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Case No. 2020-0847-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FAIR VALUE INVESTMENTS, INC., on Behalf of Itself and Similarly Situated Stockholders, and Derivatively on Behalf of the Nominal Defendant, DBM GLOBAL INC., Plaintiff, v. JAMES RUSTIN ROACH, MICHAEL R. HILL, R. RONALD YAGODA, PAUL J. HURLEY, AJ STAHL, PHILIP A. FALCONE, KENNETH S. COURTIS, ROBERT V. LEFFLER, JR., MICHAEL J. SENA, PAUL K. VOIGT, WAYNE BARR, SCOTT D. SHERMAN, and HC2 HOLDINGS INC., Defendants, v. DBM GLOBAL INC., Nominal Defendant.	Consolidated C.A. No. 2020-0847-JTL **PUBLIC VERSION FILED MARCH 2, 2021**

AMENDED VERIFIED STOCKHOLDER CLASS ACTION AND DERIVATIVE COMPLAINT

Plaintiff Fair Value Investments, Inc. ("Plaintiff," "FVI," or "Stockholder"), by its attorneys, respectfully submits this Amended Verified Stockholder Class Action and Derivative Complaint on behalf of itself and all similarly situated stockholders, and for the benefit, of nominal defendant DBM Global Inc. ("DBM" or the "Company") against certain members of its Board of Directors (the "Board"), executive officers, and its controlling stockholder, HC2 Holdings, Inc. ("HC2"),

seeking to remedy defendants' breaches of fiduciary duties from 2014 to the present (the "Relevant Period"). Plaintiff makes these allegations upon personal knowledge as to those allegations concerning Plaintiff and, as to all other matters, upon information and belief based on the investigation of undersigned counsel, which includes, without limitation: (a) review and analysis of public filings made by HC2 and other related parties and non-parties with the United States Securities and Exchange Commission ("SEC"); (b) review and analysis of press releases and other publications disseminated by DBM, defendants (defined herein), and other related non-parties; (c) review of news articles, stockholder communications, and postings on DBM's website concerning the Company's public statements; and (d) the review and analysis of certain of the Company's Board meeting minutes and other materials obtained through demands for books and records and memorandums pursuant to 8 *Del. C.* §220 and correspondence with Company counsel regarding factual matters discussed in these documents.

INTRODUCTION

1. HC2 is a holding company that controls a variety of unrelated businesses, in media, energy, construction, manufacturing, and other areas. Between 2014 and June 2020, it was headed by Philip A. Falcone ("Falcone"), who also founded LightSquared, a communications company, and Harbinger Capital Partners ("Harbinger"), a hedge fund. Falcone and his controlled affiliates have been the

subject of numerous private litigations and regulatory actions, including a 2012 securities fraud action brought by the SEC.[1] Among other conduct, the SEC found that Falcone had used over $100 million of company assets to pay his personal taxes. In 2013, he settled the SEC claims with an admission of wrongdoing – a highly unusual outcome because defendants usually neither admit nor deny the SEC's allegations when they settle SEC actions. Falcone was barred from the investment industry, as a result. As a result of other regulatory actions, he was also barred from managing insurance companies in New York and other states.

2. However, shortly after his admission of wrongdoing in the SEC litigation, Falcone took control of HC2 and became its Chairman and CEO. Since HC2 is carefully structured to operate like a holding company or private equity fund rather than what the SEC defines as an investment company, Falcone was not barred from its management. However, in his role as HC2's Chairman and CEO, Falcone continued to be the subject of controversy as HC2 paid millions of dollars in management and rental fees to his affiliate, Harbinger, as well as other controversial related party transactions involving his and his wife's personal interests, and extracted management fees from an acquired insurance company that was in a state where he was not barred from its management.

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[1] The SEC action was captioned *SEC v. Harbinger Capital Partners LLC,* Case No. 12-CIV-5028 (S.D.N.Y. 2012).

3. In the meantime, HC2 acquired control of DBM in 2014. Falcone became DBM's Chairman. And in keeping with his *modus operandi*, he and HC2 used DBM as HC2's own private piggy bank, using DBM's cash and access to credit to support HC2's need for the cash to pay its debt service and executive office expenses instead of for the support of DBM's profitable business.

4. HC2's numerous improper actions can be divided into five categories, acting as a controlling shareholder to require DBM to:

(a) give HC2 real cash advances and "tax sharing" payments to pay theoretical liabilities;

(b) issue common stock dividends that exceed DBM's net income to meet HC2's specific liquidity needs;

(c) support loans to HC2 by restricting DBM's business and use of its own assets to satisfy covenants of HC2 loan agreements that designate DBM a "Restricted Subsidiary" without regard to the interests of DBM's minority stockholders;

(d) issue preferred stock to HC2's controlled insurance company affiliate that reduced the earnings allocable to DBM minority stockholders, diluted DBM minority stockholders, and otherwise harmed DBM's business by robbing it of cash and available

credit, as a means of providing cash that HC2 needed for its other businesses and mounting financial obligations; and

(e) using HC2's controlling stock ownership to take actions that HC2 asserted eliminate the need for DBM to hold annual meetings at which HC2's appointed directors would have to answer to stockholders.

5. Falcone's mismanagement of HC2 faced a reckoning in 2020, when activist investors, MG Capital Management Ltd. and its affiliate Percy Rockdale LLC (the "Activist Investors") sought to replace Falcone and the entire HC2 board of directors for their mismanagement and misconduct. In May 2020, the Activist Investors settled their dispute with the HC2 board of directors. Falcone was replaced as Chairman of the HC2 board by his long-term associate and mentor, Avram A. Glazer ("Glazer") and eventually left the HC2 board. Another of Falcone and Glazer's associates, Robert V. Leffler, Jr., was merely reassigned from his broadly criticized position on HC2's board to DBM's Board. All of Falcone's board and executive positions with HC2 and DBM were terminated in June, after a news report disclosed that Falcone had caused HC2's insurance subsidiary to initiate a lawsuit against a whistleblower who had stimulated the regulatory investigation that restricted HC2's extraction of management fees. Upon Falcone's departure, longstanding HC2 director Wayne Barr, an employee of the Singer family interests,

which had also established a large holding of HC2 stock, replaced Falcone initially as acting CEO of HC2 and later as permanent CEO, and eventually as a director also of DBM.

6. The Activist Investors, in their campaign, had cited as examples of mismanagement, HC2's lack of focus on core assets, and they emphasized that DBM – a profitable business with hundreds of millions of dollars in a backlog of contracts – was one of the core assets that should be nurtured.

7. However, the Activist Investors did not accomplish their goals to transform HC2. The "new" HC2 is much like the "old" HC2 because the new CEO of HC2, Glazer, was Falcone's mentor with whom he had collaborated in the stock promotions and liquidations that converted Zapata Corporation, the former George Bush oil company, into the "zap.com" venture company that became Harbinger in 2009. Another HC2 director, Warren H. Gfeller ("Gfeller") is also a long-time associate of both Falcone and Glazer, having served on the boards of Falcone- and Glazer-run companies for almost a quarter of a century. Barr, the new CEO and longstanding director, had also been criticized by the Activist Investors for failing to check Falcone and for opposing change at HC2, and at least so far has not demonstrated any change in the treatment of DBM.

8. Moreover, although Falcone and HC2's Chief Financial Officer ("CFO"), Michael A. Sena ("Sena"), have left DBM's Board, they have been

replaced by other HC2 directors, including Leffler and Barr. Thus, rather than nurture DBM, which the Activist Stockholders had pushed for, the "new" HC2 management has continued to loot DBM, and the directors HC2 unilaterally appoints to sit on DBM's Board have continued to acquiesce or affirmatively approve the looting. HC2 has continued to unilaterally elect DBM's Board while refusing to allow DBM's Board to call an annual meeting, continued to induce dividend issuances that send needed cash to HC2 but deprive DBM of cash to grow DBM's business, and, as far as Plaintiff is aware, has continued to extract supposed "tax sharing" and advance payments from DBM without either consideration or reimbursement. The "new" HC2 has also reported its intent to seek "strategic alternatives" for DBM, such as refinancing DBM with further increases in its debt to "upstream" cash needed to satisfy HC2's publicly admitted cash requirements for debt and other financial obligations.

9. For all of these harms to the stockholders and to the Company, caused by Defendants' disenfranchisement of DBM's minority stockholders and actions by HC2 as a controlling stockholder or through HC2's appointed DBM Board members, Plaintiff now brings this action to recover for Defendants' breaches of fiduciary duty and to prevent further such breaches in the future.

JURISDICTION AND VENUE

10. This action arises under the laws of the State of Delaware because it pertains to breaches of fiduciary duty by directors and officers of a Delaware corporation, and therefore, jurisdiction and venue lie in this Court under 10 *Del. C.* §3114.

11. This action also pertains to breaches of fiduciary duty by the controlling stockholder, which is a Delaware corporation, and pertains to the internal affairs of a Delaware corporation; for these reasons, too, jurisdiction and venue lie in this Court.

THE PARTIES

I. PLAINTIFF

12. Plaintiff FVI is a current stockholder of DBM and has held DBM stock continuously since before January 2017. At least since January 9, 2017, FVI has been a record owner of DBM stock. Before then, FVI was a beneficial owner of DBM stock. FVI is chaired by Gary Lutin ("Lutin"), who also chairs the Shareholder Forum (the "Forum").

13. Lutin co-founded the Forum with the New York Society of Security Analysts (the "Society") in 1999 to advocate corporate governance reforms and stockholder rights, conducting programs both independently and in collaboration with the Society and other educational institutions such as the Columbia Schools of

Business and Journalism, the Yale School of Management, and The Conference Board. Examples of public Forum programs include the "dotcom" era collaboration with Amazon.com, Inc. that led to marketplace and regulatory reforms supporting the integrity of financial reporting and fair investor access to corporate information; leading demands for both law enforcement and corporate governance reform at Computer Associates, Inc.; and seeking fair value for minority stockholders in a buyout of Dell Inc.

14. FVI, an affiliate of the Forum organized to support the interests of participating stockholders in particular companies, has been addressing the rights of DBM (previously known as Schuff International) stockholders since 2014. The Forum has also, in a separate research project, addressed the interests of HC2 stockholders.

15. The Forum's research project addressing HC2 was an October 2019 "Shareholder Survey" that had been initiated by unaffiliated HC2 stockholders. The Forum presented HC2 with comments and questions that stockholders asked to be presented to the company's management, and according to stated policy assured HC2 that any response would be presented without editing in the Forum's public report of the survey. HC2 provided a response for Forum reporting and also communicated with Lutin seeking more detailed results of the survey research. HC2's Chairman, Falcone, then responded to three survey participants who had

initiated direct communications with misrepresentations to discredit the survey research, resulting in HC2's chief legal officer intervening to stop his direct communication with investors. Then, after revising the company's published investor presentation and conducting a series of investor meetings to address the results of the survey, HC2 representatives reported to several persons that the company had rejected a proposal from Lutin of additional research services, even though no such offer had been made. In fact, HC2 was known to be informed of the Forum's long-standing, publicly posted policy: "[t]o the extent that a Program is addressing an issue of apparent significance to a broad range of a specific company's investors, the Forum may invite that company to assume responsibility for the Program's costs so that the expense is borne at a corporate level and thus allocated fairly in proportion to the interests of all investors for whose benefit the Program is conducted." HC2's management declined that invitation, so that the initiating stockholders were not reimbursed for the costs of the survey. It should be noted that, contrary to repeated false reports of HC2 representatives, no additional services had been proposed to HC2 by Lutin, or by anyone else representing the Forum or its affiliates. So, in the end, the initiating stockholders were effectively penalized for their leadership that precipitated significant changes in HC2's strategies and stated policies.

16. FVI's advocacy of DBM stockholder interests included objecting to an initially unfair settlement in the *Schuff* class action litigation[2] that would have left DBM minority stockholders to bear the costs of the settlement without receiving any benefit because the original settlement was structured so that non-defendant DBM would bear $8 million of the cost of settling claims against defendant HC2 and its affiliated defendants, which notably required DBM to take on an additional $8 million debt. Owing to FVI, with the volunteered endorsements of several DBM stockholders owning more than half the minority shares, and another objector raising similar concerns, at the hearing to evaluate the initial settlement, Vice Chancellor Zurn expressed that she, too, had concerns about the "morality" of the settlement terms. She then paused consideration of the initial settlement so that the parties could restructure the settlement to account for DBM minority stockholders' concerns. The restructured settlement provided for HC2's reimbursement of DBM minority shareholders for their apportioned share of the $8 million settlement payment, and HC2's "new" management separately promised FVI that they would present proposed reforms in August 2020 to assure DBM minority stockholders of fair treatment of what HC2 now considered a "common interest" in DBM's corporate purpose. Based on this, FVI agreed not to object to the proposed revised settlement, which was then approved by the court with an award of fees to FVI's

[2] *In re Schuff Int'l, Inc. Stockholder Litig.*, C.A. No. 10323-VCZ (Del. Ch.).

counsel in recognition of the benefit created by their objection to the initially proposed unfair settlement.

17. In August 2020, after the settlement had been concluded and DBM had paid the $8 million to settle the Schuff claims against HC2, HC2's new CEO Barr and its continuing Chief Legal Officer initially told FVI that they would prepare the promised proposal of provisions, but then informed FVI that they instead insisted upon litigating past FVI demands for records even though FVI had stated that it no longer considered those records to be needed. Pressed to start fresh with their promised focus on common interests of all DBM stockholders, the HC2 representatives refused.

18. HC2 representatives, including defendant individuals, have repeatedly misrepresented the communications and interests of FVI in efforts to mislead investors, securities, and insurance regulators, and this Court.[3]. During these and all past communications, it should be noted that FVI has never, in fact, addressed its interest in the 10 shares of DBM it owns other than in the context of its support of the interests shared by all DBM minority stockholders.

19. Acting in its clear interests as a DBM stockholder, and clearly consistent with its support of other DBM stockholder interests, FVI has since

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[3] *See, e.g.*, February 6, 2020 email correspondence between Lutin and Falcone, available at: www.shareholderforum.com/shfk/Library/20200206_FVI-email.pdf (attached as Exhibit A).

November 2017 been required to seek conventionally reported investor information by presenting 15 formal §220 demands to DBM. Each of these were disputed by DBM, which imposed unnecessary costs on DBM as well as FVI, including for a court enforcement proceeding, before DBM agreed in each case to provide all existing records for each item demanded in all of the first 12 demands that had been presented by March 2020. DBM has refused to provide any records in response to three subsequent demands presented in 2020, although some of the demanded records were subsequently provided publicly by HC2, as required by the SEC. FVI had also indicated a willingness to defer enforcement of those demands pending a review of requirements after HC2's promised proposal of new policies for its control of DBM.

II. NOMINAL DEFENDANT

20. Nominal Defendant DBM is incorporated in Delaware with business operations in Phoenix, Arizona, and several other locations. DBM was formerly known as Schuff International Inc. ("Schuff" or "SII") and is a major global construction management group of companies, including the largest steel fabricator in the country, which aggregately generate more than $700 million in annual revenues. Its majority owner since 2014 is HC2, which holds approximately 92% of DBM's common stock.

III. CONTROLLING STOCKHOLDER DEFENDANT

21. Defendant HC2 is the controlling stockholder of DBM, and holds approximately 92% of DBM's common stock. HC2 is a holding company that includes a variety of unrelated businesses as wholly or majority-owned subsidiaries, including those in insurance, media, energy, and manufacturing.

22. HC2 used to be a media company called Primus Telecommunications Group, Inc. But in 2014, Philip Falcone's company, the HRG Group Inc., obtained control of the company and renamed it "HC2 Holdings" as an echo of Harbinger, Falcone's hedge fund that he managed in the early 2000s. Falcone, a hedge fund manager, also changed HC2's business model from one primarily focused in media to one akin to a private equity group. HC2 now describes its business, in its most recent Form 10-K, as "a diversified holding company that seeks opportunities to acquire and grow businesses that can generate long-term sustainable free cash flow and attractive returns in order to maximize value for all stakeholders." Thus, under Falcone's direction (and now Avram Glazer's, who was Falcone's mentor), HC2's sole unifying strategy seemed to be to acquire companies that presented opportunities for either speculative promotion or for cash extraction, and milk the cash cows to cover costs while hoping for market opportunities to profit from the speculative ventures – *i.e.*, a common but seldom successful private equity strategy that is understandably uncommon for publicly traded companies. There is no

unifying principle to HC2's businesses. At the time of its latest Form 10-K, it had "eight reportable operating segments" in different areas that do not appear to be related, including "Construction, Marine Services, Energy, Telecommunications, Insurance, Life Sciences, Broadcasting and Other, which includes businesses that do not meet the separately reportable segment thresholds." And in describing its business strategy, the Form 10-K states that HC2 "evaluate[s] strategic and business alternatives, which may include the following: acquiring assets or businesses unrelated to our current or historical operations; operating, growing or acquiring additional assets or businesses related to our current or historical operations, or winding down or selling our existing operations. We generally pursue either controlling positions in durable, cash-flow generating businesses or companies we believe exhibit substantial growth potential. . . . We have not identified a specific industry to focus on and there can be no assurance that we will, or we will be able to, identify or successfully complete any such transaction."

23. HC2 admits that it "encounter[s] competition for acquisition and business opportunities from other entities having similar business objectives, such as strategic investors and private equity firms, which could lead to higher prices for acquisition targets. Many of these entities are well established and have extensive experience identifying and executing transactions directly or through affiliates. Our financial resources and human resources may be relatively limited when contrasted

with many of these competitors which may place us at a competitive disadvantage. Finally, managing rapid growth could create higher corporate expenses, as compared to many of our competitors who may be [at] a different stage of growth, which could affect our ability to compete for strategic opportunities."

24. Like Falcone's record in his other businesses, HC2 has had mixed success – indeed, mirroring his pattern at Harbinger by having one initial year of strong performance followed by weaker performance since. Falcone took over and rebranded HC2 and almost right out of the gate, acquired control of DBM, *see infra*, which his then lieutenant, Paul K. Voigt ("Voigt"), described as a "free cash flow machine," even though DBM – the leading steel fabricator in the construction industry – had no relation to HC2's traditional broadcasting business. HC2 has, as planned, financed its rapid string of acquisitions with debt supported by DBM and, until recently, another cash generating business.

IV. INDIVIDUAL DEFENDANTS

25. Defendant James Rustin Roach ("Roach") is the Chairman, President, and Chief Executive Officer ("CEO") of DBM, and has been a director on the Board since 2013.

26. Defendant Michael R. Hill ("Hill") is the Vice President and CFO of DBM Global, and has been a director on the Board since 2001.

27. Defendant R. Ronald Yagoda ("Yagoda") is the founder of DryAZ Consulting LLC, serves as a consultant to DBM, and was a director of DBM from 2012 until January 2021.

28. Defendant Paul J. "Pat" Hurley ("Hurley") was a director of DBM from 2016 until January 2021.

29. Defendant AJ Stahl ("Stahl") is Vice President of Investments at HC2 and was a director of DBM from 2018 until January 2021.

30. Defendant Falcone was the CEO of HC2 until June 2020, and was a director of DBM until June 2020.

31. Defendant Sena is the CFO of HC2, and was a director of DBM until June 2020.

32. Defendant Voigt was the former Vice President of Investments at HC2 and a director of DBM until May 2018.

33. Kenneth S. Courtis ("Courtis") has been a director of HC2 since May 2020 and a director of DBM since June 2020.

34. Robert V. Leffler ("Leffler") was a director at HC2 from 2014 until May 2020, and was reassigned to be a director of DBM since June 2020.

35. Wayne Barr ("Barr") is the CEO of HC2, and has been a director of DBM since January 2021.

36. Defendant Scott D. Sherman ("Sherman") has during all relevant times been the Vice President and General Counsel of DBM with responsibility for actions and the reporting of facts on which allegations are based.

37. Defendants Roach, Hill, Yagoda, Hurley, Stahl, Falcone, Sena, Voigt, Courtis, Leffler, Barr, and Sherman are sometimes collectively referred to herein as the "Individual Defendants."

SUBSTANTIVE ALLEGATIONS

I. RELATED LITIGATION BEFORE THIS COURT ILLUSTRATES HC2'S LONG PRACTICE OF EXTRACTING CASH FROM DBM WITH THE ASSISTANCE OF CONFLICTED DBM INSIDERS

38. In related litigation before this Court, *In re Schuff Int'l, Inc. Stockholder Litig.*, C.A. No. 10323-VCZ (Del. Ch. Jan. 15, 2020), an amended consolidated complaint (the "*Schuff* Complaint") illustrates that HC2's clear purpose in acquiring control of DBM was to exploit DBM's cash flow. Moreover, the *Schuff* Complaint illustrates how DBM insiders were long motivated to serve HC2's bidding rather than DBM's interests, which helps explain their subsequent conduct that is the subject of this litigation.

39. The *Schuff* Complaint describes Falcone and Voigt's long-standing relationship, and how Voigt, as Falcone's relationship banker at Jefferies, was

recruited by Falcone to work for him at HC2 to "raise money and find companies." One of Voigt's earliest targets was DBM (then known as Schuff International), which he found attractive because of the free cash flow it could provide for HC2's executive expenses and speculations.

40. In early March 2014, Voigt targeted DBM, then known as Schuff International, as a cash-generating company with an opportunity to obtain effective control from family ownership, and then buy the rest in a forced merger at a manipulated low price. In a March 13, 2014 email, Voigt told Falcone, "I like schuff steel free cash flow machine . . . would be a perfect acquisition." (ellipsis in *Schuff* Complaint). In another March 2014 email, Voigt told Falcone that "Ron Yagoda on board of Schuff worth speaking to" and provided Yagoda's cell phone number, noting that he had learned from a friend that Yagoda had "the mandate to sell" DBM; Voigt again called DBM a "free cash flow machine[.]"

41. According to the *Schuff* Complaint, on April 10, 2014, Voigt and Falcone met with Scott Schuff and Yagoda to discuss HC2's potential acquisition of DBM. Following the meeting, Voigt again told Falcone "this is a free-cash flow machine[.]"and that they could "schmooze [Scott Schuff] to a lower price" (brackets in *Schuff* Complaint).

42. In early May 2014, Voigt reiterated to Falcone, via e-mail, DBM's great financial position, "this company will do 40mm ebitda or more this year and 60mm

next year if the economy holds together . . . and make 500mm on this investment or more . . ." (ellipses in *Schuff* Complaint). Also, in early May 2014, Voigt told Falcone that he had met with all of DBM's Board directors and CFO, and he thought HC2 was "fine on schuff on all the board members and CFO have called me to assure me that we won't have Any problems . . . everyone affiliated with the company trying to help us to get this done smoothly" (punctuation and capitalization in *Schuff* Complaint).

43. By May 9, 2014, Voigt continued to deliver the news to Falcone about DBM's utility to HC2 as a "free cash flow machine." Voigt also told Falcone that Roach, a Board director at DBM then and soon to be CEO when HC2 took over, told him about DBM's promising business prospects, including that DBM "just signed 40-50mm new contact on the Sacramento Kings new arena and they are bidding on new convention center in Anaheim . . . this could be a huge homerun . . . rustin is a great guy . . ." (ellipses in *Schuff* Complaint).

44. On May 12, 2014, HC2 purchased Scott Schuff's shares in DBM for $31.50 per share, which represented 60% of DBM's outstanding shares. Yagoda had "advised" Scott Schuff on the sale of his shares because Scott Schuff wanted a "liquidity event" just as DBM's stock was beginning to rise. Rather than conduct a valuation analysis, Scott Schuff and Yagoda merely picked a range of prices that were at a premium to the stock's trading price.

45. Around the time that Yagoda advised Scott Schuff on a stock sale, he also admitted that he was talking to HC2 about his continuing role at DBM. The *Schuff* Complaint quotes Yagoda (presumably from his deposition testimony): "I wanted to know what role I would be playing on an ongoing basis and what my, what kind of deal I would have." Voigt (presumably in deposition testimony) further added that Yagoda "wanted more . . . financial compensation for being the person bringing us the Company that was for sale." And in an early April 16, 2014 email, Voigt told Falcone that "Yagoda called me today to discuss the issues around the employment contracts for senior executives." The *Schuff* Complaint alleges that Yagoda had numerous conversations with Falcone and Voigt about being paid to provide consulting services to DBM.

46. Immediately after acquiring majority control of DBM, HC2 replaced several directors at DBM with HC2 employees: Falcone, Voigt (HC2's investments head), and Keith Hladek (HC2's then Chief Operating Officer). HC2 also replaced Scott Schuff as CEO with Roach, who had previously shown his utility to HC2 by tipping Voigt and Falcone regarding DBM's promising business prospects. Board director Phillip Elbert ("Elbert") was troubled by this housecleaning, writing in an email to the DBM Board on the day the stock purchase agreement was entered that the stock sale should have gone through a Board process. He was so troubled by

HC2's naked power grab that he tendered his resignation, but a day later, withdrew his resignation when he "received a telephone call from Paul Voigt[.]"

47. Over the next couple of months, Voigt and Falcone orchestrated a plan for HC2 to wholly acquire DBM: Voigt told Falcone that "the best way to buy back the schuff stock would be at hc2 doing a tender offer at 31.5 with the independent directors take no position . . . that way you don't have to spend money on a fairness opinion."

48. In evaluating HC2's tender offer, DBM's Board formed a special committee, but staffed it with Yagoda, who was eager to get the deal done for HC2, and Elbert, who appeared after his private discussion with Voigt to acquiesce in the deal that HC2 envisioned. On August 13, 2014, Elbert emailed Yagoda, Sherman (DBM's general counsel), and Falcone to recount a conversation they had with Robert Kant, an attorney from Greenberg Traurig. Elbert stated, "I thought the Tender Offer discussion that the three of us [he, Yagoda, and Sherman] had with Bob Kant yesterday was excellent. As we thought, to protect you and me as Independent Directors could be involved with lawyers and fairness opinions. However, when you stated you [Yagoda] thought HC2 might offer the same price per share as they paid Scott Schuff, that would greatly simplify our involvement, speed up the process and lower the cost. On that basis I can totally support the tender offer and [I] think it is definitely the right move."

49. Two days later, the full DBM Board met (except Voigt, who recused himself) to discuss HC2's anticipated tender offer, and determined to form a Special Committee consisting of Yagoda and Elbert. But, as reported above, this committee's members had already committed to a path even before it was officially formed. Moreover, Yagoda and Elbert did not retain independent counsel, instead, retaining Greenberg Traurig (the company's go-to counsel, who represents DBM in this action). And the committee did not engage an independent financial advisor, reasoning that their own experience would be sufficient: Yagoda, as an investment professional, and Elbert, in the steel construction industry. Yagoda, in a puzzling statement, apparently went on record on August 25, 2014, at a Special Committee meeting as stating that retaining an independent financial advisor would actually be a ***breach*** of fiduciary duty. Yet for most of this period, the Committee never attempted to negotiate or even evaluate the tender offer of $31.50, basing the price only on the sale price of Scott Schuff's stock. Yagoda only once approached Falcone to explore raising the offer, after the Board and the Special Committee received updates on DBM being awarded a major contract from Tesla Motors, Inc. But, consistent with his history of serving HC2's interests even as they conflicted with DBM's in gaining a higher tender offer price, Yagoda immediately backed down when Falcone told him HC2 would not raise the price.

50. Meanwhile, Yagoda continued to negotiate directly with HC2, even as he was purportedly "independently" evaluating the tender offer, about his future role at the Company and compensation. The *Schuff* Complaint quoted an email from Yagoda to Falcone, after the tender offer closed, where Yagoda stated: "we agreed that you and I would sit down on the 25th to formalize an agreement between HC2, Schuff, and me. I have suggested that I be granted options to purchase HC2 stock commensurate with my value in effecting HC2's acquisition of the Schuff International stock." Yagoda proved to be a compliant Special Committee member, in "effecting HC2's acquisition" of DBM (rather than independently valuating the transaction), pushing back only once on price, arguing against conducting an independent valuation and going so far as claiming that retaining a financial advisor would be a breach of fiduciary duty, and not considering any alternative transactions.

51. According to the *Schuff* Complaint, Hill and Roach also were compliant with HC2's interests because they sought to keep their positions at DBM. Voigt communicated with Hill and Roach during the process to buy Scott Schuff's shares and then also later during the tender offer process. Hill had, along with Yagoda, worked out a "back of envelope" valuation of Scott Schuff's shares before he sold to HC2 but never disclosed it to him or to the rest of the Board. Roach fed information about DBM's business prospects to Voigt but never sought to have the price increased. When Hill and Roach helped HC2 obtain control of DBM, Hill

continued as DBM's CFO and Roach was promoted to CEO (replacing Scott Schuff).

52. Securing the support of defendants Elbert, Hill, Roach, and Yagoda allowed HC2 to acquire control of DBM and its supply of cash at a price of only $31.50 per share, eventually misleading public investors to tender more shares at the same price to bring HC2's ownership to 92% of DBM's stock by the end of 2014. But without HC2's public disclosure, and withheld by DBM from responses to FVI's §220 demands based on claims that the records did not exist, HC2 received independent valuations by Ernst & Young that the DBM stock had a value of $68 per share at the end of 2014, and that it should be valued at $74.48 per share as of September 2015 for HC2's sale of DBM stock to HC2's regulated insurance company subsidiary. By 2018, HC2 was transferring shares of its DBM stock to raise cash from its insurance subsidiary at an independently established value of $132.21 per share.

II. SUBSEQUENT TO GAINING CONTROL OF DBM, HC2 INCURRED A HUGE DEBT LOAD, FURTHER MOTIVATING HC2 TO EXTRACT CASH FROM DBM

53. After acquiring control of DBM, HC2 rapidly stepped up its rate of acquisitions and fueled them with whatever debt it could obtain, at high interest costs, with early maturities, and imposing exceptionally restrictive covenants that limited the opportunities available to DBM's business. For example, HC2's urgently

needed refinancing of debt in 2018 was reported by the Moody's ratings service to have the strongest restrictive covenants it had observed in five years, but still got a "junk" Caa rating and had to offer an 11.5% interest rate to attract investors. The even more desperate recent refinancing of that 2018 bond issue in January 2021, in spite of significant debt reductions from new HC2 management's campaign of asset liquidations and termination of Falcone related party commitments, required similarly strong covenants relating to DBM as a "Restricted Subsidiary," and received the same Caa Moody's rating.

54. By 2018, HC2's debt had increased to between $510 million to $612 million.

55. HC2's corporate debt load had continued to expand to support the Falcone speculative ventures and related party transfers, with its Form 10-K for the year ended December 31, 2019, reporting that HC2 had been required to spend $95.1 million on interest payments during that year. The interest payments are so onerous that they, combined with losses from almost every reporting segment (with DBM being the most significant exception, followed by the insurance subsidiary), to push HC2 into the red for the year. HC2 management, appreciating the concerns investors might have, minimized attention to this combination of increasing debt and decreasing real income by creating slide show presentations that focused on only the direct corporate debt without the debt borne by the DBM subsidiary to support

HC2's obligations. The Form 10-K reported that, in fact, "As of December 31, 2019, [HC2] had $870.7 million of indebtedness on a consolidated basis compared to $781.0 million as of December 31, 2018. On a stand-alone basis, as of December 31, 2019 and December 31, 2018, HC2 had indebtedness of $540.0 million and $525.0 million, respectively." Most alarmingly, the majority of that that debt, at the time of the filing of the Form 10-K, was due in 2021.

56. Following the Forum's HC2 Shareholder Survey in October 2019, in public earnings calls throughout 2020, HC2 acknowledged its need to focus on paying off debt. In In March 2020, Falcone acknowledged on an earnings call that HC2's "top priority" was "debt reduction and overhead[.]" He also acknowledged that his "goal is to transition HC2 from being a debt story to a growth and innovation story."

57. In August 2020, new HC2 CEO Barr told investors that, despite recent transactions and reforms in compensation structure, refinancing debt and liquidity will be HC2's "primary focus." Sena also assured investors that HC2's "primary focus as we traverse the remainder of 2020 is on our liquidity and refinancing." In response to a question from an analyst, Barr reiterated, "That is the key KPI that we're all operating to. And that is to get this debt refinanced. . . . [T]he primary focus of the company across the [b]oard, which is reducing the debt." Furthermore, Sena responded to a question on liquidity by responding, "We've pulled up over $20

million to date . . . which includes the $5 million dividend [from DBM] or $4.5 million that came to HC2 in August. We're working on various strategic options to generate liquidity. . . . We do have the ability to provide liquidity for the remainder of the year, and we're comfortable there. Our sources of cash, of course, are continued [sic] our overhead costs and along with our interest payment in December." When pressed on liquidity, Sena responded, "we've disclosed our cash at June 20, which was just under $1 million. We received the $4.5 million from DBM, and we have the ability to pull additional $25 million of liquidity through the end of the year." Thus, implicit in Sena's statement was that HC2 would need to pull more cash from DBM to generate liquidity.

58. In its November 2020 earnings call, Barr emphasized, "As we have noted repeatedly, our top near-term priorities at the holding company are improving our capital structure and reducing overhead. While we continue to take steps to reduce corporate overheard, executing in the near term on our first major goal of refinancing our 11.5% notes and reducing our debt service will position us well for long-term success and generating value for our stockholders." When an analyst asked how HC2 plans to reduce debt, "the $340 million question," Barr responded, "It is the #1 priority. . . . And we're continuing to take a look at a variety of different ways to achieve this refinancing." Sena added, in response to questions about the company's cash needs, "We're looking at about $22 million in interest costs . . . and

we've been running at $3.5 million to $4 million a quarter for corporate SG&A." Barr also confirmed that HC2 would be able to "pull cash from our subsidiaries" to the tune of $25 million. Because DBM was the most consistent large cash flow generator for HC2, and had been acquired specifically because it was a "free cash flow machine," Barr's statement implied that $25 million in cash would come largely or mostly from DBM.

59. More recently, HC2 has sold other assets to reduce its debt load and, as a result, has become more reliant on DBM for its financial health. In the last few months, HC2 has:

(a) conducted a rights offering of $65 million, of which at least $30 million was purchased by Glazer or his affiliates;

(b) sold its renewable energies, Beyond6, Inc., and received $70 million in proceeds; and

(c) refinanced $330 million of its 2021 notes with a new issue of 8.500% senior secured notes due 2026.

60. Moody's recently evaluated HC2's credit rating, and noted how almost all of HC2's operating cash comes from DBM. In rating the bonds at Caa1, Moody's observed, "HC2's sole source of internal cash flow is the dividends, 'tax sharing' payments and management fees it receives from its operating subsidiaries and the company is reliant on one operating subsidiary for the majority of its cash flow."

That “one operating subsidiary” is DBM, because HC2 has sold Global Marine, its other subsidiary that generated cash. Furthermore, Moody’s noted that “HC2’s dividend, management fee and ‘tax sharing’ payments from its operating subsidiaries are not expected to cover its holding company expenses of about $47 million in 2021 including about $14 million of corporate expenses, around $31 million in interest payments on $300 million of senior secured notes and $55 million of 7.5% convertible senior notes, and around $2 million of preferred stock dividends.”

III. HC2 HAS IMPROPERLY EXTRACTED “TAX SHARING” PAYMENTS AND CASH ADVANCES FROM DBM

61. Consistent with its liquidity needs, and with its motivation for acquiring control of DBM, and as described above, HC2 has used DBM as a private piggy bank in contravention of HC2’s duties under Delaware law. At least since 2016, ignoring its duty as a controlling stockholder of DBM to act in a manner that is in the best interests of the Company and its minority stockholders, HC2 has improperly extracted value to its advantage through what it calls “tax sharing” and advance payments from DBM based on HC2 calculations of theoretical tax liabilities that do not actually exist, and which HC2 does not actually pay, and are, in any event, advanced at HC2’s direction even before the theoretical tax would be payable.

62. HC2 caused DBM to enter into what was labeled a “tax sharing” agreement whereby DBM must pay to HC2 an amount calculated by HC2 as a

theoretical amount of taxes, even when no such tax liabilities actually exist or are payable because HC2's net operating loss carryforwards have so far resulted in no actual tax payments by HC2 for several years. Under the agreement, DBM's tax amount [redacted] DBM220000002.

63. The "tax sharing" agreement was approved in 2015 by the purportedly independent directors, Elbert and Yagoda, who had months ago been induced to support HC2's low-ball tender offer for DBM stock. Thus, their past history indicates that their approval was not truly an exercise of independent judgment. In Yagoda's case, he actively assisted HC2 in its tender offer, and even sought compensation and credit for "effecting HC2's acquisition" of DBM.

64. According to records produced in response to FVI's 220 demands that were vigorously resisted, these so-called independent director approvals consisted of two terse emails: in September 9, 2015, Yagoda emailed, [redacted] (DBM220000014); on September 10, 2015. Elbert, similarly, tersely stated, [redacted] DBM220000016. These records did not refer to any consideration received or to be received by DBM for its "tax sharing" payments or any attention to consideration by these so-called independent directors or any other DBM director or officer.

65. Rather than exercise [redacted] HC2 has repeatedly requested that payments be made in advance to the tune of millions, or tens of millions, of dollars without any mention of how DBM may benefit from making these payments, or why they need to be made in advance, or even whether the payments cover real tax liabilities that HC2 will actually owe. Meanwhile, a compliant committee of supposedly independent DBM directors repeatedly has allowed these real cash advances to go forward in exchange for illusory and theoretical consideration.

66. [redacted]

67. As the *Schuff* Complaint illustrated, Yagoda had already demonstrated his eagerness to be of service to HC2. He had sought payment for "effecting HC2's acquisition" of DBM. And in his service on the Special Committee to evaluate HC2's offer, he only once sought to negotiate price but backed off quickly. Furthermore, he was insistent on ***not*** conducting an independent financial evaluation of HC2's offer, going so far as to claim that retaining a financial advisor would be a breach of fiduciary duty.

68.

69.

70. A March 2017 investor presentation by HC2 disclosed that it received from DBM almost $40 million in "tax sharing" payments and advances under the tax-sharing agreement in 2016.

71. .

72.

73. Thus, between 2016 to 2018, the public record and §220 documents show that DBM appeared to have advanced almost to HC2 for little or no consideration.

74. DBM220000405. Yet, in 2019, HC2's publicly filed financial statements show that it did not pay tax.

75. HC2 is DBM's controlling stockholder and from these transactions receives a benefit different from DBM's minority stockholders. Namely, HC2 receives cash to fund its debt service and operations. But DBM's minority stockholders do not receive this benefit; instead, they receive the burden of having the cash taken out of DBM. Therefore, because HC2 receives a non-ratable benefit,

these transactions must be evaluated for entire fairness to DBM and its minority stockholders. These "tax sharing" payments and advances provided an unfair benefit to HC2, DBM's controlling stockholder, at the expense of DBM and, by extension, its minority stockholders. The harm to DBM stems from the lost opportunity to invest the cash in DBM's business, and in incurring higher debt to pay these advances to begin with. The harm to DBM from losing the money to invest in its own business and in higher debt service is passed on to DBM's stockholders through a devaluation of DBM's stock. While this reduction in DBM value may be a reasonable trade for HC2 in exchange for its avoidance of insolvency, DBM and its minority stockholders do not similarly benefit from saving HC2.

IV. HC2 HAS IMPAIRED DBM'S CREDIT

76. HC2 has also had a history of saddling DBM with debt or forcing it to support loans to HC2 or other HC2 subsidiaries, which benefit HC2 but harm DBM by impairing DBM's credit, limiting its access to capital that could be used to support profitable business opportunities and significantly increasing the interest costs of the debt that is incurred.

77. According to SEC disclosures, in November 2017, HC2 and HC2 Broadcasting Holdings, Inc. entered into a credit agreement with Jefferies Finance LLC to borrow $45 million, while using HC2's equity in DBM, in part, as loan collateral. This unfairly burdened DBM by forcing it to, in part, support a loan for

which it did not receive any benefits, since the loan was made to benefit HC2 Broadcasting.

78. According to other SEC disclosures, when HC2 issued $470 million in debt in the form of 11.5% senior secured notes due in November 2021, it again used, in part, its equity in DBM as loan collateral. This again unfairly burdened DBM by forcing it to, in part, support an enormous debt load, which was made to benefit HC2, the parent company, at the expense of impairing DBM's credit.

79. Furthermore, more recent public communications by HC2 indicate that one of the "strategic alternatives" it is considering for DBM is to have it refinance its debt and use the proceeds to benefit HC2. According to HC2's August 10, 2020, earnings presentation, HC2 is seeking for DBM "strategic initiatives, including a potential sale or subsidiary refinancing; net proceeds to reduce HC2 debt." HC2 has, therefore, admitted publicly that DBM's refinancing of debt could be used to reduce HC2's debt, without regard to any harm to DBM resulting from further stretching its debt. Moreover, the reference to a possible sale process in the current unsettled times indicates that HC2, the parent company, is desperate for cash, and may be willing to take any steps it can to meet its own liquidity needs.

80. Finally, in refinancing its loans in January 2021, HC2 again used restrictions on DBM to support the HC2 debt. The loan indenture defines DBM and its subsidiaries as "Restricted Subsidiaries" and states, "All Advances to Restricted

Subsidiaries made by the Company [HC2] after the date of this Indenture will be evidenced by intercompany notes in favor of the Company. These intercompany notes will be pledged pursuant to the Security Documents as collateral to secure the Notes." HC2 also reserved a right to receive "dividends or distributions by a Subsidiary payable, on a pro rata basis or on a basis more favorable than pro rata to the Company[.]"

81. Furthermore, the numerous loans HC2 entered into also impaired DBM's credit by imposing restrictions on DBM's ability to borrow for its own purposes. The indentures for the senior notes to which HC2 has agreed all provide for restrictions on HC2's wholly-owned subsidiaries to borrow, limiting indebtedness to levels set in the indentures that support HC2 interest and debt service payments, rather than the business of DBM.

V. HC2 HAS CAUSED DBM TO ISSUE DIVIDENDS TO FUND HC2'S UNIQUE LIQUIDITY NEEDS

82. HC2 has also caused DBM to issue dividends whose approval by the Board is not a reasonable exercise of business judgment because, while ostensibly benefiting all DBM stockholders *pro rata*, actually give HC2 a non-ratable benefit because the associated reduction of DBM's permanent capital is justifiable to HC2 in the context of its survival, but not to minority stockholders that can realize value only from the realizable value of stock based on the future business value of their reduced capital investment in DBM. This payment of dividends that reduces capital

available for a company's business, or that increases the costs of temporary capital, is clearly different from dividends that distribute surplus capital, and it is clear that neither the controlling stockholder or the directors of DBM considered the interests of DBM and its minority shareholders in their repeated decisions to support the desperate need of HC2 for immediate cash at any cost.

83. In the last two years, DBM has issued $48.2 million in dividends, of which approximately $44.6 million went to HC2 and $3.6 million went to DBM's minority stockholders. These dividend issuances include: $15 million in May 2019 (of which $13.8 million went to HC2); $13.2 million in November 2019 (of which $12.2 million went to HC2); $15 million in May 2020 (of which $14 million went to HC2); and $5 million in July 2020 (of which $4.6 million went to HC2).

84. In 2019 alone, DBM issued more in dividends than it earned in profits. It issued $28.2 million in dividends, of which $26 million went to HC2 and approximately $2.2 million went to DBM's minority stockholders. Yet, in 2019, DBM only earned [REDACTED] in net income. But DBM's dividends benefited HC2 greatly, because HC2 would not have been able to satisfy its debt service and administrative obligations without that large component of HC2's cash.

85. The 2020 dividend issuances also met HC2's unique liquidity needs by funding its obligations under the *Schuff* settlement. By May 2020, HC2's liquidity situation was so dire that it claimed in the *Schuff* settlement that ***all*** of its cash was

tied up in operational costs, including paying for corporate executive offices and debt service. It therefore required DBM, which was not a defendant, to fund $8 million of the settlement, which meant that DBM had to incur an additional $8 million in debt. HC2 responded to DBM minority shareholder objections, supported by expressed Court views, by offering the cosmetic provision of offsetting the proportion of this DBM assumption of HC2 damage payments with a payment that was nominally made by HC2 to DBM minority shareholders to reimburse their allocated share of that $8 million, cynically using supposed HC2 funds that obviously required HC2's increased extractions of cash from DBM.

86. Just as HC2's own obligations under the *Schuff* settlement were coming up and just as it promised to compensate DBM minority stockholders, DBM issued two dividend payments within two months of each other: one payment in May 2020 for $15 million and another in July 2020 for $5 million. The two 2020 dividend issuances totaled $20 million, coinciding with HC2's obligations to fund the *Schuff* settlement relating to HC2's fiduciary duty breaches to DBM's minority stockholders.

87. HC2 had admitted in the *Schuff* litigation that it needed to have non-defendant DBM fund the settlement of claims against HC2 and its indemnified co-defendants because HC2 did not have available free cash, and stated that DBM would fund the $8 million payment of the *Schuff* settlement through incurring debt.

Causing DBM to then issue dividends – even if they ostensibly benefit all DBM stockholders equally – in reality created a non-ratable benefit for HC2, the same as for other dividend distributions other than for the specifically defined purpose of paying HC2's claims for injuring stockholders who sold their shares rather than continuing to own the stock.

VI. HC2 HAS EXTRACTED AN UNFAIR BENEFIT THROUGH A PREFERRED STOCK ISSUANCE AND REIMBURSEMENT FOR ITS ATTORNEYS' FEES

88. In 2018, HC2 induced DBM to borrow as much money as it could to fund a $135 million acquisition of GrayWolf Industrial, a leading specialty construction service company with significant strategic value to DBM's existing business. Since HC2's requirements of DBM dividend payments had been depleting DBM's permanent capital, DBM was now unable to obtain a sufficient amount of debt to fully fund the acquisition without covenants that restrict HC2's further extractions of cash. HC2 therefore arranged for DBM to issue $40 million in preferred stock to HC2's wholly owned subsidiary, DBM Global Intermediate Holdco Inc. (the "Preferred Stock Issuance"), so that HC2 could then transfer the interest to its wholly owned insurance company to get the cash DBM needed to complete the funding of the GrayWolf acquisition. The preferred stock entailed a guaranteed dividend that would amount to, annually, 9% if the dividend is paid through a further issuance of preferred stock, or 8.25% or above if paid in cash,

significantly more than the costs of either DBM's $80 million term loan for the acquisition or its working capital loan. Thus, HC2 was assured continuing access to DBM cash, and could collect fees on the transaction it arranged with its insurance affiliate. [redacted]

[redacted]

89. The Preferred Stock Issuance is a differential benefit that HC2 was able to obtain that the minority stockholders are not able to share in. Because HC2 stood on both sides of the transaction, as a controlling stockholder in DBM but also as a beneficiary of the transaction, it and the DBM directors who approved the transaction were required to act in a manner that was entirely fair to DBM and DBM's minority stockholders.

90. However, the Preferred Stock Issuance was not entirely fair to the Company or DBM's minority stockholders. DBM, as a company, has been permanently saddled by an additional obligation to pay approximately $3 million in dividends, or to elect the alternative of increasing the cash dividend in future years by issuing 9% of the equity as additional preferred stock. This is manifestly unfair because it starves the Company of needed cash while continuing to enrich HC2 at DBM's expense.

91. This transaction was also manifestly unfair to DBM's minority stockholders, whose interests are subordinate to HC2's preferential interest in the

newly issued preferred stock. Therefore, minority stockholders are forced to permanently wait farther down the queue for a distribution of common stock dividends. Furthermore, DBM's minority stockholders are harmed by this additional permanent financial burden that deprives DBM of much needed investment cash. This burden can only increase, rather than decrease, because of HC2's entitlement to receive additional preferred shares if DBM cannot pay the dividend in cash, but a larger basis of preferred shares would also result in a higher total cash dividend going forward.

92. HC2, by contrast, is not equally harmed, because whatever harm it shares from losing dividends as to its 92% interest in common stock is offset by the dividends it receives as to its 100% interest in preferred stock.

93. Aside from the preferred stock issuance itself, HC2 also reaped several non-ratable benefits in connection with the transaction. Because HC2 was the investment manager for this wholly-owned subsidiary, HC2 has also been able to reap investment-management fees relating to the Preferred Stock Issuance. This extra benefit that HC2 reaps from the transaction was not considered by the Finance Committee.

94. Furthermore,

DBM220000140. [redacted]

[redacted] DBM and DBM's minority stockholders derived no benefit from this [redacted] and, therefore, this reimbursement was not entirely fair to DBM or its minority stockholders.

VII. HC2 DISENFRANCHISES STOCKHOLDERS BY AVOIDING AN ANNUAL MEETING

95. Minority stockholders are also being deprived of their franchise right because HC2 has used its majority control to evade the Company's statutory obligation to hold an annual meeting. HC2 began to avoid conducting these meetings when FVI began to raise questions about DBM's governance. HC2's avoidance of these meetings, therefore, was a direct attempt to deprive stockholders of their rights to ask questions, be heard and participate.

96. In 2018, before the scheduled stockholders' meeting, FVI asked DBM to provide information about DBM's "tax-sharing" and advance payments to HC2 and about the HC2 indenture that constrained DBM's use of capital. To avoid giving FVI or other stockholders an opportunity to raise their concerns, HC2 then executed a written consent to "remove" directors – but then reinstall all but one of them – so that HC2 could argue support of a Delaware provision that allows a majority of the voting stock to appoint members of a corporation's board without convening an annual meeting of stockholders. In June 2018, DBM stockholders all received a "Notice of Stockholder Action by Written Consent in Lieu of a Meeting," where

DBM minority stockholders were informed that "by written consent in lieu of a meeting, the holder of more than ninety percent (90%) of the outstanding shares of common stock" of DBM "adopted the Written Consents of the Stockholders of the Company . . . effecting the removal of all of the current members of the Board of Directors of the Company and the subsequent election of directors to fill the vacancies created by such removals[.]" The 2018 Board differed by one director from the 2017 Board when Stahl took over a seat that Voigt vacated. Then, HC2 repeated the same maneuver in July 2019, again delivering the same notice and written consent, and not even making a pretense at actually replacing the Board but merely "removing" the directors and then reinstalling the exact same directors as a new Board.

97. On May 26, 2020, FVI wrote a letter to DBM's Vice President and General Counsel, Defendant Sherman, expressly requesting that the Board call an annual meeting and stating FVI's intent to present a proposal for a stockholder vote on a corporate governance proposal holding that current and former directors breached their fiduciary duties with respect to pending stockholder litigation in this Court, and therefore would not be entitled to indemnification by the Company in relation to the claims in that litigation. FVI cited Section 2 of DBM's bylaws in support of its request for the Board to call a meeting, and cited Section 2.9 of DBM's bylaws in support of offering its proposal. FVI was also exercising its statutory

rights as a DBM stockholder. Under 8 *Del. C.* §211, a corporation is required to call an annual meeting.

98. After receiving FVI's request, the Board did not call an annual meeting. Instead, a written consent notice was issued that was substantially similar to the notices issued in 2018 and 2019, again reflecting unilateral action by HC2 to elect a new Board. The 2020 Board replaced two HC2 directors with two other HC2 directors. Former HC2 CEO Falcone and former HC2 CFO Sena were replaced with former HC2 director Leffler (a long-time associate of Falcone and new HC2 chairman Glazer) and new HC2 director Courtis. However, DBM's minority stockholders were not given an opportunity to vote on, or otherwise weigh in on, the new Board, or to otherwise exercise their rights under Delaware corporation law to ask questions, be heard, and participate. Furthermore, HC2 evaded the need to address or act on FVI's May 2020 notice of a proposal for a stockholder vote on indemnification.

99. Thus, the HC2 view of a mechanism of exercising written consents has disenfranchised DBM minority stockholders by depriving them of any voice in corporate matters, because this mechanism has indefinitely deferred any annual meetings at which DBM minority stockholders could exercise their rights to be heard or to question or exercise their vote regarding the election of DBM's directors, the

management of the company, or, particularly, the right of disinterested stockholders to vote on the indemnification of directors or officers.

100. In its dispensing with annual meetings, HC2 has argued, and its co-defendants have demonstrated their view that the interests of minority stockholders are irrelevant and of no concern to HC2. In this and other actions, they have made it clear that they believe minority stockholders have no right to a vote, no right to be informed, no right to be heard, and certainly no right to hold management accountable.

101. HC2's actions disenfranchise the minority stockholders, from ever exercising a vote on matters that affect the Company, because minority stockholders do not even have an opportunity to offer an implicit rebuke to mismanagement of the Company by voting against the Board or against any measures HC2 may call up.

102. Moreover, even if HC2 followed legal formalities to prevent DBM from holding an annual meeting, its actions were inequitable because they were for the purpose of preventing DBM stockholders from exercising their franchise rights, even if those rights are limited.

103. HC2 has continued to refuse to call a meeting and has only tightened its grip since the initial filing of this action by removing all of the directors that they had argued could be considered independent. On January 27, 2021, HC2 executed its written consent to remove and replace directors of DBM's Board. It removed

Stahl, Yagoda, and Hurley as directors, and replaced Stahl with Barr. Yagoda and Hurley, the only purported independent directors of the Board, were not replaced by new independent directors.

104. All members of DBM's board, from 2018 until now, have supported or acquiesced to this behavior by HC2 by never seeking to exercise the board's authority and obligation to schedule and call a meeting.

105. These actions by HC2, and acquiescence by the DBM Board, violate 8 *Del. C.* §211 and its underlying equitable principles. Therefore, Plaintiff seeks to remedy these statutory and equitable violations by respectfully requesting that this Court order the Board to schedule and hold an annual meeting.

VIII. THE OTHER INDIVIDUAL DEFENDANTS ALSO ACTED IN BAD FAITH

106. Although only [redacted] directly approved the "tax sharing" and advance payments and preferred stock issuance to HC2, the other Individual Defendants acted in bad faith by acquiescing to those actions.

107. In particular, when Falcone was a director of the Company, he acted in bad faith because he was simultaneously the scandal-ridden subject of personal liability claims who needed cash he could withdraw from HC2 as well as the president and CEO of HC2 that was itself financially strained and in need of cash.

108. It was widely reported in the media and in numerous court proceedings that Falcone improperly extracted benefits from HC2 for his own personal use. His

inducing or acquiescing in HC2's unfair extractions from DBM was consistent with these allegations because they allowed him to extract more benefits from HC2, supported as it was by DBM's cash and credit standing.

109. Documents discovered and revealed in the *Schuff* litigation also illustrated that from the beginning, Falcone and Voigt meant to exploit DBM for its cash. Voigt repeatedly referred to DBM, then known as Schuff, as a "free cash machine." And Falcone and Voigt both negotiated directly with Yagoda to induce him to get HC2's offers for DBM stock approved. They found Yagoda to be an eager partner, because Yagoda claimed credit for "effecting HC2's acquisition" of DBM. Moreover, Yagoda directly discussed his rewards for this delivery with Falcone and Voigt.

110. Falcone and Voigt were, until 2018, the HC2 officers who primarily directed HC2's acquisition activities and its arrangements for supporting cash, not only to fund the transactions but also for debt service and for operations (including paying Falcone's other company, HRG, management fees). After Voigt left HC2 and DBM in 2018, his role at both companies was replaced by Stahl. Thus, it is reasonable to infer that during the relevant periods, Falcone, and either Voigt or Stahl, directed Yagoda to approve the "tax sharing" and advance payments or other transactions that met HC2's cash needs, because Yagoda had previously shown an eagerness to be of service to HC2.

111. Sena, similarly, had knowledge of HC2's cash needs as well as the rationale for the various transactions HC2 had DBM engage in, because he has been HC2's CFO for the entire duration of the wrongdoing. Sena was also on the Board, however, so he had a duty to prevent unfair transactions that he knew would deprive DBM of much needed resources for HC2's benefit. But he did not take any actions to prevent the inventive "tax sharing" arrangements, unjustified dividends, payments of HC2 settlement claims, eliminated stockholder meetings, or any other abuses of DBM and its minority stockholders, and thus acted in knowing bad faith.

112. Roach and Hill, as directors and officers, and Sherman as General Counsel and an officer of DBM, would have or should have been aware of DBM's resource needs and how HC2 acted improperly to extract cash from DBM and in other ways disrespect the interests of DBM and the rights of its minority stockholders. They either supported all of this conduct or simply stood aside to allow it, clearly breaching their duties of care as officers of DBM.

113. Sherman, as DBM's General Counsel, has also acted with gross negligence or in bad faith by: (1) knowingly or negligently representing HC2's interests at the expense of DBM, as previously illustrated in the *Schuff* litigation when he advised DBM directors to take a hands-off approach to evaluating HC2's tender offer; (2) supporting HC2 loan agreements that impaired DBM's credit; (3) obstructing stockholder access to information relevant to their interests; and (4)

allowing or advising DBM's Board to continue to avoid annual meetings by not challenging HC2's actions to avoid those meetings through illusive "removals" of DBM directors only to re-elect the very same directors.

114. Furthermore, in 2019 and May 2020, Individual Defendants Falcone, Roach, Hill, Stahl, Hurley, and Yagoda, as directors of DBM, acted in bad faith to approve dividend issuances that, as described above, were at the instigation of HC2 to meet its liquidity needs, at the cost of depriving DBM of capital to invest in its own business. In 2020, Individual Defendants Roach, Hill, Stahl, Hurley, Yagoda, Leffler, and Courtis acted in bad faith to continue such dividend approvals.

115. Finally, the Individual Defendants on the current Board – Barr, Leffler, Courtis, Roach, and Hill – have violated their fiduciary duties by failing to initiate any corrective actions, including not calling an annual meeting of DBM stockholders that has been evaded for three years.

CLASS ALLEGATIONS

116. Plaintiff brings this action on its own behalf and as a class action pursuant to Delaware Court of Chancery Rule 23 on behalf of all holders of DBM stock who are being, and will be, harmed by Defendants' actions described herein. Excluded from the Class are Defendants and any person, firm, trust, corporation, or other entity related to, or affiliated with, any Defendants.

117. This action is properly maintainable as a class action.

118. The Class is so numerous that joinder of all members is impracticable. There are hundreds of thousands of shares outstanding that are owned by non-HC2 affiliated holders, and the number of holders of record or in street name exceed 30 and probably are in the hundreds.

119. There are common questions of fact and law, including, *inter alia*, the following:

(a) whether the Director Defendants breached their fiduciary duties by acquiescing in, or approving, the Preferred Stock Issuance to HC2;

(b) whether the Director Defendants breached their fiduciary duties by not calling for an annual meeting, thereby disenfranchising minority stockholders by depriving them of an avenue to exercise their franchise rights over corporate matters, including the election of directors;

(c) whether HC2 breached its fiduciary duties to the DBM minority stockholders by inducing DBM to issue preferred stock to it; and

(d) whether HC2 breached its fiduciary duties to the DBM minority stockholders by exercising its written consents to prevent the Company from calling an annual meeting at which the minority could exercise their franchise rights over corporate matters.

120. Plaintiff's claims are typical of the claims of the other members of the Class, and Plaintiff does not have any interests adverse to the Class.

121. Plaintiff is an adequate representative of the Class, has retained skilled counsel with extensive experience in litigation of this nature, and will fairly and adequately protect the interests of the Class.

122. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for the party opposing the Class.

123. 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.

DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS

124. Plaintiff brings this action derivatively in the right of, and for the benefit of, DBM to redress the breaches of fiduciary duty and other violations of law committed by the Individual Defendants and HC2, as alleged herein.

125. Plaintiff will adequately and fairly represent the interests of DBM and its stockholders in enforcing and prosecuting the Company's rights. Plaintiff has retained counsel experienced in prosecuting this type of derivative action. Plaintiff

has continuously held DBM stock since before January 2017, and will continue to hold DBM stock through the resolution of this action.

126. Plaintiff has not made a pre-suit demand on the Board to assert the claims set forth herein against the Individual Defendants because such a demand would have been futile, and is thereby excused.

127. A demand on the Board to bring the claims asserted herein would be futile because there is a reasonable doubt that a majority of the current five-member Board is capable of making an independent and disinterested decision to institute and prosecute this action. Of the current Board, all five directors suffer such disabling conflicts because every director is affiliated with HC2 or is an employee of DBM.

128. The current Board consists of Roach, Hill, Barr, Courtis, and Leffler.

129. Barr, Courtis, and Leffler suffer from disabling conflicts because they are, or were during the period of the alleged misconduct, directors of HC2, whose actions up to the present day are alleged in this Action to violate its fiduciary duties to DBM and its minority stockholders. As such, their own actions in directing HC2 are being called into question, and they suffer a disabling conflict because they cannot disinterestedly or impartially assess their own actions at HC2.

130. Barr, in addition, is the CEO of HC2, and therefore, cannot impartially or disinterestedly evaluate claims against HC2 because his livelihood depends on HC2.

131. Leffler, furthermore, cannot impartially or disinterestedly evaluate claims against HC2, because of his long business relationship with HC2 Chairman Glazer. In the early 1990s, he consulted for Glazer's father, Malcolm, in the latter's attempts to obtain a football team expansion for Baltimore. In 1995, he joined the board of Zapata Corporation, shortly after the Glazer family took control, and continued to serve on its board after the Glazer family's interest in Zapata Corporation was sold to Falcone's investment firm, Harbinger. Leffler's long association with Falcone and Glazer therefore means he would not be able to impartially or disinterestedly evaluate claims against HC2, the company that Falcone and Glazer have taken turns running, because the claims against HC2 will necessarily implicate Falcone's and Glazer's actions.

132. Roach and Hill suffer from disabling conflicts because they are employees of DBM. Because DBM is controlled by HC2, Roach's and Hill's livelihoods depend on HC2, and therefore, they cannot impartially or disinterestedly assess litigation against HC2, which controls their livelihoods.

CLAIMS FOR RELIEF

COUNT I
Breach of Fiduciary Duties of Care and Loyalty
(Against the Individual Defendants, Directly on Behalf of DBM Minority Stockholders and Derivatively on Behalf of the Company)

133. Plaintiff incorporates by reference and re-alleges every allegation contained above, as though fully set forth herein.

134. For the Individual Defendants other than Sherman, as directors of DBM during the relevant actions, the Individual Defendants owed duties of care, good faith, and loyalty to the Company and its stockholders.

135. These Individual Defendants breached their fiduciary duty of loyalty to DBM's stockholders when they approved or acquiesced in conflicted transactions involving the Company's controlling stockholder who differentially benefited from those transactions compared to DBM's minority stockholders, at the expense of the Company and DBM's minority stockholders.

136. Roach, Hill, and Sherman, in addition, breached their duties of care and loyalty as officers of DBM when they either knowingly or grossly negligently acquiesced to HC2's misconduct, or acquiesced to DBM directors' wrongful approvals of harmful transactions.

137. DBM's minority stockholders have been directly harmed by the transactions that have unfairly benefited the controlling stockholder, HC2, because they have had the value of their stock impaired.

138. Moreover, the Individual Defendants' actions have harmed the Company by depriving it of cash that could be used to pay down debt or be reinvested in the business, and by impairing the Company's credit through forcing the Company to support loans that benefit HC2 without providing any benefit to DBM.

139. The Company and DBM minority stockholders suffer damages proximately caused by the Director Defendants' breaches of the fiduciary duty of loyalty.

COUNT II
Breach of Fiduciary Duty of Loyalty
(Against HC2, as the Controlling Stockholder, Directly on Behalf of DBM Minority Stockholders and Derivatively on Behalf of the Company)

140. Plaintiff incorporates by reference and re-alleges every allegation contained above, as though fully set forth herein.

141. HC2, as the controlling stockholder of DBM, owes the same fiduciary duties to the Company and to minority stockholders as DBM's Board. HC2, by inducing the above alleged transactions, unfairly benefited itself at the cost of the Company and DBM's minority stockholders by taking cash for its own purposes that could have been used to improve the business of the Company.

142. In addition, HC2 disenfranchised DBM's minority stockholders by executing written consents to elect the Board each year, which prevented the

Company from holding annual meetings, in the face of stockholder protests and proposals regarding alleged mismanagement by HC2 and DBM's Board.

143. The Company and DBM minority stockholders suffer damages proximately caused by HC2's breaches of the fiduciary duty of loyalty.

COUNT III
Injunctive Relief Under 8 *Del. C.* §211
(Against Defendants Roach, Hill, Barr, Courtis, and Leffler,
Directly on Behalf of DBM Minority Stockholders)

144. Plaintiff incorporates by reference and re-alleges every allegation contained above, as though fully set forth herein.

145. DBM has not held an annual meeting for several years, including at least the last three years.

146. 8 *Del. C.* §211 requires a corporation to hold an annual meeting at least once every 13 months and vests the Chancery with jurisdiction to compel an annual meeting where one has not been held for at least 13 months.

147. Plaintiff seeks an annual meeting because the lack of a meeting has disenfranchised it and other minority stockholders, who have been deprived of any voice in corporate affairs.

148. Defendants Roach, Hill, Barr, Courtis, and Leffler constitute the current Board of Directors of DBM. They have the power to call an annual meeting but have failed to do so.

149. As a result of the current Board's failure to call for an annual meeting, Plaintiff respectfully requests that this Court exercise its statutory jurisdiction under 8 *Del. C.* §211 to order the current Board to promptly schedule and hold an annual stockholders meeting, as required by law, in order for Plaintiff and similarly situated DBM minority stockholders to exercise their corporate franchise rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

A. An order certifying the Class as defined above, and declaring that Plaintiff is a fair and adequate representative of the Class and that its counsel can fairly and adequately prosecute this action on behalf of the Class;

B. An order declaring that Plaintiff may maintain this action derivatively on behalf of DBM;

C. An order declaring that Defendants have breached their fiduciary duties to DBM;

D. An order determining and awarding to DBM the damages sustained by it as a result of the violations set forth above by Defendants, jointly and severally, together with pre-judgment and post-judgment interest thereon;

E. An order directing DBM and Defendants to take all necessary actions to reform and improve its corporate governance and internal procedures to comply

with applicable laws and to protect DBM and its stockholders from a repeat of the wrongful conduct described herein;

F. An order compelling the scheduling and holding of an annual stockholder meeting, as required by 8 *Del. C.* §211;

G. An order enjoining HC2 from taking the actions alleged in this complaint, or from inducing DBM to approve these actions, that benefit it unfairly at the expense of DBM and DBM's minority stockholders;

H. Awarding Plaintiff its costs and disbursements for this action, including reasonable attorneys' fees and expenses; and

I. Granting such other relief as this Court deems just and appropriate.

Dated: March 2, 2021

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