Rio Royal LLC, and others issued a joint Schedule 13D that attached a letter to Company stockholders. That letter noted that the Company was trading at a deep discount to NAV. The Rockdale parties traced this discount to "years of poor oversight by the Issuer's Board of Directors, which permitted notable underperformance, a high debt load, a bloated holding company expense structure, related party transactions that disfavored shareholders, and other findings which draw into question management's suitability as stewards of a publicly listed company."

56. To redress the "[r]ampant [s]elf-dealing" and "[c]hronic [m]ismanagement" by Falcone and his allies on the Board, Percy Rockdale and MG Capital seek to revamp the Board with their own nominees. Importantly, whether or not other stockholders would actually vote for the Percy Rockdale and MG Capital director slate, there is no good faith basis to question that those nominees are appropriately qualified and do not represent the kind of inherent threat to the corporation that could justify intentionally stifling the stockholder franchise. *See* Section E below.

## E. Percy Rockdale and MG Capital Launch a Consent Solicitation To Replace the Incumbent HC2 Board

57. On February 18, 2020, MG Capital and Percy Rockdale disseminated a second public letter to HC2 stockholders, which again highlighted the Company's (a) dismal long-term performance, (b) haphazard corporate strategy, (c) ineffective incumbent Board, (d) excessive debt, (e) entry into numerous related-party transactions, and (f) relationship with Falcone despite Falcone's regulatory issues. MG Capital and Percy Rockdale's February 18 letter also revealed a list of the six candidates they were nominating to the HC2 Board (the "Dissident Director Nominees") at the Company's upcoming annual meeting of stockholders.

58. The 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.

a. George R. Brokaw ("Brokaw") has served as a private investor through several private and public investment vehicles. Previously, Brokaw served as Managing Director of the Highbridge Growth Equity Fund at Highbridge Principal Strategies, LLC ("Highbridge"). Prior to joining Highbridge, Brokaw was a Managing Director and Head of Private Equity at Perry Capital, LLC ("Perry"). Prior to joining Perry, Brokaw was Managing Director (Mergers & Acquisitions) of Lazard Frères & Co. LLC. Brokaw currently serves on the board of directors of DISH Network Corporation, Alico, Inc. and Consolidated Tomoka Inc. Brokaw previously served on several public company boards of directors including Modern Media Acquisition Corp, North American Energy Partners, Inc. and Terrapin 3 Acquisition Corporation. Brokaw received a BA from Yale University and a JD and MBA from the University of

Virginia, and is a member of the New York Bar in good standing and with no disciplinary record.

b. Kenneth S. Courtis ("Courtis") is a financial executive with over 30 years of investment banking and board experience. Since January 2009, Courtis has served as the Chairman of Starfort Investment Holdings. Previously, he served as Vice Chairman and Managing Director of Goldman Sachs, and Chief Economist and Investment Strategist of Deutsche Bank Asia. He received an undergraduate degree from Glendon College in Toronto and an MA in international relations from Sussex University in the United Kingdom. He earned an MBA at the European Institute of Business Administration and received a Doctorate with honors and high distinction from l'Institut d'etudes politiques, Paris.

c. Michael Gorzynski ("Gorzynski") is the Managing Member of MG Capital, an investment firm focused on complex value-oriented investments. From 2006-2011, he invested in special situations globally at Third Point, LLC, a large asset management firm, where he focused on macro, event-driven, distressed, and private investments across the capital structure (equity, hybrids, bonds, and loans). He is an expert in restructurings and in the insurance and banking industries, having participated in dozens of large-scale bank and insurance company restructurings. He earned a BA from the University of California, Berkeley, and received an MBA from Harvard Business School.

d. Robin Greenwood ("Greenwood") has been the George Gund Professor of Finance and Banking at Harvard Business School since 2013 and began serving as Head of the Finance Unit in 2018. At HBS he is the Faculty Director of the Behavioral Finance and Financial Stability project and cochairs the Business Economics PhD program. Greenwood also currently serves as a member of the Financial Advisory Roundtable of the Federal Reserve Bank of New York and a Research Associate at the National Bureau of Economics Research, which he joined in 2017. Greenwood received a PhD from Harvard in Economics, and BS degrees in Economics and Mathematics at MIT.

e. Liesl Hickey ("Hickey") is a veteran political strategist who has worked at the highest levels of politics and issue advocacy. Since 2016, Hickey has served as a senior advisor at each of Guide Post Strategies, Blitz Canvassing and Pathway Partners, and as a partner at Ascent Media. In addition, since 2015, she has provided political consulting services through RAE LLC. Prior to that, from 2015 to 2016, she served as an executive director of Right to Rise and a partner at Patchwork Productions. From 2013 to 2014, Hickey was the Executive Director of the National Republican Congressional Committee. She was a fellow at the University of Chicago's Institute of Politics and a contributor to the Wall Street Journal's former "Think Tank." Hickey is a graduate of Southern Methodist University.

f. Jay Newman ("Newman") is currently serving as the Managing Member of Ginzan Management Ltd., a family office he founded in 2016. He has over 40 years of experience working in the finance industry as a lawyer, investment banker and principal investor. Immediately prior to establishing Ginzan, Newman was a Senior Portfolio Manager and Member of the Management Committee at Elliott Management Corporation where he worked for over 20 years. He is a graduate of Yale College, Columbia Law School and completed an LLM in Tax at NYU, and is a member of the New York Bar in good standing and with no disciplinary record.

59. On March 13, 2020, MG Capital/Percy Rockdale filed their preliminary consent solicitation statement with the SEC. MG Capital/Percy Rockdale are soliciting HC2 stockholders' written consent for the following proposals (collectively, the "Proposals"):

a. Proposal 1 – Suspend, render temporarily ineffective and stay any change, modification, repeal or any other amendment to HC2's Fourth Amended and Restated Bylaws of the Company (the "Bylaws") not already adopted by the Board and publicly disclosed on or before March 12, 2019 (each a "Bylaw Amendment"), until HC2 stockholders have

approved all such Bylaw Amendments at the next annual or special meeting and/or by written consent;

b. Proposal 2 – Remove from the Board, without cause, all current directors including Falcone, Leffler, Barr, Gfeller, Hillman and Springer, and any other person elected or appointed to the Board at any future time or upon any event (other than those elected pursuant to MG Capital/Percy Rockdale's consent solicitation); and

c. Proposal 3 – Elect Brokaw, Courtis, Gorzynski, Greenwood, Hickey and Newman to serve as directors of the Company (or, if any such nominee is unable or unwilling to serve as a director of the Company, or if there are additional vacancies on the board of directors, any other person designated as a nominee by the affirmative vote of a majority of the newly elected Board).

**F. The Incumbent Board Files a Consent Revocation Statement Which Omits That the Proxy Puts are Approvable and Falsely and Misleadingly Describes Other Aspects of the Proxy Puts in an Attempt to Coerce Stockholders to Oppose the Dissident Director Nominees**

60. On March 20, 2020, the incumbent Board filed its preliminary consent revocation statement (the "Consent Revocation Statement") with the SEC recommending that HC2 stockholders oppose the Proposals. 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. The Board stressed that:

> The Certificate of Designation of Series A Convertible Participating Preferred Stock and the Certificate of Designation of Series A-2 Convertible Participating Preferred Stock (collectively, the "Certificates of Designation"), each governing the Preferred Stock, contain "change in control" provisions. These change in control

> provisions are triggered, among other things, (i) if any person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) obtains the power (whether or not exercised) to elect a majority of the members of the Board (other than pursuant to a revocable proxy in favor of the Company's proposed slate of directors in respect of an annual meeting or other meeting related to the election of directors) or (ii) on the first day on which a majority of the members of the Board are not "Continuing Directors" (as defined in the Certificates of Designation).
>
> ***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*** at a price per share of Preferred Stock, equal to the greater of (i) the accrued value of the Preferred Stock, plus any accrued and unpaid dividends (to the extent not included in the accrued value of Preferred Stock), and (ii) the value that would be received if the share of Preferred Stock were converted into Common 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).

61. In bad faith, the Board declined to disclose to HC2 stockholders that the Board 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. As explained above, the Certificates of Designation unambiguously state that a change in the majority of the Board will

not constitute a "Change of Control" if the new directors are "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."

62. Second, the Board falsely informed HC2 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. The power to elect a majority of the members of the Board remains with those possessing the voting power to actually elect members—*i.e.*, HC2 stockholders—not MG Capital and Percy Rockdale.

63. On April 3, 2020, MG Capital and Percy Rockdale filed their definitive consent solicitation statement with the SEC.

64. Later that same day, the Board filed its definitive Consent Revocation Statement with the SEC, which repeated the false and misleading statements made in the preliminary Consent Revocation Statement and added additional threats to HC2 stockholders.

65. While the preliminary Consent Revocation Statement informed stockholders that redemption of the Preferred Stock "may be required" if they

supported the Dissident Director Nominees, the definitive Consent Revocation Statement adopted a more affirmative stance and stated 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:

> 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 ***shall be required***, unless a waiver is obtained from a majority of holders of the Preferred Stock, ***to make an offer to redeem the Preferred Stock at a price per share of Preferred Stock***, equal to the greater of (i) the accrued value of the Preferred Stock, *plus* any accrued and unpaid dividends (to the extent not included in the accrued value of Preferred Stock), and (ii) the value that would be received if the share of Preferred Stock were converted into Common 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. ***Pursuant to the Certificates of Designation, if the Company does not have sufficient legally available funds to redeem the Preferred Stock, the Company may be required to pay the portion of the Redemption Price (as defined in the Certificates of Designation) for which the Company does not have cash legally available out of the remaining assets of the Company legally available (valued at the fair market value of such assets on the date of payment, as reasonably determined in good faith by the Board). In addition, if the Company fails to redeem the Preferred Stock in accordance with the terms of the Certificates of Designation,***

> ***the holders of the Preferred Stock could obtain a judgment against the Company, and the Company may not have the proceeds or financing available to satisfy such judgment***.

(Emphasis added).

### G. After Plaintiff Files this Action, the Board "Approves" the Dissident Nominees for the Limited Purpose of Disabling the Proxy Puts But Asserts a Continuing Threat of a Purportedly Calamitous Redemption

66. Approximately seven weeks passed from February 18, 2020, when MG Capital and Percy Rockdale first revealed the identity of the Dissident Director Nominees, to the initial filing of this Action. During those seven weeks, the Board did not "approve" the dissidents for the limited purpose of nullifying the purportedly catastrophic effects of the Approvable Proxy Puts. Indeed, none of the Board's public statements prior to the initiation of this Action provided any indication that it had even considered "approving" the Dissident Director Nominees for this limited purpose.

67. The Board's refusal to approve the Dissident Director Nominees for purposes of disabling the Approvable Proxy Puts was intentional and well-informed. The Board has been advised by very experienced M&A lawyers. It is simply inconceivable these sophisticated M&A players failed to appreciate how a proxy put can, as this Court has previously recognized, have a "chilling effect" on the stockholder franchise.

68. After the initial filing of this Action on April 10, 2020, the Board should have realized they were caught red-handed, unconditionally approved the Dissident

Director Nominees for purpose of the Proxy Puts, and publicly acknowledged that the Company does not face a threat of forced redemption if stockholders vote for the Dissident Director Nominees.

69. Instead, the Board and its advisors became too clever by half, trying to preserve the coercive "value" of the Proxy Put even after "approving" the Dissident Director Nominees, including by lending credence to an interpretation of the Certificates of Designation that is affirmatively harmful to the Company and its common stockholders.

70. On April 15, 2020, the Board approved the Dissident Director Nominees such that they would constitute "Continuing Directors" for purposes of the Certificates of Designation.

71. The Board also issued a supplement to its Consent Revocation Statement on April 17, 2020 (the "Supplement"). Instead of resolving the matter, however, the Supplement carefully furthers the Board's stockholder coercion through inaccurate and misleading disclosures.

72. In relevant part, the Supplement indicates that despite the Board's belated but legally required limited approval of the Dissident Director Nominees, a risk of triggering the right of Preferred Stockholders to force redemption still exists. Specifically, the Board keeps its thumb on the proverbial scales by disclosing that despite Plaintiff's (indisputably correct) reading of the change-of control triggers in

the Certificate of Designations, the holders of the Preferred Stock may nonetheless argue that the election of the Dissident Director Nominees triggers a change-of-control that would require forced redemption of the Preferred Stock absent a waiver.

> [T]he holders of the Preferred Stock may take a different view than the Plaintiffs and if the Percy Rockdale Nominees are elected, the holders of the Preferred Stock may allege that the Company is required to make an offer to redeem the Preferred Stock pursuant to the Certificates of Designation, as described above.

73. Any suggestion that the Preferred Stockholders could credibly argue that the election of the Dissident Director Nominees triggers a change-of-control that would require forced redemption is baseless. As explained *supra*, even if MG Capital and Percy Rockdale's consent solicitation is successful, the power to elect a majority of the members of the Board remains with those possessing the voting power to actually elect members—*i.e.*, HC2 stockholders—not MG Capital and Percy Rockdale.

74. Unlike a proxy, which creates an agency in a named individual or individuals to vote for a stockholder, a written consent is direct action by a stockholder. Thus, the party soliciting written consent never becomes the agent (or proxy) of the stockholders. Instead, the soliciting party merely aggregates and delivers the direct action of the stockholders, *i.e.*, their written consents.

75. Correctly understood, there simply is no argument, reasonable or otherwise, to the contrary.

76. Alternatively, to the extent the Defendants are arguing that there is a risk of triggering the Proxy Puts because the carve out for a solicitation of revocable proxies is limited only to the Company's solicitation, or because action by written consent is not carved out, any such argument would directly contravene decades of law which makes clear that devices like a poison pill or, here, the Proxy Puts cannot be used in a manner which undermines the exercise of the stockholder franchise.

77. Defendants' Supplement further muddies the waters by suggesting that when Percy Rockdale (in its original Consent Solicitation Statement) identified the Proxy Puts as an entrenching device and committed to seek a waiver of any hypothetical forced redemption event absent the HC2 Board granting the requisite approval, the threat of the forced redemption somehow became incurable:

> In addition, in its consent solicitation statement on Schedule 14A, filed with the SEC on April 3, 2020, Percy Rockdale has stated that it would intend to engage with the holders of the Preferred Stock to waive, restructure or otherwise amend the potential consequences of a change in control. Whether or not this prong of the change in control definition is applicable if the Percy Rockdale Nominees become a majority of the Board, unlike the prong of the change in control definition described in the paragraph above, ***there is no unilateral action that the Board can take with respect to this prong of the change in control definition to avoid triggering***, and to render inapplicable, such prong.

(Emphasis added).

78. Through this disclosure, the Board is falsely giving stockholders the impression that Percy Rockdale endorses the Board's flawed (and self-interested) reading of the change-of-control triggers. To be clear, although Percy Rockdale

referenced the potential triggering of the change-of-control provisions in the Certificates of Designations and its plan to "immediately engage with the Preferred Shareholders" if its Dissident Director Nominees were elected, Percy Rockdale included this discussion solely in response to the incumbents' threats in the preliminary Consent Revocation Statement. *See* Percy Rockdale's April 3 Consent Solicitation Statement at 18.

79. The Board's latest disclosure indicates one of two scenarios. In the first, the Board genuinely believes that the Proxy Put at issue is not of the "approvable" variety but rather is a "Dead Hand Proxy Put," and that the redemption right under the Proxy Put could be triggered if stockholders elect the Dissident Director Nominees. If so, then immediate declaratory relief is required to invalidate the provision as being unenforceable under Delaware law because stockholders cannot be forced to vote under such a "Sword of Damocles" threat.

80. In the second—and far more likely—scenario, the Board fully appreciates that the Proxy Put language at issue is plainly inapplicable, and there is no reason for stockholders to fear any risk of forced redemption. By nevertheless presenting—and thus lending credence to—an incorrect alternative interpretation pursuant to which a redemption would be triggered, the Board is purposely harming the Company because it is effectively inviting a frivolous lawsuit by preferred

stockholders to seek a forced redemption that would purportedly be catastrophic for the Company.

81. By endorsing the idea that the provision is ambiguous and that a Preferred Stockholder waiver is necessary, the Board is also exerting coercive pressure on the stockholders and is breaching its duties of loyalty and disclosure. Indeed, the very fact that the board has gone so far as to speculate about a potential lawsuit from a preferred stockholder and publicize that speculation suggests something other than a full and balanced disclosure—especially where the effect of that ungrounded speculation is to tilt the field against the party soliciting consents and in favor of the Board itself.

## IV. CLASS ACTION ALLEGATIONS

82. The right to exercise a free and unfettered vote for or against director candidates is a direct stockholder right, enforceable in a direct individual or class action.

83. Plaintiff brings this Action pursuant to Chancery Court Rule 23, on behalf of all other holders of HC2 common stock (except Defendants herein and any person, firm, trust, corporation or other entity related to or affiliated with them and their successors-in-interest) who are or will be threatened with injury arising from Defendants' wrongful actions, as more fully described herein (the "Class").

84. This Action is properly maintainable as a class action.

85. The Class is so numerous that joinder of all members is impracticable. The number of shares of common stock of HC2 outstanding as of April 2, 2020 was 46,461,665. Plaintiff believes there are hundreds, if not thousands, of beneficial holders of HC2 common stock dispersed across the country and internationally.

86. There are questions of law and fact which are common to the Class and which predominate over questions affecting any individual Class member. The common questions include, *inter alia*, the following:

a. Whether the Individual Defendants have breached their fiduciary duties owed to Plaintiff and the other members of the Class; and

b. Whether Plaintiff and the other members of the Class would be irreparably damaged by the conduct of the Individual Defendants.

87. Plaintiff anticipates that there will be no difficulty in the management of this litigation as a class action.

88. The Individual Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole. To the extent the Individual Defendants continue their unlawful conduct complained of herein, preliminary and final injunctive and equitable relief on behalf of the Class as a whole will be entirely appropriate.

89. Plaintiff is committed to prosecuting this Action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff has the same interests as the other members of the Class. Accordingly, Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.

90. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

## COUNT I

### (Declaration Requiring the Board to Unconditionally Approve the Dissident Director Nominees to Nullify the Proxy Puts)

91. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

92. The Certificates of Designation each contain an exemption that permits the Defendants to render the Proxy Put provision inoperative by approving the Percy Rockdale and MG Capital nominees for election to the Board.

93. Under the unambiguous terms of the Certificates of Designation, the sole approval necessary to invoke this exemption is the approval of the Company's Board.

94. The Board is under an affirmative obligation to unconditionally approve such nominees for purposes of the Proxy Put absent a good faith conclusion that the nominees are known looters, criminals, otherwise pose an actual threat to the Company.

95. There was never a compelling justification or good faith basis of any kind to conclude that the Percy Rockdale and MG Capital nominees are known looters, criminals or otherwise an inherent threat to the Company such as to justify using the threat of redemption under the Proxy Puts to undermine the stockholder franchise. While the Board has nominally "approved" the Dissident Director Nominees, it did so with misleading disclosures with the effect of preserving the coercive effect of the threat of a forced redemption. Thus, the approval did not cure their prior breach of duty.

96. The Board's failure to unconditionally exempt the Dissident Director Nominees is a continuing breach of its fiduciary duty to all stockholders.

97. The Board has announced that it nominally "approved" the Dissident Director Nominees, yet it falsely (and in bad faith) warns HC2 investors that such

"approval" may not be effective to prevent the risk of a forced redemption by holders of the Company's Preferred Stock.

98. Plaintiff and the Class are entitled to a declaration that the Board's refusal to unconditionally approve the Dissident Director Nominees in order to nullify the Proxy Puts would be a breach of fiduciary duty, and, in the (unlikely) event that the Proxy Puts at issue are, in fact, "Dead Hand Proxy Puts," that such provisions are invalid and unenforceable under Delaware law.

99. Plaintiff is also entitled to interim and permanent declaratory and injunctive relief.

100. Plaintiff lacks an adequate remedy at law.

## COUNT II

### (Class Action Claim Against the Individual Defendants for Breach of Fiduciary Duty)

101. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

102. As directors of the Company, the Individual Defendants owe HC2's stockholders the highest duties of care, loyalty, good faith and candor.

103. As set forth above, the Individual Defendants have breached their duty of candor. As discussed above, the Defendants knowingly caused the Company to issue a Consent Revocation Statement that discloses in a coercive, misleading and omissive manner the operation of the Proxy Puts, falsely portraying the adverse

consequences that could befall the Company as triggered by the consent solicitation itself.

104. After Plaintiff filed this lawsuit, the Individual Defendants disseminated the Supplement, which falsely suggested that stockholders still face the risk of a forced redemption. The Supplement practically invites Preferred Holders to demand redemption if the Dissident Director Nominees are elected, thus exposing the Company and its stockholders to financial harm even if (and when) any such claim by the Preferred Holders is defeated.

105. Plaintiff and the Class are entitled to a declaration that the Individual Defendants breached their fiduciary duties.

106. Plaintiff and the Class have no adequate remedy at law.

## COUNT III

**(Claim for Injunctive Relief Against Defendants)**

107. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

108. The Individual Defendants owe HC2's stockholders the highest duties of care, loyalty, good faith and candor, and as set forth above the Individual Defendants failed to abide by their duty of candor.

109. The Individual Defendants have hampered stockholders' right to exercise the franchise with complete information.

110. Absent an injunction requiring Defendants to correct public misstatements regarding, among other things, the Proxy Puts and consent solicitation and from soliciting any further consent revocations or giving effect to any consent revocations or impeding the consent solicitation process, HC2 stockholders will not be able to exercise a fully informed and uncoerced vote.

111. Plaintiff and the Class have no adequate remedy at law.

## COUNT IV

**(Claim for Declarative Relief)**

112. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

113. The Individual Defendants have hampered stockholders' right to exercise their franchise with full and accurate information.

114. Absent a declaration regarding the meaning of the power-to-elect clause of the Certificates of Designation clarifying that no waiver is necessary in this circumstance to avoid triggering a redemption right under the Proxy Put, the Board's disloyal misstatements implying that a waiver from Preferred Stockholders may be necessary will impede HC2 stockholders from exercising a fully informed and uncoerced vote.

115. Alternatively, to the extent the Board's April 17, 2020 disclosures accurately identify a risk that the Proxy Puts at issue are not, in fact, of the defeasible

variety and the election of the Dissident Director Nominees could actually trigger a forced redemption, then the HC2 Board agreed to "Dead Hand Proxy Puts" in its Preferred Stock Certificates, and immediate declaratory relief is required invalidating such provisions.

116. Plaintiff and the Class have no adequate remedy at law.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment as follows:

a) Declaring the Action properly maintainable as a class action;

b) Declaring that the Individual Defendants have breached their fiduciary duties;

c) Declaring that the change of control provision in the Certificates of Designation contingent on the power to elect a majority of the members of the Board either (i) would not be triggered if stockholders chose to elect the Dissident Director Nominees and that no redemption waiver from any Preferred Stockholder is necessary; or (ii) is a Dead Hand Proxy Put, and therefore invalid;

d) Enjoining the Board from (1) soliciting any further consent revocations, (2) relying upon or otherwise giving effect to any consent revocations they have received to date and (3) impeding MG Capital and Percy Rockdale's consent solicitation process in any way, unless and until the Board issues corrective

disclosures;

e) Requiring the Individual Defendants to fully disclose all material information related to, among other things, the Proxy Puts and consent solicitation;

f) Ordering the Individual Defendants, jointly and severally, to account to Plaintiff, the other members of the Class and the Company for all damages suffered and to be suffered by them as a result of the wrongs complained of herein, including pre- and post-judgment interest;

g) Awarding Plaintiff the costs and disbursements of this Action including a reasonable allowance for Plaintiff's attorneys' fees and experts' fees and pre- and post-judgment interest; and

h) Granting such other and further relief as this Court may deem to be just and proper.

Dated: April 19, 2020

**BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP**

*/s/ Gregory V. Varallo*
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**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| ROBERT TERA,<br><br>Plaintiff,<br><br>v.<br><br>HC2 HOLDINGS, INC., a Delaware Corporation, PHILIP A. FALCONE, WARREN H. GFELLER, ROBERT V. LEFFLER, JR., LEE S. HILLMAN, and JULIE TOTMAN SPRINGER,<br><br>Defendants. | ) | C.A. No. 2020-0275-JRS |

**UNSWORN VERIFICATION AND DECLARATION OF ROBERT TERA IN SUPPORT OF AMENDED VERIFIED CLASS ACTION COMPLAINT SEEKING INJUNCTIVE AND EQUITABLE RELIEF**

I, ROBERT TERA, do hereby state as follows:

1. I am plaintiff in the above-captioned action and a continuous holder of HC2 Holding, Inc. common stock during all relevant times alleged in the Amended Verified Class Action Complaint Seeking Injunctive and Equitable Relief (the "Amended Complaint"). I am a resident of Michigan and am of full legal age. I make this unsworn verification and declaration in support of the Complaint filed in the above-captioned case.

2. I make this declaration under penalty of perjury.

3. I have read the Amended Complaint and consulted with counsel.

4. The facts alleged in the Complaint are true and correct to the best of my knowledge, information, and belief.

5. In accordance with Delaware Court of Chancery Rules 23(aa) I have not received, been promised or offered and will not accept any form of compensation, directly or indirectly, for prosecuting or serving as a representative party in this Action except for:

(a) such fees, costs or other payments as the Court expressly approves to be paid to or on behalf of me; or

(b) reimbursement, paid by my attorneys, of actual and reasonable out-of-pocket expenditures incurred directly in connection with the prosecution of this Action.

I declare under penalty of perjury under the laws of Delaware that the foregoing is true and correct.

Executed on this 19TH day of April 2020.

By: _____
Robert Tera

Attachment to

# Amended Verified Class Action Complaint Seeking Injunctive and Equitable Relief

# **REDLINE**

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| ROBERT TERA,<br><br>Plaintiff,<br><br>v.<br><br>HC2 HOLDINGS, INC., a Delaware Corporation, PHILIP A. FALCONE, WARREN H. GFELLER, ROBERT V. LEFFLER, JR., LEE S. HILLMAN, and JULIE TOTMAN SPRINGER,<br><br>Defendants. | ) | C.A. No. 2020-~~-~~<br>~~_____ ____~~0275-JRS |

**AMENDED VERIFIED CLASS ACTION COMPLAINT SEEKING INJUNCTIVE AND EQUITABLE RELIEF**

Plaintiff Robert Tera ("Plaintiff"), on behalf of himself and all other similarly situated public stockholders of HC2 Holdings, Inc. ("HC2" or the "Company"), brings the following Amended Verified Class Action Complaint Seeking Injunctive and Equitable Relief (the "~~Verified~~ Complaint"~~) (i~~) against the Company and current members of the Company's board of directors (the "Board")—specifically, Philip A. Falcone ("Falcone"), Warren H. Gfeller ("Gfeller"), Robert V. Leffler, Jr. ("Leffler"), Lee S. Hillman ("Hillman"), and Julie Totman Springer ("Springer")—for breach of fiduciary duty (the "Action").

The allegations of the Complaint are based on the knowledge of Plaintiff as to himself and on information and belief as to all other matters, including the investigation of counsel and review of publicly available information.

## I. NATURE OF THE ACTION

1. This Action concerns an ongoing solicitation of written consents to remove and replace the entire Board of the Company. Simultaneously, the Company is seeking revocations of written consents through an affirmatively misleading revocation statement. Through that consent revocation statement (together with any amendments and/or supplements thereto, the "Consent Revocation Statement"), the Board is actively misusing and misrepresenting the proxy put provisions in the Company's preferred stock instruments to coerce stockholders into refusing to give a written consent or revoking consents already given. Immediate relief from the Court is ~~the only thing that will~~necessary to allow a fair and informed exercise of the stockholder franchise.

2. Certain types of agency problems are inherent in the corporate form and tend to repeat themselves no matter how Delaware corporate law develops. Other types of agency costs can and should be conclusively eliminated when the law squarely addresses an issue and makes clear that particular conduct is proscribed. The self-interested abuse of so-called "Approvable Proxy Put"

provisions giving rise to this Action should have been a thing of the past. This Action shows it is not.

3. In 2009, "[i]n keeping with this state's public policy of stringent policing of the fairness of corporate elections, this court's decision in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals* made clear that a board deciding whether to approve directors for the purposes of a Proxy Put could not act consistently with its fiduciary duties by simply failing to approve any director candidates who ran against the incumbent slate." *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 246 (Del. Ch. 2013) (citing *Amylin Pharmaceuticals*, 983 A.2d 304 (Del. Ch. 2009).

4. In 2013, in *Kallick v. Sandridge Energy, Inc.*, this Court faced a target board that: (i) failed to disclose a proxy put exemption which allowed the board to defuse the risk of debt acceleration upon a change of board membership by "approving" the nomination of the dissent director candidates; and (ii) then refused to grant such "approval" while continuing to oppose the election of those individuals. *See* 68 A.3d 242. In response, this Court enjoined the incumbent board "from soliciting consent revocations, voting any proxies it received from the consent revocations, and impeding TPG's consent solicitation in any way until the incumbent board has approved the TPG slate. The equities here weigh heavily in favor of the stockholders' right to make a free, uncoerced choice." *Id.* at 247.

5. In 2015, this Court in *Pontiac General Employees Retirement System v. Ballantine*, No. 9789-VCL (Del. Ch. Oct. 14, 2014) (Transcript) elaborated on the harm from proxy puts, stating that a non-approvable "Dead Hand" proxy put would "have a chilling effect on, among other things, potential proxy contests" because stockholders "would have the Sword of Damocles hanging over them, when they were deciding what to do with respect to a proxy contest."

6. Against this backdrop and other judicial rulings making clear the limits of director discretion in adopting and employing proxy puts as an entrenchment device, the HC2 Board's manipulation of "Approvable Proxy Put" provisions in two series of preferred stock certificates of designation is plainly disloyal, irreconcilable with clear Delaware law, and warrants immediate injunctive relief.

7. In 2015, the Board approved two Certificates of Designation for the Company's Series A and Series A-2 Convertible Participating Preferred Stock (together, the "Certificates of Designation")—both of which contain an Approvable Proxy Put.

8. As described *infra*, HC2 has performed miserably since Falcone, a former hedge fund manager who was barred from the securities industry for five years as a result of a settlement of securities fraud charges levied against him,

made a large investment in the Company and became its Chairman and Chief Executive Officer ("CEO").

9. Not surprisingly, other stockholders have become frustrated with the Company's performance, with two separate investors—Percy Rockdale LLC ("Percy Rockdale") and MG Capital Management Ltd. ("MG Capital")—deciding to nominate a director slate to replace the incumbent members of the Board. On March 13, 2020 Percy Rockdale and MG Capital filed a preliminary consent solicitation seeking to solicit sufficient written consents to replace the incumbent directors.

10. In response, the HC2 Board is both misleading the electorate about the nature of the Company's proxy put obligations~~,~~ and acting in bad faith by refusing to permit a free and fair election.

11. Specifically, ~~in their~~until Plaintiff initiated this Action, the Board's Consent Revocation Statement urging HC2 stockholders to refuse to grant consents and to revoke any consents already provided~~,~~ concealed the Board~~ conceals its own~~'s power to unilaterally ~~to~~ eliminate the risk of a default event ~~requiring the repayment~~triggering redemption of the preferred shares. Instead, the Board ~~warns~~warned stockholders in an April 3, 2020 Consent Revocation Statement:

> [The Company] ***shall be required***, unless a waiver is obtained from a majority of holders of the Preferred Stock, to make an offer to redeem

> the Preferred Stock at a price per share of Preferred Stock . . . ***for which [redemption] the Company does not have cash legally available*** out of the remaining assets of the Company legally available . . . . In addition, if the Company fails to redeem the Preferred Stock in accordance with the terms of the Certificates of Designation, the holders of the Preferred Stock could obtain a judgment against the Company, and the Company may not have the proceeds or financing available to satisfy such judgment.

(Emphasis added).

12. This disclosure ~~is~~was misleading. Under the terms of the Proxy Put, the Board plainly has (and had) the ability to approve the nomination of the competing directors for ~~purpose~~purposes of defusing the threat of a redemption event, even as the Board can continue to oppose their actual election by stockholders.

13. Importantly, the HC2 Board's conduct can no longer be written off to mere ignorance or mistake. ***First***, Skadden, Arps, Slate, Meagher & Flom LLP, and Cadwalader, Wickersham & Taft LLP—two of the world's most sophisticated M&A law firms—are advising the Board.

14. ***Second***, as described below, when caught red-handed by Plaintiff's filing of the original complaint in this Action, the Board and its advisors adopted a cynical ploy to evade judicial accountability while preserving the coercive effects of threatening financial calamity if investors vote for the dissident director slate.

15. Specifically, after Plaintiff filed this Action, the Board "approved" the competing directors for the purpose of disabling the Proxy Put. Instead of

fighting the consent solicitation on the merits alone, however, the Board continued to undermine the stockholder franchise by claiming in supplemental filings that the election of MG Capital and Percy Rockdale's nominees could nonetheless constitute a change of control giving rise to a default event that could trigger a forced redemption. The Board further misleads investors by indicating that it would be reasonable for the preferred stockholders to argue that a waiver of this change of control provision by preferred stockholders is necessary.

16. The Board's interpretation of the Proxy Put is plainly incorrect. Further, for a corporate board to publicly disseminate a strained interpretation of their own company's documents that is so counter to the company's best interests is disloyal.

17. ~~13.~~ Through this Action, Plaintiff seeks (a) a declaration to immediately cure the stockholder coercion caused by the Board's false disclosures and ~~enjoin~~invalidate any consent revocations received by the Board ~~from soliciting unless and until they approve the nominations of the competing director slate~~unless and until it issues a truthful and non-coercive consent revocation statement, and (b) an order enjoining the Board from further interfering with MG Capital and Percy Rockdale's consent solicitation and with the stockholder franchise.

18. ~~14. Only then can stockholders properly exercise their~~Stockholders have a fundamental right to ~~vote~~exercise their franchise based on the merits of the competing director slates, without facing an illegitimate "thumb on the scales" from the continued threat of illusory financial harm if stockholders vote for the competing director slate.

## II. PARTIES

19. ~~15.~~ Plaintiff is a stockholder of HC2 and has owned HC2 common stock at all material times alleged in the Complaint.

20. ~~16.~~ Defendant HC2 is a Delaware corporation with its executive offices in New York, New York. HC2's common stock trades on the New York Stock Exchange under the ticker symbol "HCHC." HC2 is a diversified holding company with an array of operating subsidiaries across eight reportable segments, including construction, marine services, energy, telecommunications, life sciences, broadcasting and insurance.

21. ~~17.~~ Defendant Falcone has served as a director of HC2 since January 2014, and as President and Chief Executive Officer ("CEO") since May 2014 and is a director of several of HC2's subsidiaries. Falcone previously served as Chairman of the Board from May 2014 until 2020. As described in more detail below, pursuant to a settlement of charges of fraud brought by the U.S. Securities

and Exchange Commission ("SEC"), Falcone had been barred from working in the securities industry.

22. ~~18.~~ Defendant Gfeller has served as a director of the Company since June 2016 and as interim Chairman of the Board since April 2020. Gfeller was a director of Global Marine Holdings, LLC, a majority-owned subsidiary of HC2 from June 2018 until its sale in February 2020.

23. ~~19.~~ Defendant Leffler has served as a director of HC2 since September 2014 and served as lead independent director from June 2016 through February 2020.

24. ~~20.~~ Defendant Hillman has served as a director of the Company since June 2016.

25. ~~21.~~ Defendant Springer has served as a director of the Company since February 2020.

26. ~~22.~~ The defendants listed in ¶¶ 17-21 above are collectively referred to herein as the "Individual Defendants" or the "Board."

27. ~~23.~~ Each Individual Defendant owed and owes the Company and its stockholders fiduciary obligations of care, candor, good faith, and loyalty and was and is required to: (i) use his or her ability to control and manage the Company in a fair, just, and equitable manner; (ii) act in furtherance of the best interests of the Company and its stockholders; (iii) govern the Company in such a manner as to

heed the expressed views of its public stockholders; (iv) refrain from abusing his or her position of control; and (v) not favor his or her personal interests, or any third persons' interests, at the expense of the Company and its public stockholders.

## III. SUBSTANTIVE ALLEGATIONS

### A. Background on HC2's Business and Involvement with Falcone

28. ~~24.~~ In June 2012, the SEC filed fraud charges against Falcone and his hedge fund Harbinger Capital Partners ("Harbinger") for misappropriation of client assets, market manipulation, and betraying their clients. The SEC alleged that:

a. Falcone fraudulently obtained $113.2 million from the Harbinger Special Situations Fund and misappropriated the proceeds to pay his personal taxes;

b. Falcone and two Harbinger investment managers manipulated the price and availability of a series of distressed high-yield bonds by engaging in an illegal "short squeeze";

c. Falcone and Harbinger secretly offered and granted favorable redemption and liquidity rights to certain strategically important investors in exchange for those investors' consent to restrict redemption rights of other fund investors, and concealed the arrangement from the fund's directors and investors; and

d. Harbinger engaged in illegal trades in connection with the purchase of common stock in three public offerings after having sold the same securities short during a restricted period.

29. ~~25.~~ In the press release announcing the charges, Robert Khuzami, the then-Director of the SEC's Division of Enforcement, stated:

> Today's charges read like the final exam in a graduate school course in how to operate a hedge fund unlawfully. Clients and market participants alike were victimized as Falcone unscrupulously used fund assets to pay his personal taxes, manipulated the market for certain bonds, favored some clients at the expense of others, and violated trading rules intended to prohibit manipulative short sales.In August 2013, Falcone and the SEC entered into a settlement to resolve the charges against Falcone. Pursuant to the settlement, Falcone was barred from the securities industry from five years, Falcone and Harbinger were forced to pay more than $18 million in fines and Falcone and Harbinger were forced to admit certain wrongdoing.

30. ~~26.~~ Commenting on the settlement, Andrew Ceresney, a Co-Director of the SEC's Division of Enforcement, stated: "Falcone and Harbinger engaged in serious misconduct that harmed investors, and their admissions leave no doubt that they violated federal securities law."

31. ~~27.~~ Falcone hired the law firm of Dontzin Nagy & Fleissig ("Dontzin") to help negotiate the SEC settlement. Despite Dontzin's work securing a settlement that did not result in a lifetime ban from the securities industry and Falcone's recognition in an August 2013 email that Dontzin did a "super job," Falcone refused to pay the majority of Dontzin's fees. In March 2020, Manhattan State Supreme Court Justice Arthur Engoron ruled that Falcone was obligated to pay at least $13.7 million in unpaid legal fees and interest to Dontzin. In addition, Justice Engoron granted Dontzin's motion to freeze Falcone's assets.

32. ~~28.~~ At the time of the 2013 SEC settlement, Falcone and Harbinger controlled a publicly-traded holding company named Harbinger Group Inc. ("HRG"). In January 2014, HRG acquired a 40% stake in Primus Telecommunications Group, Inc. ("Primus") and in April 2014, Primus was renamed HC2 Holdings, Inc. In May 2014, Falcone became HC2's President, CEO and Board Chairman.

## B. The HC2 Board Embeds Proxy Puts in the Certificate of Designations Governing the Company's Preferred Stock

33. ~~29.~~ On May 29, 2014, HC2 entered into a securities purchase agreement with affiliates of Hudson Bay Capital Management, Benefit Street Partners LLC and DG Capital Management (collectively, the "Series A Purchasers"), pursuant to which the Company agreed to sell an aggregate of (i) 30,000 shares of Series A Convertible Participating Preferred Stock of the Company (the "Series A Preferred Stock") to the Series A Purchasers at a purchase price of $1,000 per share, and (ii) 1,500,000 shares of the Company's common stock at a purchase price of $4.00 per share, resulting in aggregate gross proceeds to the Company of $36 million.

34. ~~30.~~ The Series A Preferred Stock was initially convertible at $4.25 per share, subject to adjustment from time to time for various corporate transactions. The terms of the Series A Preferred Stock also included a quarterly cash dividend at an annualized rate of 7.5%, and a cumulative quarterly

pay-in-kind ("PIK") dividend at an annualized rate of 4%, which would be increased to 7.25% upon the occurrence of certain events and would be reduced to 2% or 0% if HC2 achieved specified rates of growth measured by net asset value ("NAV").

35. ~~31.~~ On January 5, 2015, HC2 entered into a securities purchase agreement with certain investors (collectively, the "Series A-2 Purchasers"), pursuant to which the Company agreed to sell an aggregate of 14,000 shares of Series A-2 Convertible Participating Preferred Stock of the Company (the "Series A-2 Preferred Stock," and together with the Series A Preferred Stock, the "Preferred Stock") to the Series A-2 Purchasers at a purchase price of $1,000 per share, resulting in aggregate gross proceeds to the Company of $14 million.

36. ~~32.~~ The Series A-2 Preferred Stock was initially convertible at $8.25 per share, subject to adjustment from time to time for various corporate transactions. The terms of the Series A-2 Preferred Stock also included a quarterly cash dividend at an annualized rate of 7.5%, and a cumulative quarterly PIK dividend at an annualized rate of 4%, which would be increased to 7.25% upon the occurrence of certain events and would be reduced to 2% or 0% if HC2 achieved specified rates of growth measured by NAV.

37. ~~33.~~ The certificates of designation governing the Preferred Stock (the "Certificates of Designation") each contain proxy puts that serve to insulate HC2's incumbent directors from potential proxy or consent solicitations.

38. ~~34.~~ Specifically, pursuant to Section 6(c) of the Certificates of Designation:

> If a Change of Control occurs, each Holder shall have the right to require the Company to redeem its Preferred Shares pursuant to a Change of Control Offer, which Change of Control Offer shall be made by the Company in accordance with Section 6(c)(ii). In such Change of Control Offer, the Company will offer a payment (such payment, a "Change of Control Payment") in cash per Preferred Share equal to the greater of: (i) the sum of (A) the Specified Percentage of the Accrued Value, plus (B) all accrued and unpaid Dividends (including, without limitation, accrued and unpaid Cash Dividends and accrued and unpaid Accreting Dividends for the then current Dividend Period), if any, on such share to the extent not included in the Accrued Value and (ii) an amount equal to the amount the Holder of such Preferred Share would have received in connection with such Change of Control had such Holder converted such Preferred Share into Common Stock (or Reference Property, to the extent applicable) immediately prior thereto (such greater amount, the "Change of Control Payment Amount").

39. ~~35.~~ In other words, in the event of a "Change of Control" at HC2, the Company is required to make an offer to redeem the then-outstanding Preferred Stock at a price per share equal to the greater of (a) the accrued value of the Preferred Stock, plus any accrued and unpaid dividends; and (b) the value that would be received if the Preferred Stock were converted into HC2 common stock.

40. ~~36.~~ The Certificates of Designation define "Change of Control" as follows:

> "Change of Control" means (i) a sale of all or substantially all of the consolidated assets of the Company (including by way of any reorganization, merger, consolidation or other similar transaction or a sale of Equity Securities issued by Subsidiaries of the Company), (ii) a direct or indirect acquisition of Beneficial Ownership of Voting Power of the Company by any Person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) by means of any transaction or series of transactions (including any reorganization, merger, consolidation, joint venture, share transfer, share exchange, share issuance, reclassification or other similar transaction), pursuant to which the stockholders of the Company immediately preceding such transaction or transactions collectively own, following the consummation of such transaction or transactions, less than fifty percent (50%) of the Voting Power of the Company or other surviving entity (or parent thereof), as the case may be, (iii) the obtaining by any Person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) of the power (whether or not exercised), other than pursuant to a revocable proxy in favor of the Company's proposed slate of directors in respect of an annual meeting or other meeting related to the election of directors, to elect a majority of the members of the Board or more than fifty percent (50% of the Voting Power of the Company; provided, that this clause (iii) will not trigger a Change of Control as a result of the HRG Affiliates or any person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) in which the HRG Affiliates own a majority of the voting power (the "HRG Change of Control Group") obtaining Beneficial Ownership of more than fifty percent (50%) of the Voting Power of the Company if and only if the Public Float Hurdle is satisfied at all times during which the HRG Change of Control Group has the power to elect a majority of the Board or Beneficial Ownership of more than fifty percent (50%) of the Voting Power of the Company, or ***(iv) the first day on which a majority of the members of the Board are not Continuing Directors***; provided, that, for the avoidance of doubt, change in the ownership of HRG (without the occurrence of the events listed in (i) through (iv) above) shall not constitute, in and of itself, a Change of Control.

(Emphasis added).

41. ~~37.~~ The Certificates of Designation define "Continuing Directors" as follows:

> "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 by any HRG Affiliates, or with the approval of either the Holders or 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).

42. ~~38.~~ 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.

**C. The HC2 Board Presides Over Massive Value Destruction at HC2**

43. ~~39.~~ On November 20, 2018, the Company issued $470 million in senior secured notes at a considerable interest rate of 11.5%, despite having a market capitalization of only just over $100 million.

44. ~~40.~~ In a searing January 2020 letter, Percy Rockdale and MG Capital called these levels of debt "inappropriate" given the "high holding company expense structure and the illiquid nature of its holdings."

45. ~~41.~~ While levering up the Company, Falcone has extracted stockholder value for personal gain. From 2014 to2018, Falcone—an individual

banned for five years from the securities industry with several civil judgments outstanding against him—has extracted over $50 million in cash and stock compensation, which is flagrantly excessive given that the Company's market capitalization is just over $100 million.

46. ~~42.~~ In addition to granting Falcone excessive executive compensation, in 2015, the Company also gifted Falcone's personal investment advisory firm, Harbinger, a four-year investment services agreement that assures the Harbinger $4 million per year in fees. In other words, according to Percy Rockdale, as of the Company's January 2020 market capitalization, "nearly 4% of the value of HC2 is being siphoned through this back-door arrangement to the CEO's advisory company each year."

47. ~~43.~~ The arrangement between the Company and Harbinger appears to flout Falcone's 2013 settlement agreement with the SEC that prevents Falcone from taking on any new advisory clients and banned him from the investment and securities industry.

48. ~~44.~~ While Falcone has used the Company as his personal piggy bank, HC2 itself has suffered. From the time Falcone joined the Board in 2014 until 2018, the Company's share price declined more than 35%, even as the S&P 500 returned over 101%. Measurement with lower time horizons also reflects poorly on Falcone and the Board's leadership: the Company's share price declined

65.56% over a three year total shareholder return ("TSR") horizon, versus a positive S&P 500 return of 53.16% and a positive average return of 13.77% among HC2's 2019 proxy peer group.

49. ~~45.~~ Over a five-year TSR horizon, the Company's share price declined 71.97%, as compared to an S&P 500 return of 80.79% and a 2019 proxy peer group average return of 31.29%.

50. ~~46.~~ Qualified managers have also fled the Company. At least by mid-2019, at least one HC2 executive, Louis Libin, left HC2 Holdings after only a year to return to Sinclair Broadcast Group in rumored frustration over lack of funding at the Company. The Radio and Television Business Report noted that in mid-2019 the Company failed to close on five deals, valued at more than $17 million, forcing HC2 to relinquish escrows and pay extension penalties.

51. ~~47.~~ In short, over the last few years the Board has allowed management to destroy or divert tens—if not hundreds—of millions of dollars of shareholder value.

**D. Multiple HC2 Stockholders Call for Changes at the Company**

52. ~~48.~~ On October 8, 2019, news outlet *The Deal* reported that the Shareholder Forum, a New York based research fund, had disclosed the results of a survey that had sought input from all Company shareholders with authorized electronic reporting who owned 100 or more shares of HC2 stock. That survey

found that "only 24% of polled HC2 investors had confidence in the current board and executives, while 68% of [polled] shareholders supported adding at least some new directors to HC2's five-person board."[1] Responses from significant shareholders (owning over 100,000 shares) showed a "much stronger two-thirds level support for replacing all or most of the board."[2]

53. ~~49.~~ One of stockholders' primary concerns was the manageability of the Company's debt load. The same survey found that 70% of respondents wished HC2 to defer investments in new ventures until debt was reduced to "manageable levels of cost and risk."[3]

54. ~~50.~~ Starting in January 2020, several activist shareholders issued public letters expressing dissatisfaction with the status quo and urging serious changes at the Company.

55. ~~51.~~ On January 27, Percy Rockdale MG Capital, Rio Royal LLC, and others issued a joint Schedule 13D that attached a letter to Company stockholders. That letter noted that the Company was trading at a deep discount to NAV. The Rockdale parties traced this discount to "years of poor oversight by the Issuer's Board of Directors, which permitted notable underperformance, a high debt load, a

[1] Ronald Orol, *Activist Target: HC2 Holdings*, THE DEAL, Oct. 8, 2019, *available at* http://www.shareholderforum.com/access/Library/20191008_Deal.htm.
[2] *Id.*
[3] *Id.*

bloated holding company expense structure, related party transactions that disfavored shareholders, and other findings which draw into question management's suitability as stewards of a publicly listed company."

56. ~~52.~~ To redress the "[r]ampant [s]elf-dealing" and "[c]hronic [m]ismanagement" by Falcone and his allies on the Board, Percy Rockdale and MG Capital seek to revamp the Board with their own nominees. Importantly, whether or not other stockholders would actually vote for the Percy Rockdale and MG Capital director slate, there is no good faith basis to question that those nominees are appropriately qualified and do not represent the kind of inherent threat to the corporation that could justify intentionally stifling the stockholder franchise. *See* Section E below.

**E. Percy Rockdale and MG Capital Launch a Consent Solicitation To Replace the Incumbent HC2 Board**

57. ~~53.~~ On February 18, 2020, MG Capital and Percy Rockdale disseminated a second public letter to HC2 stockholders, which again highlighted the Company's (a) dismal long-term performance, (b) haphazard corporate strategy, (c) ineffective incumbent Board, (d) excessive debt, (e) entry into numerous related-party transactions, and (f) relationship with Falcone despite Falcone's regulatory issues. MG Capital and Percy Rockdale's February 18 letter also revealed a list of the six candidates they were nominating to the HC2 Board

(the "Dissident Director Nominees") at the Company's upcoming annual meeting of stockholders.

58. ~~54.~~ The 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.

a. George R. Brokaw ("Brokaw") has served as a private investor through several private and public investment vehicles. Previously, Brokaw served as Managing Director of the Highbridge Growth Equity Fund at Highbridge Principal Strategies, LLC ("Highbridge"). Prior to joining Highbridge, Brokaw was a Managing Director and Head of Private Equity at Perry Capital, LLC ("Perry"). Prior to joining Perry, Brokaw was Managing Director (Mergers & Acquisitions) of Lazard Frères & Co. LLC. Brokaw currently serves on the board of directors of DISH Network Corporation, Alico, Inc. and Consolidated Tomoka Inc. Brokaw previously served on several public company boards of directors including Modern Media Acquisition Corp, North American Energy Partners, Inc. and Terrapin 3 Acquisition Corporation. Brokaw received a BA from Yale University and a JD and MBA from the University of Virginia, and is a member of the New York Bar in good standing and with no disciplinary record.

b. Kenneth S. Courtis ("Courtis") is a financial executive with over 30 years of investment banking and board experience. Since January 2009, Courtis has served as the Chairman of Starfort Investment Holdings. Previously, he served as Vice Chairman and Managing Director of Goldman Sachs, and Chief Economist and Investment Strategist of Deutsche Bank Asia. He received an undergraduate degree from Glendon College in Toronto and an MA in international relations from Sussex University in the United Kingdom. He earned an MBA at the European Institute of Business Administration and received a Doctorate with honors and high distinction from l'Institut d'etudes politiques, Paris.

c. Michael Gorzynski ("Gorzynski") is the Managing Member of MG Capital, an investment firm focused on complex value-oriented investments. From 2006-2011, he invested in special situations globally at Third Point, LLC, a large asset management firm, where he focused on macro, event-driven, distressed, and private investments across the capital structure (equity, hybrids, bonds, and loans). He is an expert in restructurings and in the insurance and banking industries, having participated in dozens of large-scale bank and insurance company restructurings. He earned a BA from the University of California, Berkeley, and received an MBA from Harvard Business School.

d. Robin Greenwood ("Greenwood") has been the George Gund Professor of Finance and Banking at Harvard Business School since 2013 and began serving as Head of the Finance Unit in 2018. At HBS he is the Faculty Director of the Behavioral Finance and Financial Stability project and cochairs the Business Economics PhD program. Greenwood also currently serves as a member of the Financial Advisory Roundtable of the Federal Reserve Bank of New York and a Research Associate at the National Bureau of Economics Research, which he joined in 2017. Greenwood received a PhD from Harvard in Economics, and BS degrees in Economics and Mathematics at MIT.

e. Liesl Hickey ("Hickey") is a veteran political strategist who has worked at the highest levels of politics and issue advocacy. Since 2016, Hickey has served as a senior advisor at each of Guide Post Strategies, Blitz Canvassing and Pathway Partners, and as a partner at Ascent Media. In addition, since 2015, she has provided political consulting services through RAE LLC. Prior to that, from 2015 to 2016, she served as an executive director of Right to Rise and a partner at Patchwork Productions. From 2013 to 2014, Hickey was the Executive Director of the National Republican Congressional Committee. She was a fellow at the University of Chicago's Institute of Politics and a contributor to the Wall Street Journal's former

"Think Tank." Hickey is a graduate of Southern Methodist University.

f. Jay Newman ("Newman") is currently serving as the Managing Member of Ginzan Management Ltd., a family office he founded in 2016. He has over 40 years of experience working in the finance industry as a lawyer, investment banker and principal investor. Immediately prior to establishing Ginzan, Newman was a Senior Portfolio Manager and Member of the Management Committee at Elliott Management Corporation where he worked for over 20 years. He is a graduate of Yale College, Columbia Law School and completed an LLM in Tax at NYU, and is a member of the New York Bar in good standing and with no disciplinary record.

59. ~~55.~~ On March 13, 2020, MG Capital/Percy Rockdale filed their preliminary consent solicitation statement with the SEC. MG Capital/Percy Rockdale are soliciting HC2 stockholders' written consent for the following proposals (collectively, the "Proposals"):

a. Proposal 1 – Suspend, render temporarily ineffective and stay any change, modification, repeal or any other amendment to HC2's Fourth Amended and Restated Bylaws of the Company (the "Bylaws") not already adopted by the Board and publicly disclosed on or before March 12, 2019 (each a "Bylaw Amendment"), until HC2 stockholders have approved all such Bylaw Amendments at the next annual or special meeting and/or by written consent;

b. Proposal 2 – Remove from the Board, without cause, all current directors including Falcone, Leffler, Barr, Gfeller, Hillman and Springer, and any other person elected or appointed to the Board at any future time or upon any event (other than those elected pursuant to MG Capital/Percy Rockdale's consent solicitation); and

c. Proposal 3 – Elect Brokaw, Courtis, Gorzynski, Greenwood, Hickey and Newman to serve as directors of the Company (or, if any such nominee is unable or unwilling to serve as a director of the Company, or if there are additional vacancies on the board of directors, any other person designated as a nominee by the affirmative vote of a majority of the newly elected Board).

**F. The Incumbent Board Files a Consent Revocation Statement Which Omits That the Proxy Puts are Approvable and Falsely and Misleadingly Describes Other Aspects of the Proxy Puts in an Attempt to Coerce Stockholders to Oppose the Dissident Director Nominees**

60. ~~56.~~ On March 20, 2020, the incumbent Board filed its preliminary consent revocation statement (the "Consent Revocation Statement") with the SEC recommending that HC2 stockholders oppose the Proposals. 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. The Board stressed that:

> The Certificate of Designation of Series A Convertible Participating Preferred Stock and the Certificate of Designation of Series A-2 Convertible Participating Preferred Stock (collectively, the "Certificates of Designation"), each governing the Preferred Stock, contain "change in control" provisions. These change in control provisions are triggered, among other things, (i) if any person or "group" (within the meaning of Rules 13d-3 and 13d-5 under the Exchange Act) obtains the power (whether or not exercised) to elect a majority of the members of the Board (other than pursuant to a revocable proxy in favor of the Company's proposed slate of directors in respect of an annual meeting or other meeting related to the election of directors) or (ii) on the first day on which a majority of the members of the Board are not "Continuing Directors" (as defined in the Certificates of Designation).

> ***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*** at a price per share of Preferred Stock, equal to the greater of (i) the accrued value of the Preferred Stock, plus any accrued and unpaid dividends (to the extent not included in the accrued value of Preferred Stock), and (ii) the value that would be received if the share of Preferred Stock were converted into Common 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).

61. ~~57.~~ In bad faith, the Board declined to disclose to HC2 stockholders that the Board 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. As explained above, the Certificates of Designation unambiguously state that a change in the majority of the Board will not constitute a "Change of Control" if the new directors are "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."

62. ~~58.~~ Second, the Board ~~is~~ falsely ~~telling~~informed HC2 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. The power to elect a majority of the members of the Board remains with those possessing the voting power to actually elect members—*i.e.*, HC2 stockholders—not MG Capital and Percy Rockdale.

63. ~~59.~~ On April 3, 2020, MG Capital and Percy Rockdale filed their definitive consent solicitation statement with the SEC.

64. ~~60.~~ Later that same day, the Board filed its definitive Consent Revocation Statement with the SEC, which repeated the false and misleading statements made in the preliminary Consent Revocation Statement and added additional threats to HC2 stockholders.

65. ~~61.~~ While the preliminary Consent Revocation Statement informed stockholders that redemption of the Preferred Stock "may be required" if they supported the Dissident Director Nominees, the definitive Consent Revocation

Statement adopted a more affirmative stance and stated 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:

> 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 ***shall be required***, unless a waiver is obtained from a majority of holders of the Preferred Stock, ***to make an offer to redeem the Preferred Stock at a price per share of Preferred Stock***, equal to the greater of (i) the accrued value of the Preferred Stock, *plus* any accrued and unpaid dividends (to the extent not included in the accrued value of Preferred Stock), and (ii) the value that would be received if the share of Preferred Stock were converted into Common 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. ***Pursuant to the Certificates of Designation, if the Company does not have sufficient legally available funds to redeem the Preferred Stock, the Company may be required to pay the portion of the Redemption Price (as defined in the Certificates of Designation) for which the Company does not have cash legally available out of the remaining assets of the Company legally available (valued at the fair market value of such assets on the date of payment, as reasonably determined in good faith by the Board). In addition, if the Company fails to redeem the Preferred Stock in accordance with the terms of the Certificates of Designation, the holders of the Preferred Stock could obtain a judgment against the Company, and the Company***

***may not have the proceeds or financing available to satisfy such judgment***.

(Emphasis added).

**G. ~~The Board Refuses to "Approve" the Dissident Nominees for the Limited Purpose of Disabling the Proxy Puts~~After Plaintiff Files this Action, the Board "Approves" the Dissident Nominees for the Limited Purpose of Disabling the Proxy Puts But Asserts a Continuing Threat of a Purportedly Calamitous Redemption**

~~62. 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" the dissidents 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.~~

~~63. As then-Chancellor Strine explained in *Sandridge*, the Board's self-interested decision to keep a thumb on the scale of the stockholder franchise by failing to approve a dissident slate that is clearly not comprised of people~~

~~"lacking ethical integrity" or "known looters" is a breach of fiduciary duty.~~[4]

66. Approximately seven weeks passed from February 18, 2020, when MG Capital and Percy Rockdale first revealed the identity of the Dissident Director Nominees, to the initial filing of this Action. During those seven weeks, the Board did not "approve" the dissidents for the limited purpose of nullifying the purportedly catastrophic effects of the Approvable Proxy Puts. Indeed, none of

[4] ~~*See* 68 A.3d at 246 ("In keeping with this state's public policy of stringent policing of the fairness of corporate elections, this court's decision in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals* made clear that a board deciding whether to approve directors for the purposes of a Proxy Put could not act consistently with its fiduciary duties by simply failing to approve any director candidates who ran against the incumbent slate. Rather, the incumbent board must respect its primary duty of loyalty to the corporation and its stockholders and may refuse to grant approval only if it determines that the director candidates running against them posed such a material threat of harm to the corporation that it would constitute a "breach of the directors' duty of loyalty to the corporation and its stockholders" to "pass[ ] control" to them. In other words, unless the incumbent board determined, by way of example, that the rival candidates lacked ethical integrity, fell within the category of known looters, or made a specific determination that the rival candidates proposed a program that would have demonstrably material adverse effects for the corporation's ability to meet its legal obligations to its creditors, the incumbent board should approve the rival slate and allow the stockholders to choose the corporation's directors without fear of adverse financial consequences, and also eliminate the threat to the corporation of a forced refinancing. Notably, absent any determination by the incumbents that the rival slate has suspect integrity or specific plans that would endanger the corporation's ability to repay its creditors, there is no harm threatened to the creditors by the election of the slate. Rather, the only "harm" threatened is that the stockholders will choose to seat a new board of directors. The incumbents' expected view that they are better suited to run the company effectively is, without substantially more, not a sufficient fiduciary basis to deny approval to their opponents.").~~

the Board's public statements prior to the initiation of this Action provided any indication that it had even considered "approving" the Dissident Director Nominees for this limited purpose.

67. The Board's refusal to approve the Dissident Director Nominees for purposes of disabling the Approvable Proxy Puts was intentional and well-informed. The Board has been advised by very experienced M&A lawyers. It is simply inconceivable these sophisticated M&A players failed to appreciate how a proxy put can, as this Court has previously recognized, have a "chilling effect" on the stockholder franchise.

68. After the initial filing of this Action on April 10, 2020, the Board should have realized they were caught red-handed, unconditionally approved the Dissident Director Nominees for purpose of the Proxy Puts, and publicly acknowledged that the Company does not face a threat of forced redemption if stockholders vote for the Dissident Director Nominees.

69. Instead, the Board and its advisors became too clever by half, trying to preserve the coercive "value" of the Proxy Put even after "approving" the Dissident Director Nominees, including by lending credence to an interpretation of the Certificates of Designation that is affirmatively harmful to the Company and its common stockholders.

70. On April 15, 2020, the Board approved the Dissident Director Nominees such that they would constitute "Continuing Directors" for purposes of the Certificates of Designation.

71. The Board also issued a supplement to its Consent Revocation Statement on April 17, 2020 (the "Supplement"). Instead of resolving the matter, however, the Supplement carefully furthers the Board's stockholder coercion through inaccurate and misleading disclosures.

72. In relevant part, the Supplement indicates that despite the Board's belated but legally required limited approval of the Dissident Director Nominees, a risk of triggering the right of Preferred Stockholders to force redemption still exists. Specifically, the Board keeps its thumb on the proverbial scales by disclosing that despite Plaintiff's (indisputably correct) reading of the change-of control triggers in the Certificate of Designations, the holders of the Preferred Stock may nonetheless argue that the election of the Dissident Director Nominees triggers a change-of-control that would require forced redemption of the Preferred Stock absent a waiver.

> [T]he holders of the Preferred Stock may take a different view than the Plaintiffs and if the Percy Rockdale Nominees are elected, the holders of the Preferred Stock may allege that the Company is required to make an offer to redeem the Preferred Stock pursuant to the Certificates of Designation, as described above.

73. Any suggestion that the Preferred Stockholders could credibly argue that the election of the Dissident Director Nominees triggers a change-of-control that would require forced redemption is baseless. As explained *supra*, even if MG Capital and Percy Rockdale's consent solicitation is successful, the power to elect a majority of the members of the Board remains with those possessing the voting power to actually elect members—*i.e.*, HC2 stockholders—not MG Capital and Percy Rockdale.

74. Unlike a proxy, which creates an agency in a named individual or individuals to vote for a stockholder, a written consent is direct action by a stockholder. Thus, the party soliciting written consent never becomes the agent (or proxy) of the stockholders. Instead, the soliciting party merely aggregates and delivers the direct action of the stockholders, *i.e.*, their written consents.

75. Correctly understood, there simply is no argument, reasonable or otherwise, to the contrary.

76. Alternatively, to the extent the Defendants are arguing that there is a risk of triggering the Proxy Puts because the carve out for a solicitation of revocable proxies is limited only to the Company's solicitation, or because action by written consent is not carved out, any such argument would directly contravene decades of law which makes clear that devices like a poison pill or, here, the Proxy

Puts cannot be used in a manner which undermines the exercise of the stockholder franchise.

77. Defendants' Supplement further muddies the waters by suggesting that when Percy Rockdale (in its original Consent Solicitation Statement) identified the Proxy Puts as an entrenching device and committed to seek a waiver of any hypothetical forced redemption event absent the HC2 Board granting the requisite approval, the threat of the forced redemption somehow became incurable:

> In addition, in its consent solicitation statement on Schedule 14A, filed with the SEC on April 3, 2020, Percy Rockdale has stated that it would intend to engage with the holders of the Preferred Stock to waive, restructure or otherwise amend the potential consequences of a change in control. Whether or not this prong of the change in control definition is applicable if the Percy Rockdale Nominees become a majority of the Board, unlike the prong of the change in control definition described in the paragraph above, ***there is no unilateral action that the Board can take with respect to this prong of the change in control definition to avoid triggering***, and to render inapplicable, such prong.

(Emphasis added).

78. Through this disclosure, the Board is falsely giving stockholders the impression that Percy Rockdale endorses the Board's flawed (and self-interested) reading of the change-of-control triggers. To be clear, although Percy Rockdale referenced the potential triggering of the change-of-control provisions in the Certificates of Designations and its plan to "immediately engage with the Preferred Shareholders" if its Dissident Director Nominees were elected, Percy

Rockdale included this discussion solely in response to the incumbents' threats in the preliminary Consent Revocation Statement. *See* Percy Rockdale's April 3 Consent Solicitation Statement at 18.

79. The Board's latest disclosure indicates one of two scenarios. In the first, the Board genuinely believes that the Proxy Put at issue is not of the "approvable" variety but rather is a "Dead Hand Proxy Put," and that the redemption right under the Proxy Put could be triggered if stockholders elect the Dissident Director Nominees. If so, then immediate declaratory relief is required to invalidate the provision as being unenforceable under Delaware law because stockholders cannot be forced to vote under such a "Sword of Damocles" threat.

80. In the second—and far more likely—scenario, the Board fully appreciates that the Proxy Put language at issue is plainly inapplicable, and there is no reason for stockholders to fear any risk of forced redemption. By nevertheless presenting—and thus lending credence to—an incorrect alternative interpretation pursuant to which a redemption would be triggered, the Board is purposely harming the Company because it is effectively inviting a frivolous lawsuit by preferred stockholders to seek a forced redemption that would purportedly be catastrophic for the Company.

81. By endorsing the idea that the provision is ambiguous and that a Preferred Stockholder waiver is necessary, the Board is also exerting coercive

pressure on the stockholders and is breaching its duties of loyalty and disclosure. Indeed, the very fact that the board has gone so far as to speculate about a potential lawsuit from a preferred stockholder and publicize that speculation suggests something other than a full and balanced disclosure—especially where the effect of that ungrounded speculation is to tilt the field against the party soliciting consents and in favor of the Board itself.

## IV. CLASS ACTION ALLEGATIONS

82. ~~64.~~ The right to exercise a free and unfettered vote for or against director candidates is a direct stockholder right, enforceable in a direct individual or class action.

83. ~~65.~~ Plaintiff brings this Action pursuant to Chancery Court Rule 23, on behalf of all other holders of HC2 common stock (except Defendants herein and any person, firm, trust, corporation or other entity related to or affiliated with them and their successors-in-interest) who are or will be threatened with injury arising from Defendants' wrongful actions, as more fully described herein (the "Class").

84. ~~66.~~ This Action is properly maintainable as a class action.

85. ~~67.~~ The Class is so numerous that joinder of all members is impracticable. The number of shares of common stock of HC2 outstanding as of April 2, 2020 was 46,461,665. Plaintiff believes there are hundreds, if not

thousands, of beneficial holders of HC2 common stock dispersed across the country and internationally.

86. ~~68.~~ There are questions of law and fact which are common to the Class and which predominate over questions affecting any individual Class member. The common questions include, *inter alia*, the following:

a. Whether the Individual Defendants have breached their fiduciary duties owed to Plaintiff and the other members of the Class; and

b. Whether Plaintiff and the other members of the Class would be irreparably damaged by the conduct of the Individual Defendants.

87. ~~69.~~ Plaintiff anticipates that there will be no difficulty in the management of this litigation as a class action.

88. ~~70.~~ The Individual Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole. To the extent the Individual Defendants continue their unlawful conduct complained of herein, preliminary and final injunctive and equitable relief on behalf of the Class as a whole will be entirely appropriate.

89. ~~71.~~ Plaintiff is committed to prosecuting this Action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff has the same

interests as the other members of the Class. Accordingly, Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.

90. ~~72.~~ The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

**COUNT I**

**(Declaration Requiring the Board to Unconditionally Approve the Dissident Director Nominees to Nullify the Proxy Puts)**

91. ~~73.~~ Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

92. ~~74.~~ The Certificates of Designation each contain an exemption that permits the Defendants to render the Proxy Put provision inoperative by approving the Percy ~~Rochdale~~Rockdale and MG Capital nominees for election to the Board.

93. ~~75.~~ Under the unambiguous terms of the Certificates of Designation, the sole approval necessary to invoke this exemption is the approval of the Company's Board.

94. ~~76.~~ The Board is under an affirmative obligation to unconditionally approve such nominees for purposes of the Proxy Put absent a good faith conclusion that the nominees are known looters, criminals, otherwise pose an actual threat to the Company.

95. ~~77.~~ There ~~is~~was never a compelling justification or good faith basis of any kind to conclude that the Percy Rockdale and MG Capital nominees are known looters, criminals or otherwise an inherent threat to the Company such as to justify using the threat of redemption under the Proxy Puts to undermine the stockholder franchise. While the Board has nominally "approved" the Dissident Director Nominees, it did so with misleading disclosures with the effect of preserving the coercive effect of the threat of a forced redemption. Thus, the approval did not cure their prior breach of duty.

96. ~~78.~~ The Board's failure to unconditionally exempt the Dissident Director Nominees is a continuing breach of its fiduciary duty to all stockholders.

97. The Board has announced that it nominally "approved" the Dissident Director Nominees, yet it falsely (and in bad faith) warns HC2 investors that such "approval" may not be effective to prevent the risk of a forced redemption by holders of the Company's Preferred Stock.

98. ~~79.~~ Plaintiff and the Class are entitled to a declaration that ~~to fail to~~the Board's refusal to unconditionally approve the ~~Percy Rockdale and MG~~

~~Capital nominees~~Dissident Director Nominees in order to nullify the Proxy Puts would be a breach of fiduciary duty, and, in the (unlikely) event that the Proxy Puts at issue are, in fact, "Dead Hand Proxy Puts," that such provisions are invalid and unenforceable under Delaware law.

99. ~~80.~~ Plaintiff is also entitled to interim and permanent declaratory and injunctive relief.

100. ~~81.~~ Plaintiff lacks an adequate remedy at law.

## COUNT II

**(Class Action Claim Against the Individual Defendants for Breach of Fiduciary Duty)**

101. ~~82.~~ Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

102. ~~83.~~ As directors of the Company, the Individual Defendants owe HC2's stockholders the highest duties of care, loyalty, good faith and candor.

103. ~~84.~~ As set forth above, the Individual Defendants have ~~also~~ breached their duty of candor. As discussed above, the Defendants knowingly caused the Company to issue a Consent Revocation Statement that discloses in a coercive, misleading and omissive manner the operation of the Proxy Puts, falsely portraying the adverse consequences that could befall the Company as triggered by the consent solicitation itself~~, without disclosing that the Defendants could eliminate the effect of the Proxy Puts through the approval exemption~~.

104. After Plaintiff filed this lawsuit, the Individual Defendants disseminated the Supplement, which falsely suggested that stockholders still face the risk of a forced redemption. The Supplement practically invites Preferred Holders to demand redemption if the Dissident Director Nominees are elected, thus exposing the Company and its stockholders to financial harm even if (and when) any such claim by the Preferred Holders is defeated.

105. ~~85.~~ Plaintiff and the Class are entitled to a declaration that the Individual Defendants breached their fiduciary duties.

106. ~~86.~~ Plaintiff and the Class have no adequate remedy at law.

## COUNT III

**(Claim for Injunctive Relief Against Defendants)**

107. ~~87.~~ Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

108. ~~88.~~ The Individual Defendants owe HC2's stockholders the highest duties of care, loyalty, good faith and candor, and as set forth above the Individual Defendants failed to abide by their duty of candor.

109. ~~89.~~ The Individual Defendants have hampered stockholders' right to exercise the franchise with complete information.

110. ~~90.~~ Absent an injunction requiring Defendants to correct public misstatements regarding, among other things, the Proxy Puts and consent solicitation and from soliciting any further consent revocations or giving effect to any consent revocations or impeding the consent solicitation process, HC2 stockholders will not be able to exercise a fully informed and uncoerced vote.

111. ~~91.~~ Plaintiff and the Class have no adequate remedy at law.

## COUNT IV

**(Claim for Declarative Relief)**

112. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

113. The Individual Defendants have hampered stockholders' right to exercise their franchise with full and accurate information.

114. Absent a declaration regarding the meaning of the power-to-elect clause of the Certificates of Designation clarifying that no waiver is necessary in this circumstance to avoid triggering a redemption right under the Proxy Put, the Board's disloyal misstatements implying that a waiver from Preferred Stockholders may be necessary will impede HC2 stockholders from exercising a fully informed and uncoerced vote.

115. Alternatively, to the extent the Board's April 17, 2020 disclosures accurately identify a risk that the Proxy Puts at issue are not, in fact, of the defeasible variety and the election of the Dissident Director Nominees could actually trigger a forced redemption, then the HC2 Board agreed to "Dead Hand Proxy Puts" in its Preferred Stock Certificates, and immediate declaratory relief is required invalidating such provisions.

116. Plaintiff and the Class have no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment as follows:

a) Declaring the Action properly maintainable as a class action;

b) Declaring that the Individual Defendants have breached their

fiduciary duties;

c) Declaring that the change of control provision in the Certificates of Designation contingent on the power to elect a majority of the members of the Board either (i) would not be triggered if stockholders chose to elect the Dissident Director Nominees and that no redemption waiver from any Preferred Stockholder is necessary; or (ii) is a Dead Hand Proxy Put, and therefore invalid;

d) ~~c)~~ Enjoining the Board from (1) soliciting any further consent revocations, (2) relying upon or otherwise giving effect to any consent revocations they have received to date and (3) impeding MG Capital and Percy Rockdale's consent solicitation process in any way, unless and until the Board ~~approves the Dissident Director Nominees for the limited purposes of the Proxy Puts~~issues corrective disclosures;

e) ~~d)~~ Requiring the Individual Defendants to fully disclose all material information related to, among other things, the Proxy Puts and consent solicitation;

f) ~~e)~~ Ordering the Individual Defendants, jointly and severally, to account to Plaintiff, the other members of the Class and the Company for all damages suffered and to be suffered by them as a result of the wrongs complained of herein, including pre- and post-judgment interest;

g) ~~f)~~ Awarding Plaintiff the costs and disbursements of this Action

including a reasonable allowance for Plaintiff's attorneys' fees and experts' fees and pre- and post-judgment interest; and

h) ~~g)~~ Granting such other and further relief as this Court may deem to be just and proper.

Dated: April 10, 2020

**BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP**

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