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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

CASE BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE,

C.A. No. 11580-VCL

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal is from the Court of Chancery's Order approving the distribution of the net proceeds from a $35 million, eve-of-trial partial settlement of a stockholder class action. The challenged transaction was the 2015 sale of Good Technology Corporation ("Good" or the "Company") to Blackberry Limited ("Blackberry") for $425 million (the "Merger").

The class action was pursued by five named plaintiffs who, in the aggregate, owned over 13 million shares of Good common stock. Plaintiffs' original complaint, filed while the Merger was pending, alleged that the Merger was "driven by certain venture capital ("VC") firms who hold the Company's preferred stock and … want to exit the Company and care only about getting paid their liquidation preferences." (A192 ¶ 4) The Court of Chancery commented favorably on "the strength of the complaint" and put the case on a relatively fast track toward a post-closing trial. (B162)

When approving the Merger, the VC stockholder/directors, including appellants Russell E. Planitzer and his affiliated VC fund LTP Fund, II, LP ("LTP"), took a united stance. They released any claims they possessed as preferred or common stockholders of Good.

When confronted with class litigation, the VC stockholder/directors, including Planitzer and LTP, again took a united stance. They sought to shut it down. They voted to amend a voting agreement so as to create Bring Along rights enforceable post-Merger by Good against the largest common stockholders. They authorized Good to file an action to enjoin the named plaintiffs in the stockholder class action from participating in the case. By doing so, the VC stockholder/directors sought to lock in their respective economic interests in the Merger proceeds, particularly their respective contingent rights as preferred stockholders in a $65 million escrow.

In 2017, after completion of fact discovery, plaintiffs voluntarily dismissed certain defendants, including Planitzer and LTP. Plaintiffs beat back the remaining defendants' efforts to obtain summary judgment (A710-19) and to defeat class certification (A720-24). Plaintiffs subsequently reached two preliminary partial settlements, both of which have since been finalized. One of them, for $35 million, was with Good's former financial advisor, J.P. Morgan Securities LLC ("JP Morgan"). The other, for $17 million, was with former directors of Good and affiliated VC firms.

In the wake of the settlements, Planitzer and LTP claimed the mantle of class members. They sought to collect their pro-rata share of the settlement

proceeds for the Good common stock they had owned. Plaintiffs sought to exclude Planitzer and LTP from participating in the settlement. Vice Chancellor Laster held that Planitzer's conduct in 2015 to shut down the class action litigation operated as a waiver of the right of Planitzer and LTP to participate in any future class action settlement, reasoning: "Conduct that runs so contrary to the interests of the Class amounts to clear indication of waiver." (A1373 ¶ 14) Planitzer and LTP appealed from that Order.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly held that extraordinary facts regarding Planitzer's demonstrated hostility to the Class satisfied the unquestioned proposition of law that a person's conduct can constitute a waiver. After having approved the Merger and released LTP's claims in conjunction with that approval, Planitzer acted on behalf of LTP to create post-Merger Bring Along rights for the Company, and then voted as a director to authorize a lawsuit by the Company against the class action plaintiffs to enjoin them from pursuing the class action. His conduct operated as a waiver of Planitzer's right and LTP's right to participate in any future class-wide recovery from the class action they sought to terminate.

STATEMENT OF FACTS

A. Background to the Merger

In early 2015, Good was a Silicon Valley-based, VC-financed, software technology company valued in the vicinity of $1 billion that needed to be sold or to go public in the near future. (*See* B451-53) The stockholder class action challenged the actions and inaction that led to the Company being sold for only $425 million pursuant to a merger agreement dated as of September 4, 2015. On that date, a VC stockholder/director wrote in an email: "Blackberry got an absolutely fire sale fantastic deal because the company couldn't have made payroll next week." (B338 ¶ 25)

A majority of Good's directors represented VC firms that owned various forms of preferred securities. (B347-69 ¶¶ 44-49, 51-71) The Merger allowed the VC firms to recover the great bulk of their liquidation preferences, with little left over for common stockholders. (B341-42 ¶¶ 29-30)

LTP owned [REDACTED] shares of Series C-2 Preferred Stock and [REDACTED] shares of Common Stock. (B369 ¶ 71; B106-07 at 59-60)

The Court of Chancery noted that the discovery record contained evidence of the following misconduct in the early months of the dual track IPO/sale process:

> "There is evidence that this decision [to delay entering into a transaction quickly] was motivated by the Company Fiduciaries' economic interests, which caused them to be more risk-seeking than a loyal fiduciary."
>
> "Viewed in the light most favorable to the non-movant, the Company Fiduciaries acted disloyally by not negotiating an immediate sale in light of the Company's looming cash crisis."
>
> "Viewing the evidence most favorable to the non-movants, J.P. Morgan could have launched the IPO as scheduled, but refused for self-interested reasons."
>
> "Viewing the evidence in the light most favorable to the non-movants, J.P. Morgan favored Blackberry when the Company began negotiating with potential buyers in June and July 2015."

(A712-16 ¶¶ 8, 9, 17, 18)

Emails from the summer of 2015 reflect feuding among different VC stockholder/directors. Following a Board meeting on July 20, 2015, one VC stockholder/director wrote internally to his VC firm colleagues: "Looks like Good is going to [be] sold at fire sale price and Oak is only going to get our cost back[.]" (B334 ¶ 18) In a follow-up email, he wrote (with emphasis added):

> ***Lots of BS at BoD level***… [Good] bought a company that is failing and ***Lazard (Russ Planitzer) has forced us into [a] corner*** along with $90 million of debt that was to convert at IPO that now had to be repaid… So looks like only downside from here…***what a tragedy and why I hate co-investors…I will never do it again!***

(*Id.*)

In August 2015, the substantial common stockholders who later filed this litigation "caught a rumor of a potential acquisition" of Good. (A207 ¶ 49) They "began conducting an investigation and became extremely concerned about the misconduct of the Company's directors and officers." (*Id.*) "[P]laintiff Harvest Growth Capital sent numerous emails to [CEO Christy] Wyatt, offering introductions to several alternative equity and debt capital sources that could help the Company," and "set up a meeting between Wyatt and [a potential source of capital]." (A208 ¶¶ 51, 53)

When negotiating with BlackBerry, the VC stockholder/directors knew that their conduct opened them up to claims by common stockholders. One VC stockholder/director wrote to another that he "would favor disbanding the special committee, voting the deal as we discussed it yesterday and wait to be kicked in the shins again in litigation where we already have created a roadmap for the plaintiff's lawyers...." (B337 ¶ 23) Anticipating litigation by common stockholders, BlackBerry negotiated for $65 million of the merger consideration to be held in escrow.[1]

[1] The operation of the escrow is described in the Information Statement for the Merger. (B87-89) Each class of equity securities had its own specified interest in the escrow.

Shortly after public announcement of the Merger, a VC stockholder/director wrote a retrospective email describing how conflicts among VC firms arising from their different preferred securities contributed to the ultimate decision to agree to the Merger:

> ***[E]very time we were on the verge of monetizing at a nice return, some*** macro or ***board decision got in the way***. We had a sale to a strategic lined up in May that would have yielded a 2plus return but chose not to pursue that route given we felt an IPO would yield a higher upside. But in the intervening week, the one public comp cracked forcing us to push off the IPO. There is so much more to the story but short answer is the market volatility combined with the need to raise cash outside of an IPO in a volatile market prompted us to take our money off the table. This will be a 1x. We are definitely leaving value on the table but ***given*** the risk going forward and ***the board dynamic which I would call very dysfunctional, getting our money back seemed the best course***. The preferred instrument had a variety of impacts depending on state of play, both positive and problematic. The biggest problem were ***the venture investors that wanted a 10x and didn't have much enthusiasm for our return profile***. More evidence why returns in the venture asset class have [been] challenged.

(B338-39 ¶ 26 (emphasis added))

B. Major Stockholder Approval and Adoption of the Merger Agreement

Contemporaneous with unanimous Board approval of the merger agreement, various major stockholders of Good, including Planitzer on behalf of LTP, executed written consents (the "Written Consent"). (B1-17) The signatories

consented to numerous resolutions and agreements, including (with emphasis added):

> that ***the material facts as to the interested directors' relationships and financial interests in the Merger and involvement with the transactions described herein have been fully disclosed and are known to the entire Board***, which has had an adequate opportunity to ask questions regarding, and investigate the nature of, such involvement and interests, and the stockholders of the Company.
>
> * * *
>
> that the undersigned stockholder, with respect only to himself, herself or itself, hereby ***irrevocably waives appraisal rights*** under Section 262 of the DGLC, in connection with the Merger.
>
> * * *
>
> Such undersigned stockholder has had the opportunity to ask representatives of the Company questions with regard to all the resolutions, agreements, consents and other provisions in this Action by Written Consent and that ***all such questions have been answered fully and to the satisfaction of such undersigned stockholder***.
>
> * * *
>
> Upon undersigned stockholder's receipt of all merger consideration to be paid to it, him or her pursuant to the Merger Agreement and Parent's deposit of all sums required to be deposited pursuant to the Merger Agreement and Escrow Agreement, such undersigned hereby ***irrevocably and unconditionally releases Parent, Merger Sub, the surviving corporation and the respective affiliates*** from past, present, and future disputes, claims, controversies, demands, rights, obligations, liabilities, actions, and causes of action relating to

consideration for the Merger, other than the consideration contemplated by Sections 1.4 and 1.6 of the Merger Agreement.

(B2-4)

Planitzer on behalf of LTP also executed a Joinder Agreement, dated as of September 4, 2015 (the "Joinder Agreement"). In that document LTP:

- agreed that it "made an independent and informed decision that the transactions and other undertakings provided for in this Agreement are in [its] best interests" (B18-33 at 1);
- released Good, BlackBerry and their affiliates and insurers "for any matter, cause or thing relating to the Company and any of its subsidiaries, officers, or directors occurring at any time at or prior to the Effective Time," subject to certain exceptions (B19 § 3(a));
- covenanted to "refrain from, directly or indirectly asserting any Potential Claim" (*id.* § 3(b));
- agreed not to assert appraisal rights (B21 § 4(b));
- agreed not to solicit other bids (B23 § 7(a));
- represented that it "do[es] not have any claim against the Company or any other Equityholder" (B22 § 5(d));

- represented that any questions it may have about the Merger "have been answered fully and to [its] satisfaction" (B23 § 5(j)); and
- acknowledged that its "right to a portion of the Merger Consideration is sufficient consideration for every promise, duty, release, obligation and agreement of [LTP] that is contained in or contemplated by this Agreement" (B24 § 8(a)(i)).

C. The Court of Chancery Puts Plaintiffs' Strong Complaint Against the VC Directors on a Fast Track Toward Trial

The original complaint in this action was filed on October 6, 2015. The five named plaintiffs owned in the aggregate "in excess of 13 million shares." (A197 ¶ 13)

The Complaint alleged that the VC stockholder/directors were looking out for their own investments in preferred stock, to the detriment of the common stockholders:

> 4. The Proposed Merger is a self-interested transaction. It is being driven by certain venture capital ("VC") firms who hold the Company's preferred stock and have interests that diverge from the interests of the Company's common stockholders. ***The VC firms do not care how the common stock is priced in any change of control transaction. They want to exit the Company and care only about getting paid their liquidation preferences***. After the $425 million total merger consideration is adjusted for payment related to certain expenses and Company debt, approximately $300 million is left for the Company's stockholders ("Total Stockholder Consideration").

> Common stockholders will receive only approximately $40 million, while preferred stockholders will receive approximately $250 million.
>
> 5. The Board is controlled by the VC firms. Six members of the nine member Board are managing directors or founders of the VC firms. These six directors and their VC firms alone will collectively receive over $165.4 million for their preferred stock in this transaction, or more than half of the Total Stockholder Consideration.
>
> 6. The Board expressly recognized the existence of conflicts between the interests of the VC firms and the Company's common stockholders in structuring a transaction. Yet, all six conflicted members of the Board participated for most of the sales process. The Board established a special committee ("Special Committee") only after Blackberry made its $425 million offer and was granted exclusivity….
>
> …
>
> 11. …. ***The Information Statement*** …. does not disclose anything about – or even mention – the two fairness opinions purportedly provided by the Company's financial advisors, and it ***is devoid of any financial analyses regarding the fairness of the Common Consideration to the Company's common stockholders***. It also falsely suggests that the Board had a reasonable basis for pursuing the transaction, when the only motivating factor was the self-interest of the VC firms….

(A192-96 (emphasis added))

Plaintiffs moved for expedited proceedings. The Court of Chancery denied the motion, but commented favorably on the "strength of the complaint" and instructed the parties to proceed with full discovery and toward a relatively prompt trial on an enhanced scrutiny claim:

> Money damages or an alternative form of post-closing relief can provide an adequate remedy in this case. There are obvious parallels between the facts as alleged in the complaint and the Trados litigation. Although the defendants prevailed on the merits in Trados, the ability of the court to have provided a post-closing remedy in Trados evidences the court's similar ability to do so here.
>
> The parties will negotiate a schedule to bring this matter to trial within 12-15 months after closing. Given the strength of the complaint, the defendants shall file a timely answer. Any pleading-stage arguments for dismissal that the defendants wish to make will be preserved and can be made pursuant to Rule 12(c). Discovery will not be stayed; any Rule 12(c) motion will be briefed and heard in parallel with discovery.

(B162) (citing *In re Trados Inc. S'holders Litig.*, 73 A.3d 17 (Del. Ch. 2013))

Plaintiffs filed an amended complaint on October 12, 2015, seeking class-wide relief on the breach of fiduciary duty claim. (A224-57) The proposed class was defined to exclude defendants or their affiliates, such as LTP. (A250 ¶ 79)

D. Planitzer and LTP Join in Seeking to Shut Down the Class Action

The Merger was scheduled to close on October 30, 2015. (A265 ¶ 21)

On or about October 29, 2015, Planitzer, on behalf of LTP, along with several other VC stockholder/directors, signed Amendment No. 1 to the Amended and Restated Voting Agreement ("Amendment No. 1" to the "Voting Agreement"). (B163-74) Amendment No. 1 purported to provide that the "Bring

Along" rights of Good under the pre-existing Voting Agreement would "not be extinguished by the Merger." (B163-64 § 1 (referencing A276-79 § 6))

Separately, in his capacity as a director of Good, Planitzer voted to authorize Good to file a complaint on October 29, 2015, against the five named plaintiffs in the class action, and against Brian Bogosian, a former CEO of Good and the authorized representative of named plaintiff MARBEK Revocable Trust (the "Bring Along Complaint"). (A258-311) Good alleged in the Bring Along Complaint that the named plaintiffs in the class action had "breached their obligations under the Bring Along provisions by refusing to vote their shares of Company stock in favor of the Merger, purporting to exercise appraisal rights in connection with the Merger, filing and pursuing a lawsuit in this Court challenging the Merger, … and refusing to actions reasonably requested by Good in support of the Merger."[2] (A260 ¶ 4)

Good sought the following relief in the Bring Along Complaint:

a) Ordering each of the Defendants to promptly deliver to Good an executed Written Consent and an executed Joinder Agreement;

[2] The requested actions were to "immediately execute and return the Written Consent and Joinder Agreement, withdraw from the MARBEK Action [*i.e.*, the class action], and withdraw their purported exercise of appraisal rights." (A268 ¶ 28)

b) Ordering each of the Defendants to withdraw his or its notice to Good of his or its intent to assert appraisal rights in connection with the Merger;

c) Ordering each of the Defendants to withdraw from and discontinue any participation in the *MARBEK* Action [*i.e.*, the class action];

d) Enjoining each of the Defendants from taking any further steps to assert appraisal (or dissenters') rights in connection with the Merger;

e) Enjoining each of the Defendants from taking any further steps to oppose the Merger through litigation;

f) Declaring that each of the Defendants has breached the Voting Agreement[.]

(A270-71)

E. Plaintiffs Overcome Litigation Obstacles Authorized by Planitzer and LTP

Planitzer and LTP never distanced themselves from any other defendant in the class action. They asserted no cross-claims. Planitzer joined with the other former director defendants in answering the Second Amended Complaint and asserting affirmative defenses. (B175-318) LTP joined with the other VC defendants in answering the Second Amended Complaint and asserting affirmative defenses. (B319-444)

Meanwhile, Good pursued the claim asserted in the Bring Along Complaint, moving on June 27, 2016, for partial summary judgment and moving on July 18,

2016, for entry of a briefing schedule. (A348) Had Good succeeded on its motions, the class action would have been hamstrung. The largest, most involved, and most informed common stockholders would have been eliminated from the case. It is speculative whether the class action would have gone forward with a hypothetical new plaintiff not bound by the Voting Agreement.

On August 9, 2016, the Court of Chancery denied entry of a briefing schedule on Good's motion for partial summary judgment respecting the Bring Along provisions, ruling that deciding the motion for summary judgment would not be "an efficient use of judicial or litigant resources," given the factual nature of the affirmative defenses. (A350)

On March 10, 2017, after completion of fact discovery and just before the exchange of opening expert reports, plaintiffs stipulated to the voluntary dismissal of Planitzer and LTP. (A520-24)

On May 12, 2017, the Court of Chancery rejected Defendants' request to brief a motion for summary judgment based on the Bring Along rights that Planitzer on behalf of LTP had agreed to extend to survive the Merger. (A717-18 ¶ 21) On May 12, the Court of Chancery granted plaintiffs' motion for class certification, rejecting the argument that the Bring Along rights created a unique defense that defeated typicality. (A721-22 ¶ 4)

It was not until Plaintiffs succeeded in deferring ultimate resolution of the Bring Along arguments until after trial that Plaintiffs entered into any partial settlements. On May 23, 2017, Plaintiffs' counsel advised the Court about a $17 million partial settlement with the director defendants and the VC defendants. (B496-98) On May 26, 2017, Plaintiffs' counsel advised the Court of a settlement with Good respecting the companion appraisal action and the Bring Along action. (B499-507) On June 1, 2017, following pre-trial briefing, Plaintiffs' counsel advised the Court of a $35 million partial settlement with JP Morgan. (B508-15)

F. The Court of Chancery Rules that Planitzer and LTP Waived the Right to Participate in a Class-Wide Recovery

Due to extended collateral litigation that delayed finalization of the partial settlements, as of today only the $35 million JP Morgan partial settlement has been presented to the Court of Chancery for approval. (The $17 million partial settlement is scheduled to be presented to the Court of Chancery on November 5, 2018.) On July 9, 2018, Planitzer and LTP sought to be designated as "Settlement Payment Recipients" for purposes of the JP Morgan partial settlement. (A1078-355)

Following briefing and oral argument, the Court of Chancery ruled that Planitzer and LTP, by their conduct in 2015, waived the right to participate in a potential future class-wide 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 a 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.

(A1372 ¶ 14)

ARGUMENT

THE COURT OF CHANCERY PROPERLY FOUND THAT PLANITZER AND LTP WAIVED THE RIGHT TO PARTICIPATE IN ANY FUTURE CLASS-WIDE RECOVERY

A. Question Presented

Did the Court of Chancery correctly find that Planitzer and LTP waived the right to participate in a class-wide recovery? (A1372 ¶ 14)

B. Scope of Review

A trial court's application of an equitable defense presents a mixed question of law and fact. *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014). An appeal from a factual determination of a waiver will be upheld "as long as those facts are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Zimmerman v. Customers Bank*, 94 A.3d 739, 744 (Del. 2014).

C. Merits of Argument

There is no dispute respecting the law of waiver. "Waiver 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). Delaware law recognizes "waiver by conduct." *Baio v. Commercial Union Ins. Co.*, 410 A.2d 502, 508 (Del. 1979). "A waiver is the intentional relinquishment of a known

right, either in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power." *Rose v. Cadillac Fairview Shopping Ctr. Properties (Delaware) Inc.*, 668 A.2d 782, 786 n.1 (Del. Super. 1995) (internal quotation omitted), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996). "The facts relied upon to prove waiver must be unequivocal." *Aeroglobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.3d 428, 444 (Del. 2005).

The operative facts are unequivocal. On the eve of the closing of the Merger, Planitzer was confronted with a choice. He could act with the objective of shutting down the class action or not. He chose on behalf of LTP to consent to the extension of the Company's Bring Along rights post-Merger. (B163-74) He chose as a director of Good to authorize a lawsuit against all named plaintiffs seeking their discontinuance of the class action. (A270-71)

The background facts are also unequivocal. LTP had a significant financial interest in seeing the $65 million escrow distributed in full as merger consideration. Full distribution of the $65 million escrow would mean the distribution of $0.13 per share for each of LTP's [redacted] shares of Common Stock (*i.e.*, a total of [redacted]) and the distribution of $0.91 per share for each of LTP's [redacted] shares of Series C-2 Preferred Stock (*i.e.*, a total of

). (B87-89 at 41-42, B106-07 at 59-60) LTP's Preferred Stock interest in the escrow dwarfed its Common Stock interest in the escrow. A class action on behalf of the common stockholders would create third-party claims against the escrow for advancement of attorneys' fees. A class-wide recovery on behalf of common stockholders could deplete the escrow for purposes of any return to preferred stockholders.

Planitzer, acting on behalf of LTP, had already released litigation claims when executing the Written Consent and the Joinder Agreement on September 4, 2015. On October 29, 2015, Planitzer was confronted as a defendant with a class action that had been placed on track toward full discovery and trial. Approving the extension and enforcement of the Bring Along rights in the Voting Agreement was a potential means of shutting down the class action at a relatively small expense to the escrow.

Planitzer and LTP argue that Planitzer was not acting on behalf of LTP when he voted as a Good director to authorize filing of the Bring Along Complaint. (OB at 18-20) This argument ignores the fact that Planitzer had contemporaneously signed Amendment No. 1 as an authorized representative of LTP. (B163-74) That action by LTP created the basis for Good's lawsuit against

the named plaintiffs, which Planitzer necessarily understood when he signed Amendment No. 1 on LTP's behalf.

Planitzer further argues that authorizing the lawsuit was something "he believed to be [in] the Company's best interests." (OB at 22) This argument ignores that Planitzer had created the Company's post-Merger contract right by signing Amendment No. 1. It also ignores that the interest at stake was cutting off litigation claims by common stockholders, and thereby preserving the escrow for distribution as merger consideration, mostly for the benefit of preferred stockholders.

Planitzer and LTP argue that authorization of the Bring Along Complaint "was not *a priori* adverse to the entire Class." (OB at 23) Pursuit of the Bring Along Complaint is conceded to be "adverse to the ***named plaintiffs'*** individual interests," but it supposedly "cannot reasonably be viewed as inimical to the entire Class or its ability to recover[.]" (*Id.* at 24) This distinction is untenable.

According to the defendants in the class action, the Voting Agreement operated to preclude all of the named plaintiffs and 45% of the proposed Class from bringing claims for breach of fiduciary duty or appraisal. (A499-500) The defendants argued that the class, properly constituted, only included non-signatories of the Written Consent. (A500 n.28) The Bring Along Complaint

sought to make the named plaintiffs sign the Written Consent, whereby they, like LTP, would not be valid class members.

Planitzer and LTP are positing an implausible hypothetical scenario in which some common stockholder not bound by the Voting Agreement would intervene and pursue the class action on behalf of a class that included Planitzer and LTP. In the words of Planitzer and LTP, eliminating all of the named plaintiffs from the class action would create the possibility of some future class action in which "the interests of the Class" would not be "compromised by the personal objectives of conflicted representatives." (OB at 24)

The reality is that the only persons seeking relief on behalf of the common stockholders were the named plaintiffs who brought the class action. LTP and Planitzer authorized the filing of a lawsuit that sought to enjoin them from pursuing it. Planitzer's execution of a written consent to create contract rights potentially enforceable by Good against all named plaintiffs was a means of preventing a class-wide recovery. So was his vote in favor of filing the Bring Along Complaint. Planitzer was protecting LTP's interests as a preferred stockholder, and he was protecting his own interests as a defendant. In so doing, Planitzer renounced his and LTP's rights as common stockholders in the potential class-wide recovery that the named plaintiffs hoped to obtain in the face of the

large obstacle that Planitzer and LTP authorized the Company to place in the plaintiffs' path.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the Order Approving the Settlement Distribution List of the Court of Chancery.

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