

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SCHUFF INTERNATIONAL) CONSOLIDATED
INC. STOCKHOLDERS LITIGATION) C.A. No. 10323-VCZ

**SUPPLEMENTAL AFFIDAVIT OF SETH D. RIGRODSKY, ESQUIRE,
IN SUPPORT OF THE PROPOSED SETTLEMENT
AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES**

STATE OF DELAWARE)
) ss.
COUNTY OF NEW CASTLE)

I, SETH D. RIGRODSKY, being duly sworn, do hereby state as follows:

1. I am a shareholder in the law firm of Rigrotsky & Long, P.A. (“Rigrotsky & Long”) and am admitted to practice law in the States of Delaware and New York. Rigrotsky & Long is Co-Lead Counsel for Plaintiffs in the above-captioned class action (the “Action”).

2. I respectfully submit this Supplemental Affidavit in support of (a) the proposed revised settlement (the “Revised Settlement”) of the Action, and (b) Plaintiff’s counsel’s application for attorneys’ fees and reimbursement of expenses. I make this Affidavit based upon my personal knowledge. This Supplemental Affidavit supplements and hereby incorporates by reference the factual record and all exhibits in the Affidavit I previously submitted in support of the original Settlement (“Rigrotsky Aff.”).

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3. After more than five years of litigation, including the completion of fact discovery, and arduous, protracted and arm's-length negotiations, plaintiff Mark Jacobs ("Plaintiff") and defendants HC2 Holdings, Inc. ("HC2"), Philip A. Falcone ("Falcone"), Keith M. Hladek ("Hladek"), and Paul Voigt ("Voigt"), Michael R. Hill ("Hill"), James Rustin Roach ("Roach"), D. Ronald Yagoda ("Yagoda") and Phillip O. Elbert ("Elbert") (collectively, "Defendants") have achieved the Revised Settlement. In exchange for the release of claims against them on a class-wide basis, Defendants will pay or cause to be paid, \$35.95 per share in cash to the stockholders who tendered their shares of Schuff International, Inc. ("Schuff" or the "Company") in the October 2014 tender offer (the "Tendered Stockholders") by the Company's majority stockholder, HC2 for \$31.50 per share (the "Tender Offer").¹ Additionally, as set forth below, the Revised Settlement provides for a payment of \$3.51 per share to the Company's remaining minority stockholders (the "Non-Tendered Stockholders").

Background of the Revised Settlement

4. On January 14, 2020, Plaintiff filed a brief in support of the Original Settlement Agreement ("Original Settlement") and an Amended Complaint

¹ Schuff was renamed DBM Global, Inc. on September 1, 2016. Stipulation, ¶ EE. For consistency, the Company will be referred to herein as "Schuff" or the "Company."

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reflecting Plaintiff's then-current allegations in the Action. On January 24, 2020, two DBMG stockholders, Fair Value Investments, Inc. (the holder of 10 DBMG shares) and AB Value Partners, L.P. ("AB Value") (the holder of 34,394 DBMG shares) (collectively, "Objectors"), served objections to the Original Settlement Agreement.

5. On February 3, 2020, Plaintiff and three of the HC2 Defendants filed briefs addressing the Objectors' objections to the Original Settlement. Among other things, these briefs argued that (1) Plaintiff was a Non-Tendered Stockholder who aggressively litigated the case on behalf of both the Tendered Stockholders and Non-Tendered Stockholders; (2) the Original Settlement properly gave the Non-Tendered Stockholders the opportunity to liquidate their shares of DBMG common stock for the same value received by the Tendered Stockholders; (3) HC2, through its insurance and indirectly through its 92.5% equity ownership of DBMG, would bear nearly all of financial burdens of the Original Settlement ; (4) DBMG would receive benefits as a result of the Original Settlement that far outweighed any burdens it would assume; (5) the scope of the proposed settlement release was customary and proper; and (6) the scope of the releases required to access the materials in the virtual data room was proper. On February 10, 2020 HC2 announced that it had retained Jefferies & Co. to explore strategic options for DMB Global Inc. including a

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potential sale.

6. On February 13, 2020, the Court held a settlement hearing to consider whether to approve the Original Settlement pursuant to Court of Chancery Rule 23. At the settlement hearing, the Court raised five primary issues: (a) whether the proposed class period, which included stockholders who did not own Schuff common stock at the time of the 2014 Tender Offer, might be overbroad; (b) whether Plaintiff was an adequate class representative for the Non-Tendered Stockholders in light of the objections to the Original Settlement Agreement by stockholders representing a supermajority of the Non-Tendered Stockholders Shares; (c) why Schuff was funding directly the Settlement Tender Offer and a portion of the payment to the Tendered Stockholders; (d) the lack of information in the Parties' settlement presentations regarding the terms under which Schuff became obligated to make certain payments under the Original Settlement Agreement; and (e) whether the Non-Tendered Stockholders were receiving sufficient consideration for their releases. Exhibit A, Settlement Hearing Transcript. The Court asked the Parties whether they wished to have the Court decide whether to approve the Original Settlement as presented to the Court or whether the Parties would prefer to consider a revised settlement framework. *Id.* at 79. The Parties requested additional time to consider a revised settlement framework. *Id.* at 80.

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7. After the settlement hearing on February 13, 2020 the parties discussed options to address the issues raised by the Court, and ultimately negotiated, at length, potential revisions to the Original Settlement. Plaintiff and Plaintiff's Counsel also consulted extensively with a financial expert.

8. On May 8, 2020, the parties entered into the Revised Settlement. That same day, the Schuff Board (consisting of defendants Falcone, Yagoda, Roach and Hill, and non-parties A.J. Stahl (Vice President-Investments of HC2), Michael Sena (Chief Financial Officer of HC2) and Paul J. Hurley) approved the payment by Schuff of approximately \$8.055 million of the total payment to be made to the Tendered Stockholders. At their insistence and as part of the Revised Settlement, Plaintiff's Counsel have received and reviewed the Schuff Board minutes associated with the May 8 approval of the Settlement and the Revised Settlement Framework. Furthermore, Article Nine, Section A of the Company's Certificate of Incorporation ("COI") specifically states, "the Corporation shall to the fullest extent authorized by Delaware General Corporation Law . . . indemnify and hold harmless any person who was or is a party . . . in any threatened, pending or completed action, suit or proceeding . . . by reason of the fact that such person is or was a director or officer of the Corporation" Moreover, Schuff owes advancement obligations to these same defendants in connection with their legal defense. Specifically, Article Nine,

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Section B of the COI explicitly states that the “right to indemnification conferred in this section shall include the right to be paid by the Corporation and the expenses (including attorneys’ fees) incurred in defending any such proceeding in advance of its final disposition.” According to the Schuff Board minutes reviewed by Plaintiff’s counsel as a condition of the Revised Settlement, this approval was based upon an analysis of Schuff’s interests and circumstances, including the Company’s indemnification and defense cost advancement obligations under its corporate charter. Exhibit B, DBM Board Minutes, May 8, 2020, HC2_STO_000642-45.

9. Also on May 8, 2020, the board of directors of HC2 (consisting of defendant Falcone and nonparties Warren H. Gfeller, Wayne Barr, Jr., Robert V. Leffler, Jr., Lee S. Hillman and Julie Totman Springer) approved the Revised Settlement.

10. Plaintiff’s Counsel consented to the terms of the Revised Settlement after lengthy, arms’-length, and often contentious negotiations with counsel for Defendants, a review of additional documents, and consultation with experts.

The Tendered Shareholders Will Receive 114% of the Tender Offer Price

11. No member of the putative class objected to the term of the Original Settlement which provided for a payment to the Tendered Stockholders of \$35.95 per share. Accordingly, the Revised Settlement maintains the same Gross Tender

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Payment of \$35.95 per share to the Tendered Stockholders—for a total payment of approximately \$20.44 million—of which (1) approximately \$12.39 million will be funded by HC2’s Insurers (and thereby indirectly by HC2) and (2) approximately \$8.055 million will be funded by Schuff (and thereby indirectly by HC2 through its 92.5% equity ownership of Schuff). The Revised Settlement contemplated that Schuff will fund the approximately \$8.055 million by borrowing that amount.

The Non-Tendered Shareholders Will Not Directly or Indirectly Fund the Payment to the Tendered Shareholders

12. Under the Revised Settlement, to address the potential indirect burden the Non-Tendered Stockholders would arguably bear as a result of Schuff’s funding obligations, and the fact that Schuff would fund portions of the settlement directly while HC2 would fund these payments indirectly through its insurance and 92.5% ownership of DBMG, HC2 will fund a payment to offset the potential indirect financial impact on the Non-Tendered Stockholders of Schuff’s funding obligations in the Settlement in light of the Non-Tendered Stockholders’ 7.52% ownership of Schuff (the “HC2 Offset Payment” and the “HC2 Interest Offset Payment”). Based on the potential Schuff borrowing of approximately \$8.055 million to fund the Gross Tender Payment in the Settlement, the Non-Tendered Stockholders arguably would indirectly be potentially impacted by \$726,158 of principal, fees, and interest in such

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borrowing.² To eliminate any potential indirect financial impact upon the Non-Tendered Stockholders in connection with the Revised Settlement, HC2 will pay the \$726,158 total amount of the HC2 Offset Payment and the HC2 Interest Offset Payment to the Non-Tendered Stockholders -- or \$2.51 per share.

The Non-Tendered Shareholders Will Receive Fair Consideration For Their Release of Claims In The Action

13. HC2 will also make another payment in exchange for a full release of claims by the Non-Tendered Stockholders related to the Action and the implementation of the Settlement under the Revised Settlement. HC2 will fund \$289,902 in release payments to the Non-Tendered Stockholders—or \$1.00 per share (the “HC2 Release Payment”).

14. The Settlement requires HC2 to fund directly total offset and release payments of \$1,016,060—or \$3.51 per share—to the Non-Tendered Stockholders.

15. Since the Merger did not close, the Non-Tendered Stockholders were

² Given the Non-Tendered Stockholders’ 7.52% ownership of Schuff (i.e., 289,902 Non-Tendered Stockholders Shares divided by 3,855,721 Schuff shares outstanding), the Non-Tendered Stockholders arguably have an indirect financial interest of \$605,648 in the approximately \$8.055 million principal amount of the DBMG Financing. This 7.52% ownership also arguably gives the Non-Tendered Stockholders an indirect financial interest of \$120,510 in the fees and interest Schuff is expected to pay prior to the October 1, 2021 maturity date for the DBMG Financing. Accordingly, the total amount of the HC2 Offset Payment and the HC2 Interest Offset Payment is \$726,158.

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deprived of the right to seek appraisal of the fair value of their shares, and instead remained shareholders in the Company allowing them to receive dividends and share in the equity returns of the Company. What the Non-Tendered Stockholders lost was a potential right to seek appraisal in October 2014, or essentially the ability to “put” their shares back to the Company for fair value at that time. In light of these underlying realities, Plaintiff’s Counsel requested their financial consultant to develop an analysis using a Black-Scholes-Merton Put Option (“BSM Put Option”) model that attempts to quantify financial damages incurred by the Non-Tendered Stockholders as a result of not gaining the right to seek appraisal in October 2014. *See* Affidavit of David G. Clarke, ASA In Support of the Proposed Revised Settlement, Exhibit C.

16. The BSM Put Option model indicates a value for this right of \$4.56 attributable to each share held by the Non-Tendered Shareholders. *See id.* at ¶15.

17. However, while the hypothesized appraisal put had a theoretical value of \$4.56 per share, in order to realize that value by exercising the right to seek appraisal at the end of a 120-day period, the Non-Tendered Shareholders would have faced significant expense in the form of expert fees and other direct litigation expenses. *See id.* at ¶ 16.

18. Further, the Non-Tendered Shareholders would have had to retain

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counsel and pay them either hourly rates or, and more likely, a contingency fee that would be based on the outcome of the appraisal proceedings. Assuming \$500,000 in litigation expenses (most notably including expert fees) and a conservative 27.5% contingency fee arrangement to ultimately enforce those appraisal rights, the BSM Put Option value is reduced to \$1.59 per share (\$4.56 less \$1.72 for expenses, less \$1.25 for attorneys' fees). *See id.* at ¶19.

19. And it is important to note that this entire analysis assumes that the Non-Tendered Stockholders would have prevailed on their claim that HC2 was obligated to complete the Buyout and thereby provide the Non-Tendered Stockholders with appraisal rights, and further would have prevailed in establishing a fair value of Schuff's shares of \$66.61. These assumptions are subject to substantial dispute between Plaintiff and Defendants.

20. Defendants would argue that HC2 never committed to complete a short-form merger if it had to resort to open-market purchases to exceed the 90% ownership threshold. Indeed, they would contend that the Tender Offer documents specifically reserved the right not to proceed with a short form merger if the 90% threshold was not reached in the Tender Offer and that any waiver of the 90% condition was strictly as to the closing of the Tender Offer and not as to any commitment to conduct a short-form merger. HC2 did publicly state its intent to

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execute a short-form merger if HC2 was able to acquire more than 90% of Schuff's outstanding shares after the Tender Offer was consummated. *See* Amended Complaint at ¶¶ 89 and 107. However, HC2 later publicly stated that a short-form merger “has never been formally proposed or acted upon” and that HC2 cannot assure stockholders that HC2 “will complete such merger in the near term or at all.” *Id.* at ¶ 126.

21. Thus, there was substantial risk that the Court would have ruled that the Non-Tendering Stockholders were not entitled to appraisal rights, or would have ruled that the fair value of Schuff stock as of October 2014 was significantly less than \$66.61 per share. Plaintiff and Plaintiff's Counsel took this reality into account in considering the fairness of the Revised Settlement.

22. Moreover, Defendants would contend that, because they were never deprived of their shares, the Non-Tendered Stockholders have actually benefitted from the fact that HC2 never consummated a short-form merger, in that they have received \$21.05 per share in dividends (including a \$3.89 per share dividend that was distributed on May 14, 2020), and have enjoyed the appreciation of the value of their Schuff shares. Thus, Defendants would contend that, even if the Non-Tendered Stockholders had valid claims, they have suffered no damages. This additional risk was taken into consideration by Plaintiff and Plaintiff's Counsel in analyzing the

fairness of the Revised Settlement.

PLAINTIFFS' COUNSEL'S FEE APPLICATION

23. Contingent upon Court approval of the Settlement, Plaintiff's counsel seek an award of attorneys' fees representing 27.5% of the \$20,439,588.20 payable to the Tendered Stockholders. To date, Plaintiff's Counsel have spent 3,795.00 hours in the Action. *See* Declaration of Seth D. Rigrodsky, Esquire on Behalf of Rigrodsky & Long, P.A. In Support of Plaintiff's Application for an Award of Attorneys' Fees and Reimbursement of Expenses In Connection With the Revised Settlement, Exhibit D; Declaration of Donald J. Enright, Esquire on Behalf of Levi & Korsinsky, LLP In Support of Plaintiff's Application for an Award of Attorneys' Fees and Reimbursement of Expenses In Connection With the Revised Settlement, Exhibit E. Although they spent an additional 424.50 hours negotiating the Revised Settlement, Plaintiff are not seeking *any fee* from the consideration to be paid to the Non-Tendered Shareholders.

24. Plaintiff's Counsel are also seeking reimbursement of expenses in the amount of \$175,000. Plaintiff's counsel expended \$189,738.72, but agreed to cap their expenses at \$175,000 to avoid shifting any burden for the expenses from the Non-Tendered Stockholders to the Tendered Stockholders. *Id.*

25. In addition, Plaintiff, who supports the Revised Settlement, is seeking

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an incentive award in an amount to be determined by the Court, and of no more than \$25,000, for his efforts in assisting counsel in this Action. Plaintiff's role in this litigation, and his support for the Original Settlement and the Revised Settlement, have never been in any way contingent on receiving an incentive award. *See* Affidavit of Mark Jacobs, Exhibit F. Plaintiff simply asks that the court fairly compensate him for his time and effort in litigating this case and obtaining an excellent result for the Class.

26. To the extent the Court awards any such incentive award to Plaintiff, and with the Court's permission, Plaintiff's Counsel will pay it from any fees the Court awards to them. Defendants have not opposed this request and have taken no position as to the fee application. Plaintiff's counsel believe that their request is fair and reasonable under the standards applicable in this Court and the relevant facts of this case. *See* Exhibits D & E.

27. Plaintiff's counsel respectfully submit that the fee request is fair and reasonable, based on, among other things, the extensive time, costs, and effort expended by Plaintiff's counsel, the prosecution of Plaintiff's claims on a fully contingent basis, and the quality of the services rendered in pursuing and resolving the claims asserted by Plaintiff and his counsel, including the investigation and analysis of the underlying facts and successful negotiations with Defendants'

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counsel.

28. Given the substantial benefits conferred through the efforts of Plaintiff's counsel and the numerous litigation risks and complexities Plaintiff would have confronted had the case been prosecuted to trial, I respectfully submit that the proposed Settlement is fair, reasonable, and adequate and should be approved by the Court. Additionally, given the material benefits achieved and substantial services rendered by Plaintiff's counsel, I respectfully submit that the requested award of attorneys' fees of \$5,620,886.76 and reimbursement of expenses of \$175,000.00 are fair and reasonable and fully merit the Court's approval.

Pursuant to 10 Del. C. § 3927, as provided by the Court of Chancery Covid Guidelines, I declare under penalty of perjury under the laws of the State of Delaware that the foregoing is true and correct.

Executed this 5th day of June, 2020

RIGRODSKY & LONG, P.A.



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