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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUSSELL E. PLANITZER and LTP FUND II, L.P., Defendants Below-Appellants, v. MARBEK REVOCABLE TRUST, HARVEST GROWTH CAPITAL LLC, HARVEST GROWTH CAPITAL II LLC, SATURN PARTNERS LP III and SPLP II OPPORTUNITY LP, Plaintiffs Below-Appellees.	No. 434, 2018 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 11580-VCL

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This action concerns the November 2015 acquisition of Good Technology Corporation ("Good" or the "Company") by Blackberry Corporation ("Blackberry") for $425 million in cash. Appellant Russell E. Planitzer was a Good director who approved the transaction and was then named as a defendant, along with his fellow Board members, when plaintiffs filed a class action complaint in the Court of Chancery on behalf of the Company's common stockholders. *See* A190-A223. Later, plaintiffs asserted a claim against appellant LTP Fund II, LP ("LTP"), an entity managed by Mr. Planitzer, for allegedly aiding and abetting the directors' purported breaches of fiduciary duties. *See* A380-A381; A418-A419. Together, Mr. Planitzer and LTP held more than 6 million shares of the Company's common stock prior to the Blackberry acquisition.

After taking discovery, plaintiffs concluded that Mr. Planitzer did not suffer from the same alleged self-interest as other Good directors and, therefore, there was no basis on which to question Mr. Planitzer's business judgment as a fiduciary. Accordingly, plaintiffs voluntarily dismissed their claims against Mr. Planitzer and LTP with prejudice. *See* A520-A530.

Ultimately, plaintiffs settled the class action, first with Good's financial advisor, J.P. Morgan Securities LLC ("J.P. Morgan"), and then with the other remaining defendants. The Court of Chancery approved the J.P. Morgan settlement,

authorizing payment of $35 million (less administrative expenses and attorneys' fees) to a class consisting of holders of Good common stock but "excluding the defendants in this action and their associates, affiliates, legal representatives, heirs, successors in interest, transferees and assignees." A811-A822.

When plaintiffs submitted for the Court of Chancery's approval a list of Good common stockholders to whom settlement proceeds would be distributed, the proposed list ***excluded*** Mr. Planitzer and LTP, even though they had long since been dismissed as defendants with prejudice. *See* A824-A833. Mr. Planitzer and LTP objected and asked the Court of Chancery to confirm that they, as former common stockholders of Good and members of the class, are entitled to their *pro rata* share of settlement proceeds. *See* A1079-A1092.

On July 31, 2018, the Court of Chancery issued an order approving plaintiff's proposed distribution list and excluding Mr. Planitzer and LTP from receiving any settlement funds. *See* Ex. A. In that order, the trial court held that Mr. Planitzer and LTP met the "Class" definition because they owned Good common stock and did not fall within any enumerated exclusion. Specifically, the court concluded that Mr. Planitzer and LTP are not excluded from the Class as "defendants" because they had been dismissed prior to the court's approval of the J.P Morgan settlement. *See id.* ¶ 10. The court also determined that Mr. Planitzer and LTP did not qualify as excluded "affiliates" or "associates" of the remaining defendants, according to those

terms' "widely used definitions adopted by the federal securities laws." *Id.* ¶¶ 11-13.

While the Court of Chancery correctly recognized Mr. Planitzer and LTP as members of the Class, it nonetheless ruled that Mr. Planitzer, through his acts as a Good director, had waived the right to participate in the settlement on behalf of himself and LTP. In particular, the court pointed to a separate proceeding, initiated by Good and later consolidated into this class action, in which the Company alleged that the named plaintiffs' challenge to the Blackberry merger breached the "bring-along" provisions of a voting agreement to which plaintiffs were parties. The court opined that Mr. Planitzer, by joining in Board votes to enforce the voting agreement, "demonstrated that he did not want this action to go forward at all, making obvious his view that there should not be any recovery." Ex. A ¶ 14. The court excluded Mr. Planitzer and LTP from collecting settlement proceeds based on its view that "[c]onduct that runs so contrary to the interests of the Class amounts to clear indication of waiver." *Id.*

On August 21, 2018, the trial court entered a final judgment, pursuant to Court of Chancery Rule 54(b), as to Mr. Planitzer's and LTP's rights concerning the distribution of settlement proceeds. *See* Ex. B. Mr. Planitzer and LTP commenced this appeal the following day.

SUMMARY OF ARGUMENT

1. The Court of Chancery committed reversible error by approving a settlement distribution list that excluded Mr. Planitzer and LTP. The Court of Chancery correctly determined that Mr. Planitzer and LTP qualified as Class members under the definition certified by the court, yet still ruled that they were not eligible to share in a Class-wide recovery. The court's holding relied upon the erroneous conclusion that Mr. Planitzer, by supporting an action to enforce the Company's contractual rights against the named plaintiffs, waived both his and LTP's entitlement to participate in a future settlement of the Class's claims. There was no evidence before the court, as Delaware law requires, that Mr. Planitzer knowingly or intentionally waived, on behalf of himself or LTP, any rights as Good common stockholders. Additionally, there was no basis for the Court of Chancery to conclude that Mr. Planitzer or LTP took actions that were so adverse to the interests of the Class that Mr. Planitzer and LTP should be deemed to have surrendered their right as common stockholders to share in a future Class-wide recovery.

STATEMENT OF FACTS

I. PLAINTIFFS CHALLENGE THE GOOD-BLACKBERRY MERGER AND FILE SUIT AGAINST APPELLANTS.

On September 4, 2015, Good and Blackberry announced a merger through which Blackberry acquired Good for $425 million in cash. On October 6, 2015, plaintiffs, purporting to represent a class of Good common stockholders, filed a Verified Complaint in the Court of Chancery against the Company's directors challenging the merger as a breach of the defendants' fiduciary duties. A190-A223. Mr. Planitzer, then a director of Good, was one of the named defendants. A199. Plaintiffs alleged that a majority of Good's directors, including Mr. Planitzer, faced a disabling self-interest because the venture capital funds they represented held shares of Good preferred stock which incentivized the directors to favor an initial public offering ("IPO") and oppose selling the Company at an earlier time on terms that would have better favored the common stockholders.

Plaintiffs twice amended their complaint. In the Verified Second Amended Complaint, filed August 25, 2016, plaintiffs added a claim against the director defendants' affiliated investment funds (including LTP) for allegedly aiding and abetting the directors' breach of fiduciary duty. A418-A419. At the same time, plaintiffs also added a claim that J.P. Morgan, Good's financial advisor in connection with the Blackberry transaction, aided and abetted the directors' breach of fiduciary duty. A419-A420.

II. THE COMPANY FILES THE BRING-ALONG ACTION AGAINST PLAINTIFFS.

On October 29, 2015, Good commenced a separate action in the Court of Chancery, styled *Good Technology Corp. v. MARBEK Revocable Trust, et al.*, C.A. No. 11654-VCL (the "Bring-Along Action"), by filing a complaint against the stockholder plaintiffs in this proceeding and Brian Bogosian, the Company's former Chief Executive Officer and the principal of plaintiff MARBEK Revocable Trust. A258-A311. In the Bring-Along Action, Good sought to enforce the terms of a Voting Agreement between plaintiffs and the Company requiring vote in favor of, and take no actions to oppose, a sale of the Company under certain conditions. A269-A270. Among other relief, Good requested in the Bring-Along Action an order compelling plaintiffs to withdraw from and discontinue the class action. A270. Ultimately, the Bring-Along Action was consolidated with plaintiffs' class action claims and stockholder appraisal claims into this proceeding, under the caption *In re Good Technology Corp. Stockholder Litig.*, C.A. No. 11580-VCL. A351-A355.

When originally executed, the Voting Agreement provided that it would expire upon, *inter alia*, the occurrence of a "Liquidation Event" involving the Company. A280 (§ 14). On October 29, 2015, Good and the holders of a majority of the Company's outstanding preferred stock (including LTP), voting together as a class on an as-converted to common stock basis, agreed to amend the Voting Agreement to confirm that the stockholders' "bring-along" obligations would not be

terminated by, but would survive, the Blackberry merger. A1018-A1029. Mr. Planitzer executed the amendment to the Voting Agreement on behalf of LTP. A1024.

On June 27, 2016, the Company moved for partial summary judgment in the Bring-Along Action, requesting that the Court of Chancery specifically enforce the Voting Agreement and compel Mr. Bogosian, and the entities he controls, to withdraw appraisal petitions and tender their shares in exchange for the merger consideration. A312-A347. However, the Court of Chancery stayed consideration of Good's summary judgment motion, concluding that deciding the motion was "not an efficient use of judicial or litigant resources" because plaintiffs "identified affirmative defenses implicating factual disputes that will make it difficult to rule … as a matter of law at this early juncture." A350.

In advance of trial, which was scheduled for June 2017, the Company requested leave to renew its motion for partial summary judgment to enforce the Voting Agreement. A593-A602. The Court of Chancery denied the Company's request, finding again that plaintiffs "still assert viable defenses that foreclose summary judgment" and "will require a factual determination based on a full trial record." A717-A718.

III. PLAINTIFFS DISMISS APPELLANTS WITH PREJUDICE BEFORE THE COURT OF CHANCERY CERTIFIES A CLASS.

On December 30, 2016 – about six months before trial was to be held – plaintiffs moved for class certification pursuant to Court of Chancery Rule 23. A423-A447. On February 24, 2017, all defendants ***except Mr. Planitzer and LTP*** filed an Answering Brief opposing class certification. A448-A519. This is because, by the time the opposition brief was filed, plaintiffs had agreed in principle to dismiss with prejudice the claims alleged against Mr. Planitzer and LTP. Plaintiffs decided to voluntarily dismiss these claims after having an opportunity to evaluate the full discovery record and take Mr. Planitzer's deposition.

The agreement was memorialized in a stipulation filed on March 10, 2017, by which plaintiffs dismissed the action against Mr. Planitzer and LTP with prejudice as to plaintiffs themselves and, as Court of Chancery Rule 23(e) requires, without prejudice to other class members. A520-A524. For his part, Mr. Planitzer stipulated that he would "make himself available at trial at the request of any party giving proper and sufficient notice." A521. On March 13, 2017, before hearing argument on class certification, the Court of Chancery entered the stipulated Order dismissing plaintiffs' claims against Mr. Planitzer and LTP with prejudice. A525-A530.

During the class certification process, plaintiffs offered further insight into their decision to dismiss Mr. Planitzer and LTP from the action. For example, on March 31, 2017, plaintiffs filed a Reply Brief in support of their Motion for Class

Certification in which they stated: "Plaintiffs have dismissed Planitzer and the Lazard affiliates from this action. ***Planitzer's conduct was unique, and he did not share the conflicts of interest of other VC stockholder-directors***." A542 (emphasis added). Nowhere in their Reply Brief did plaintiffs suggest that Mr. Planitzer or LTP should be excluded from the class they asked the Court of Chancery to certify. Plaintiffs also did not argue that the Company's decision to pursue the Bring-Along Action should be viewed as antagonistic to common stockholders' interests as a class or should have any effect on Mr. Planitzer's or LTP's rights as Good stockholders.

The Court of Chancery heard argument on plaintiffs' Motion for Class Certification on April 26, 2017. At the class certification hearing, plaintiffs' counsel reinforced that Mr. Planitzer held a "unique" position among Good's directors by reason of his and LTP's common stock holdings and did not suffer from the same conflicts of interest allegedly affecting other directors' decision-making. For example, plaintiffs' counsel observed that Mr. Planitzer consistently supported selling Good, in contrast to directors who favored an IPO and purportedly allowed their self-interest to prejudice the sale process. *See* A619 ("Planitzer, who was a Series C investor, had been banging the drum about 'This company needs cash. It needs to get money in the door ….' He's saying, 'We've got to sell the company,' and the other directors are saying, 'No.' The Series B directors, they've got their eye on the prize of an IPO …. They don't want to sell the company."); A706 ("And,

no, all the directors weren't for an IPO. Planitzer said at the time, 'My hand goes up for a sale [at] anything over $750 million.'"). Once again, plaintiffs did not suggest during the certification hearing that Mr. Planitzer or LTP should be excluded from the class due to Mr. Planitzer's actions as a Good director, either during the sale process or in connection with the Bring-Along Action.

To the contrary, the discovery record demonstrated that Mr. Planitzer consistently advocated for a value-maximizing sale because he believed Good was unable to meet its short-term cash needs and, therefore, fully supported plaintiffs' decision to dismiss their claims against Mr. Planitzer and LTP with prejudice. *See* A1231; A1236; A1238; A1246; A1257; A1264; A1319-A1335. As evidenced by the record, Mr. Planitzer's efforts to push for a sale were rebuffed or ignored and Mr. Planitzer found himself a vocal minority on the Company's Board. *See* A1225; A1229-A1230; A1233-A1234; A1236; A1238; A1242; A1330-A1332; A1337-A1350. By the time the Blackberry transaction was presented to the Board for approval, Mr. Planitzer and the other directors had been advised that Good was due to run out of cash in less than one month. *See* A1254; A1258-A1259; A1265; A1276.

On May 12, 2017, the Court of Chancery entered an order granting class certification (the "Certification Order") and defining the "Class" as:

> [A]ll holders of Good Technology Corporation common stock on October 30, 2015, whether beneficial or of

> record, including their legal representatives, heirs, successors in interests, transferees and assignees of all such foregoing holders, but ***excluding the defendants in this action*** and their associates, affiliates, legal representatives, heirs, successors in interest, transferees and assignees.

A724 (emphasis added). At the time the Court certified the Class, neither Mr. Planitzer nor LTP was a defendant in the action.

IV. PLAINTIFFS SETTLE THEIR CLAIM AGAINST J.P. MORGAN BUT EXCLUDE APPELLANTS FROM CLASS-WIDE DISTRIBUTION OF SETTLEMENT PROCEEDS.

Later, plaintiffs agreed to settle, on behalf of the Class, the claim alleged against J.P. Morgan. On August 21, 2017, plaintiffs and J.P. Morgan filed a Stipulation and Agreement of Compromise and Settlement (the "First Stipulation") with the Court of Chancery. A725-A810. In the First Stipulation, plaintiffs and J.P. Morgan agreed that a "Net Settlement Amount," consisting of $35 million less administrative expenses, taxes and an award of attorneys' fees, would be distributed to "Settlement Payment Recipients" – defined as "all Class Members who receive a portion of the Settlement Fund." A735-A741. The First Stipulation adopted the "Class" definition set forth in the Certification Order and provided that, following Court of Chancery approval of the settlement, the "Net Settlement Amount" would be distributed to "the Settlement Payment Recipients as approved by the Court." A742.

The Court of Chancery approved plaintiffs' settlement with J.P. Morgan and, on April 5, 2018, entered an Order and Final Judgment (the "Final Order") certifying a non-opt-out Class as defined in the Certification Order and releasing the Class's claims against J.P. Morgan. A811-A822. The Final Order directed plaintiffs and J.P. Morgan to consummate the settlement in accordance with the First Stipulation. A814.

In early May 2018, the settlement administrator mailed notice to Mr. Planitzer and LTP of the administrator's determination that Mr. Planitzer and LTP did not qualify as "Settlement Payment Recipients" entitled to payment of proceeds from the J.P Morgan settlement. A855-A857. As requested by the notice, Mr. Planitzer and LTP objected in writing to the administrator's determination. A873-A875.

Plaintiffs then moved the Court of Chancery to approve a proposed settlement distribution list that excluded Mr. Planitzer and LTP. A823-A853. In support of their motion, plaintiffs argued that Mr. Planitzer and LTP were not entitled to receive settlement proceeds for two reasons: (i) they were excluded from the Class definition because they previously were "defendants in the Action" or were "associates" or "affiliates" of other defendants; and (ii) they had waived their right to participate in the settlement through various acts, including Mr. Planitzer's decisions to amend the Voting Agreement and to authorize Good to pursue the Bring-Along Action. A830-A833. After Mr. Planitzer and LTP opposed plaintiffs'

motion (A1078-A1355), the Court of Chancery heard oral argument on July 31, 2018. A1374-A1398.

V. THE COURT OF CHANCERY FINDS THAT APPELLANTS ARE CLASS MEMBERS BUT HOLDS THAT THEY SHOULD NOT RECEIVE SETTLEMENT PROCEEDS.

Later the same day, the Court of Chancery issued an Order holding that, according to the language and intent of the First Stipulation, Mr. Planitzer and LTP met the "Class" definition as holders of Good common stock. *See* Ex. A. The trial court further held that Mr. Planitzer and LTP were not excluded from the Class as "defendants" because, at the time the court approved the J.P. Morgan settlement, they already had been dismissed from the action. *See id.* ¶ 10 ("[A]bsent contractual language specifying otherwise, the defendants for purposes of a settlement should be those at the time of court approval."). The court also ruled that Mr. Planitzer and LTP were not "affiliates" or "associates" of the remaining defendants, since "when sophisticated parties in corporate litigation use these terms, they base their understanding on the widely used definitions adopted by the federal securities laws." *Id.* ¶ 11. Applying the federal definitions – which rely on concepts of common control or ownership – the trial court determined that Mr. Planitzer and LTP were not excluded from the Class. *See id.* ¶¶ 12-13.

Nonetheless, despite finding that Mr. Planitzer and LTP are Class members, the Court of Chancery held that they are not entitled to receive settlement proceeds.

Specifically, the trial court opined that Mr. Planitzer's involvement in the Bring-Along Action gave rise to an intentional waiver, on behalf of himself and LTP, in any future Class recovery:

> If Planitzer had only defended against the plaintiffs' claims in this litigation and then subsequently testified by deposition, then I would not view him as having waived his right to participate in the recovery. By voting to amend the voting agreement, however, Planitzer demonstrated that he did not want this action to go forward at all, making obvious his view that there should not be any recovery. By later authorizing Good's lawsuit against the plaintiffs, Planitzer again made his position clear. As the manager of LTP, Planitzer's actions are attributed to LTP. To my mind, it would be incongruous and inconsistent with Planitzer's actions to allow Planitzer and LTP to participate in Class-wide recovery when Planitzer took extrajudicial steps in an effort to prevent the lawsuit from happening in the first place. Conduct that runs so contrary to the interests of the Class amounts to clear indication of waiver.

Ex. A ¶ 14.

On August 20, 2018 – before the Court of Chancery entered a partial final judgment from which Mr. Planitzer and LTP could appeal – plaintiffs filed a Stipulation and Agreement of Compromise and Settlement (the "Second Stipulation") executed with the remaining individual and entity defendants. A1420-A1506. Under the Second Stipulation, an additional "Net Settlement Amount" of $17 million (less administrative expenses, taxes and an award of attorneys' fees), will be distributed to "Settlement Payment Recipients" according to "an approved

Plan of Allocation." A1435-A1436. Therefore, if the Court of Chancery approves the terms of the Second Stipulation and its prior Order adopting plaintiffs' distribution list is not reversed, Mr. Planitzer and LTP will be excluded from receiving their *pro rata* share of $52 million in total proceeds distributed to the Class.

ARGUMENT

I. THE COURT OF CHANCERY COMMITTED REVERSIBLE ERROR BY EXCLUDING APPELLANTS FROM THE SETTLEMENT DISTRIBUTION LIST.

A. Question Presented.

Despite their status as former Good common stockholders who qualify as Class members, should Mr. Planitzer and LTP nonetheless be excluded from a Class-wide recovery of settlement proceeds because of Mr. Planitzer's prior acts, as a Good director, to pursue enforcement of the Company's contractual rights – particularly since a contrary decision would have favored Mr. Planitzer's personal interests over those of the Company? *See* A1088-A1091.

B. Scope of Review.

This Court reviews the approval of a class action settlement allocation plan for abuse of discretion. *Schultz v. Ginsburg*, 965 A.2d 661, 666-67 (Del. 2009). The trial court "abuses its discretion when it exceeds the bounds of reason in light of the circumstances or when it ignores the rules of law or practices in a manner that creates injustice." *Id.* To the extent the trial court "formulated incorrect legal precepts or applied those precepts incorrectly, this Court reviews those claims *de novo*." *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1139 (Del. 2008).

C. Merits of Argument.

1. *Appellants Did Not Waive Their Right To Share In A Future Class-Wide Recovery.*

The Court of Chancery held correctly that Mr. Planitzer and LTP, as common stockholders of Good who were no longer defendants in this action, and were not affiliated or associated with any existing defendants, are members of the certified Class. Nonetheless, the trial court ruled that Mr. Planitzer and LTP, unlike other Class members, are not "Settlement Payment Recipients" entitled to proceeds from the settlements plaintiffs agreed to on the Class's behalf. The court's ruling was based entirely on its conclusion that Mr. Planitzer and LTP waived their rights as Class members to participate in the settlements. However, since this finding of waiver was reversible error, the Order approving the settlement distribution list should be reversed.

As this Court has recognized, "[w]aiver is the ***voluntary*** and ***intentional*** relinquishment of a known right." *Realty Growth Inv'rs v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982) (emphasis added). *Accord, e.g.*, *Daskin v. Knowles*, — A.3d —, 2018 WL 3968466, at *6 (Del. Aug. 20, 2018). Thus, the standard for establishing waiver is "quite exacting," and "implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d

428, 444 (Del. 2005). "The facts relied upon to prove waiver must be unequivocal." *Id.*

In this case, there is no evidence that Mr. Planitzer, either on his own behalf or as a representative of LTP, knowingly or intentionally relinquished either party's rights as a Good common stockholder, at the time the Company brought the Bring-Along Action, to share in future benefits arising from the Blackberry merger. Instead, the Court of Chancery ***inferred*** that Mr. Planitzer waived those rights by taking action to amend the Voting Agreement and approve the Bring-Along Action, finding those acts "incongruous and inconsistent" with the Class's interest in recovering on plaintiffs' claims. Ex. A ¶ 14. While one may waive a right by express terms or by conduct, that conduct must still "clearly indicate[] an intention to renounce a known privilege or power." *Rose v. Cadillac Fairview Shopping Ctr. Properties (Delaware) Inc.*, 668 A.2d 782, 786 (Del. Super. 1995), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996). By concluding that Mr. Planitzer's actions resulted in an ***implied*** waiver, notwithstanding the absence of any knowing or intentional repudiation of rights by words or conduct, the Court of Chancery did not adhere to the "quite exacting" standard of proof required under Delaware law.

Even if Mr. Planitzer's actions as a Good director could be viewed as waiving his individual rights as a common stockholder, the Court of Chancery mistakenly

"attributed" those actions to LTP in finding that Mr. Planitzer waived those rights on LTP's behalf. Ex. A ¶ 14. In moving for approval of their proposed distribution list, plaintiffs offered no evidence – because they could not – that Mr. Planitzer authorized the Bring-Along Action in any capacity other than as a director of the Company. While he was LTP's designee to Good's Board, Mr. Planitzer unquestionably owed "fidelity to the corporation and all of its shareholders" in his conduct as a director, rather than loyalty to LTP. *Phillips v. Insituform of N. Am., Inc.*, 1987 WL 16285, at *10 (Del. Ch. Aug. 27, 1987). *See also Gilbert v. El Paso Co.*, 1988 WL 124325, at *9 (Del. Ch. Nov. 21, 1988) ("[D]irectors' fiduciary duty runs to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders or shareholder subgroups."), *aff'd,* 575 A.2d 1131 (Del. 1990). Thus, imputing Mr. Planitzer's approval of the Bring-Along Action to LTP incorrectly assumes that Mr. Planitzer, in violation of his fiduciary obligations, favored LTP's interests over those of the Company.

Additionally, there is no indicia that Mr. Planitzer was authorized to bind LTP through his conduct as a Good director. LTP was an investment entity that held securities in addition to its holdings of Good common and preferred stock. LTP owned and managed those securities on behalf of constituent investors which, in turn, managed investments for their own limited partners. *See* A1207. LTP also had an advisory board to which Mr. Planitzer reported. *See* A1208. Under principles of

agency, the interests of LTP's investors could not have been waived by Mr. Planitzer's actions as a Good director without the actual authority to do so. *See Billops v. Magness Const. Co.*, 391 A.2d 196, 197 (Del. 1978) ("Actual authority is that authority which a principal expressly or implicitly grants to an agent."). Similarly, there is no record evidence from which the Court of Chancery could have concluded that Mr. Planitzer had the apparent authority to waive LTP's rights. *See id.* at 198 ("In order to establish a chain of liability to the principal based upon apparent agency, a litigant must show reliance on the indicia of authority originated by the principal, … and such reliance must have been reasonable.") (citations omitted). In short, there was no basis for the Court of Chancery to impute Mr. Planitzer's actions as a Good director to the entity that appointed him to the Board.

2. *The Bring-Along Action Was Not Adverse To The Class Of Good Common Stockholders.*

In the proceeding below, plaintiffs argued that Mr. Planitzer and LTP should be excluded from receiving settlement proceeds because they "repeatedly acted as part of a united front with the other defendants, not the stockholder plaintiffs seeking to create a common fund for the Class." A832. In addition to the Bring-Along Action, plaintiffs cited the answers and affirmative defenses Mr. Planitzer and LTP filed in response to the Second Amended Complaint as evidence that they acted adversely to the Class and waived their right to participate in the settlement. *See* A833. In essence, therefore, plaintiffs sought to exclude Mr. Planitzer and LTP from

the settlement distribution simply because they chose to defend themselves against the claims alleged against them – ***claims that plaintiffs themselves ultimately decided to dismiss with prejudice after determining that Mr. Planitzer did not face a disabling conflict of interest.***

The Court of Chancery rightly recognized this contradiction in plaintiffs' argument, finding that "[i]f Planitzer had only defended against the plaintiffs' claims in this litigation and then subsequently testified by deposition, then I would not view him as having waiver his right to participate in the recovery." Ex. A ¶ 14. Despite this, the trial court still excluded Mr. Planitzer and LTP from the distribution of settlement funds based solely on the Bring-Along Action. Specifically, the court viewed the Bring-Along Action, and the Voting Agreement amendment that facilitated it, as "extrajudicial steps" intended to "prevent the lawsuit from happening in the first place," and "[c]onduct that runs … contrary to the interests of the Class." *Id.*

This holding, however, failed to consider that Mr. Planitzer and the other directors authorized the Bring-Along Action to enforce Good's contractual rights under the Voting Agreement – rights that were negotiated with and agreed to by Mr. Bogosian and the named plaintiffs for the benefit of the Company and all of its constituents. Thus, the Court of Chancery found that Mr. Planitzer could defend the merits of the Class claims alleged against him ***personally*** without affecting his rights

as a common stockholder, but should be deemed to have waived those rights when he supported ***the Company's*** action to resist the named plaintiffs' efforts to pursue those claims in breach of the Voting Agreement. This, however, suggests that Mr. Planitzer, when presented with the Bring-Along Action, should have acted in the best interests of himself and LTP by opposing the Bring-Along Action or abstaining – thereby preserving his and LTP's rights as common stockholders – rather than acting in what he believed to be the Company's best interests.

In this way, the trial court's holding incentivizes future directors to favor the interests of specific stockholders over those of the corporation in contravention of their fiduciary duties under Delaware law. *See Phillips*, 1987 WL 16285, at *10; *Gilbert*, 1988 WL 124325, at *9. The holding, if not reversed, also offers more questions than answers to fiduciaries faced with a similar decision. For example, should a director representing both common and preferred stock holdings oppose (or abstain from) efforts to protect the corporation's assets from unauthorized stockholder action in all circumstances? If so, how would such a rule benefit the interests of all common stockholders? Additionally, why should the rights of an investor entity such as LTP be deemed waived by the actions of the entity's director designee, when "stockholders are not fiduciaries for the entities in which they own stock"? *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152, at *16 (Del. Ch. May 31, 2017). *See also Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845

(Del. 1987) ("It is not objectionable that [stockholders'] motives may be for personal profit, or determined by whim or caprice, so long as they violate no duty owed other shareholders.").

Moreover, there is nothing incongruous or inconsistent between the Bring-Along Action and the interests of the Class. Less than one-half of the common shares in the Class were held by signatories to the Voting Agreement. *See* A350; A499. The Bring-Along Action was asserted only against the named plaintiffs (and Mr. Bogosian, their principal) to enforce their contractual obligations and, had the Court of Chancery granted judgment in the Company's favor, the Bring-Along Action would not have prevented any other common stockholder who had not executed the Voting Agreement from pursuing claims on behalf of the Class.

Thus, even if the Bring-Along Action was intended to "prevent the lawsuit from happening in the first place," it was not *a priori* adverse to the entire Class. In actuality, the Bring-Along Action, if successful, would have prevented Mr. Bogosian – the Company's former CEO and the driving force behind this action – and his affiliates from pursuing litigation to advance interests that ***differed*** from the Class's. During the class certification process, the remaining defendants opposed plaintiffs' appointment as Class representatives based on, *inter alia*, Mr. Bogosian's personal involvement in events leading to the Blackberry sale – specifically, Mr. Bogosian's role in the Company's inability to pursue an IPO prior to that transaction. *See* A509-

A513. Defendants also opposed class certification on the grounds that plaintiffs, as parties to the Voting Agreement with unique contractual obligations, were not typical Class members. *See* A499-A502.

While the Court of Chancery ultimately granted class certification over defendants' objections, it acknowledged that whether Mr. Bogosian qualified as a suitable Class representative posed a close question that was not easily answered. *See* A679 ("I'm wrestling with whether this is grounds to knock the guy out."). Additionally, the Court of Chancery denied the Company leave to pursue summary judgment on the Bring-Along claim because it presented factual and legal issues that would have been adjudicated at trial had the parties not settled. *See* A717-A718. In short, the Bring-Along Action was not merely a tactical maneuver designed to hinder the Class's ability to recover on plaintiffs' claims, it raised – as the trial court itself recognized – legitimate, triable issues concerning the named plaintiffs' right and ability to pursue those claims on behalf of the Class.

While the Bring-Along Action was adverse to the ***named plaintiffs'*** individual interests, it cannot reasonably be viewed as inimical to the entire Class or its ability to recover on the claims that were alleged in this action – to the contrary, Mr. Planitzer and the other Good directors unanimously authorized the Bring-Along Action to protect the Company's rights and ensure that the interests of the Class were not compromised by the personal objectives of conflicted representatives. The

circumstances of this case do not establish that Mr. Planitzer, by supporting the Bring-Along Action, "demonstrated that he did not want this action to go forward at all, making obvious his view that there should not be any recovery." Ex. A ¶ 14.

CONCLUSION

As this Court has held, "[a]n allocation plan must be fair, reasonable, and adequate." *Schultz*, 965 A.2d at 667. Here, the settlement distribution list approved by the Court of Chancery, which excludes Mr. Planitzer and LTP despite their status as Class members, fails to meet this standard. Accordingly, Mr. Planitzer and LTP respectfully request that the Court reverse the trial court's judgment and hold that Mr. Planitzer and LTP shall receive distributions of their *pro rata* shares of all settlement proceeds paid to the Class of Good common stockholders.

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