



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FAIR VALUE INVESTMENTS
INCORPORATED, 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, KENNETH S.
COURTIS, ROBERT V. LEFFLER, JR.,
PHILIP A. FALCONE, MICHAEL J. SENA,
PAUL K. VOIGT, and HC2 HOLDINGS
COMPANY INC.,

Defendants,

v.

DBM GLOBAL INC.,
Nominal Defendant.

C.A. No. 2020-0847 JTL

PUBLIC VERSION

FILED OCTOBER 6, 2020

**VERIFIED STOCKHOLDER CLASS ACTION
AND DERIVATIVE COMPLAINT**

Plaintiff Fair Value Investments Incorporated (“Plaintiff,” “FVI,” or “Stockholder”), by its attorneys, respectfully submits this 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 Company Inc. (“HC2”), seeking to remedy defendants’ breaches of fiduciary duties from October 9, 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, a hedge

fund. Falcone was the subject of numerous controversies and litigation, including a 2012 securities fraud action brought by the SEC.¹ Among other allegations, the SEC accused Falcone of using over \$100 million of company assets to pay his personal taxes. In 2013, he settled his lawsuit with the SEC, and admitted to 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.

2. However, shortly after his admission of wrongdoing in the SEC litigation, Falcone took control of HC2 and became its Chairman and CEO. While he was no longer technically an investment advisor, he, in effect, was able to circumvent the SEC’s ban because HC2 operates like a private equity firm in the sense that, like a private equity firm, it manages a disparate collection of businesses that do not have obvious synergies. And in his role as HC2’s Chairman and CEO, Falcone continued to be the subject of controversy as HC2 engaged the services of Harbinger Capital to the tune of millions of dollars in fees.

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

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

used DBM as HC2's own private piggy bank, taking actions that deprive DBM of cash or impair its actions, to the benefit of HC2 and to the detriment of DBM.

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

- (a) give HC2 real cash advances to pay theoretical liabilities;
- (b) issue common stock dividends that exceed DBM's net income, which cannot be a reasonable exercise of business judgment because it violates common principles of sound financial management and harms DBM's ability to invest in its own business, to provide cash for HC2 to use for its other businesses and mounting financial obligations;
- (c) act as a guarantor or provide collateral for loans that HC2 takes on that benefit only HC2 or its other subsidiaries through helping them secure much-needed credit but do not benefit DBM, and that reduce the capital that would otherwise be available to DBM for application to profitable business opportunities;
- (d) issue preferred stock to the wholly-owned subsidiary of HC2 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, while also

providing cash for HC2 to use for its other businesses and mounting financial obligations; and

(e) disenfranchise DBM's minority stockholders by preventing DBM from holding annual meetings.

5. Falcone's mismanagement of HC2 faced a reckoning in 2020, when activist investors MG Capital Management Ltd. and its affiliated 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 left the HC2 board about a month after the settlement, but he was replaced by his long-term associate and mentor, Avram A. Glazer ("Glazer"). Another of Falcone and Glazer's associates, Robert V. Leffler, Jr. ("Leffler"), was merely reassigned from his broadly criticized position on HC2's board to DBM's Board.

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. Glazer, Falcone's mentor and associate, became the new chairman. The "new" HC2 is much like the "old" HC2 because the new CEO of HC2, Avram

A. Glazer (“Glazer”), was Falcone’s mentor and had formerly sold a controlling stake in his company, Zapata Corp., to Falcone. 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. The interim CEO, Wayne Barr, Jr., has also been criticized by the Activist Investors for failing to check Falcone and for being connected to parties that opposed change at HC2.

8. Moreover, although Falcone and Michael A. Sena (“Sena”) have left DBM’s Board, they have been replaced by other HC2 directors, including Leffler. Thus, rather than nurture DBM, which the Activist Stockholders had pushed for, HC2 has continued to loot DBM and DBM’s Board has 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 [REDACTED]

[REDACTED] The “new” HC2 has also continued to seek “strategic alternatives” for DBM, including floating the possibility of refinancing DBM with further increases in its debt to “upstream” cash needed to satisfy HC2’s publicly admitted urgent cash requirements for pressing parent level debt and other financial obligations.

9. For all of these harms to the stockholders and to the Company, caused by Defendants' disenfranchisement of the stockholders and harm to the Company, Plaintiff now brings this action to recover for Defendants' breach of fiduciary duty and 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 at least 2017.

II. Nominal Defendant

13. 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 92% of DBM’s common stock.

III. Defendants

14. 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.

15. Defendant Michael R. Hill (“Hill”) is the Vice President and Chief Financial Officer (“CFO”) of DBM Global, and has been a director on the Board since 2001.

16. Defendant R. Ronald Yagoda (“Yagoda”) is the founder of DryAZ Consulting LLC, serves as a consultant to DBM, and has been a director of DBM since 2012. [REDACTED]

17. Defendant Paul J. “Pat” Hurley (“Hurley”) has been a director of DBM since 2016. [REDACTED]

18. Defendant AJ Stahl (“Stahl”) is Vice President of Investments at HC2 and has been a director of DBM since 2018.

19. Defendant Kenneth S. Courtis (“Courtis”) has been a director of HC2 since May 2020 and a director of DBM since June 2020.

20. Defendant Leffler was a director at HC2 from 2014 until May 2020, and was reassigned to be a director of DBM since June 2020.

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

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

23. Defendant Paul K. Voigt (“Voigt”) was a director of DBM until May 2018.

24. Defendants Roach, Hill, Yagoda, Hurley, Stahl, Courtis, and Leffler are sometimes collectively referred to as the “Current Director Defendants.”

25. The Current Director Defendants and Falcone, Sena, and Voigt are sometimes collectively referred to as the “Director Defendants.”

26. Defendant HC2 is the controlling stockholder of DBM, and holds 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.

SUBSTANTIVE ALLEGATIONS

I. HC2 Has Unfairly Extracted Cash Advances from the Company

27. Since taking a controlling stake in DBM, formerly known as Schuff, HC2 has used DBM as a private piggy bank in contravention of HC2's duties under Delaware law. Ignoring its duty to act in a manner that is entirely fair to the Company and DBM's minority stockholders, HC2 has extracted value unfairly to its advantage through what it calls "tax 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.

28. HC2 and DBM have a "tax sharing" agreement whereby DBM must pay to HC2 a theoretical amount of federal and state taxes that is determined by HC2, even though 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, [REDACTED]

[REDACTED]

[REDACTED]

29. [REDACTED]

[REDACTED]

[Redacted]

[Redacted]

30. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

31. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

32. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

33.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Moreover, these

advances were made in the context of only theoretical tax liabilities by HC2, whose SEC filings show that in 2017 and 2018, it did not pay taxes.

34.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Yet,

in 2019, as well, HC2's publicly filed financial statements show that it did not pay tax.

35. Because HC2, as DBM's controlling stockholder, stands on both sides of these transactions, and receives a benefit different from DBM's minority stockholders, these transactions must be evaluated for entire fairness to DBM and its minority stockholders. These 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 shareholders do not similarly benefit from saving HC2.

II. HC2 Has Impaired DBM's Credit

36. HC2 has also had a history of saddling DBM with debt or forcing it to guarantee loans to HC2, which benefit HC2 but harm DBM by impairing DBM's credit.

37. According to SEC disclosures, in November 2017, HC2 and HC2 Broadcasting Holdings, Inc. entered a credit agreement with Jefferies Finance LLC to borrow \$45 million, while using DBM's equity, in part, as loan collateral. This unfairly burdened DBM by forcing it to, in part, guarantee a loan for which it did not receive any benefits, since the loan was made to benefit HC2 Broadcasting.

38. 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, DBM's equity as loan collateral. This again unfairly burdened DBM by

forcing it to, in part, guarantee an enormous debt load, which was made to benefit HC2, the parent company, at the expense of impairing DBM's credit.

39. 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.

III. HC2 Has Caused DBM to Issue Dividends to the Company's Detriment

40. HC2 has also caused DBM to issue dividends whose approval by the Board is not a reasonable exercise of business judgment because the issuances violate all standards of sound business by exceeding annual income, harming the Company by causing DBM to incur further debt, and preventing it from investing further in its business.

41. Since November 2017, DBM has issued \$53.2 million in dividends, of which approximately \$49 million went to HC2 and \$4 million went to DBM's

minority stockholders. These dividend issuances include: \$5 million in November 2017 (of which \$4.5 million went to HC2); \$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).

42. 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.

43. Furthermore, the improper dividend issuances have continued even following the purported reconstitution of HC2's board, and the departures of Falcone and Sena from DBM's Board. The latest dividend issuance, in July 2020, was merely two months after an earlier dividend issuance in May 2020. The two 2020 dividend issuances totaled \$20 million, coinciding with HC2's need for cash to settle claims in another lawsuit pending before this Court relating to HC2's fiduciary duty breaches to DBM's minority stockholders. Although DBM's latest financial statements have not been disclosed to Plaintiff, indications from HC2's public financial reports suggest that DBM's income this year is reduced by business disruptions caused by the COVID-19 pandemic, and that it is therefore likely that the dividend issuance will again exceeded DBM's income. Moreover, the Company

still owes HC2 preferred stock dividends of about \$3 million for this year. Thus, the Board may have breached its fiduciary duties by approving a dividend issuance that, especially in a year of global uncertainty, could not be a reasonable exercise of business judgment. These new dividend issuances that rob the Company of valuable cash belie the new HC2's board's representations that it would nurture DBM as a core business of HC2. Instead, it appears that the new HC2 board is continuing and, in its practice of forcing dividend issuances, accelerating the plunder of DBM's assets for HC2's benefit.

IV. HC2 Has Extracted an Unfair Benefit Through a Preferred Stock Issuance

44. In 2018, HC2 induced DBM to incur tens of millions of dollars of debt to acquire GrayWolf. As part of the financing of the transaction, HC2 also induced DBM to issue \$40 million in preferred stock to HC2's wholly owned subsidiary, DBM Global Intermediate Holdco Inc. (the "Preferred Stock Issuance"). 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. Thus, HC2 is guaranteed a dividend of approximately \$3 million per year. 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 Preferred Stock Issuance was approved by a

[REDACTED]

45. 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.

46. 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 \$8 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.

47. 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.

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

49. The Preferred Stock Issuance is further unfair because, [REDACTED]

[REDACTED]

[REDACTED] DBM220000140. DBM and DBM's minority stockholders derived no benefit from this [REDACTED], and, therefore, this transaction was not entirely fair to them.

V. HC2 Disenfranchises Stockholders by Avoiding an Annual Meeting

50. 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.

51. On May 26, 2020, FVI wrote a letter to DBM's general counsel ("GC"), Scott D. Sherman ("Sherman"), 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.

52. Instead of holding annual meetings, for the last few years, the Board positions have been elected by HC2 delivering its written consents, claiming that Delaware law does not require an annual meeting if all directorships that could be elected to the Board are vacant and filled at the time through written consent by a majority of voting shares. For example, in June 2018 and July 2019, 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 2019 Board was merely a pro forma replacement because it was exactly the same as the 2018 Board.

The 2018 Board differed by one director from the 2017 Board when Stahl took over a seat that Voigt vacated.

53. 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 notice 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.

54. Thus, the 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 DBM's Board for its mismanagement of the Company or acquiescence to HC2.

55. Although DBM's minority stockholders may not be able effect a change in directors because they only have a minority of the voting power, they still have a valuable stockholder franchise to exercise at an annual meeting. They could offer proposals, as FVI showed in its correspondence with Sherman, or exercise a protest vote against directors or the Board as a whole to provide feedback as to their view of the management of the Company.

56. 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.

57. The Board has, in the meantime, acquiesced to this behavior by HC2 by never seeking to exercise its own authority and obligation to schedule and call a meeting.

58. 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.

VI. DBM's Board Has in Bad Faith Allowed HC2 to Ride Roughshod Over the Company

59. The Board has in bad faith acquiesced to HC2's wrongful actions by approving the actions that have unfairly benefited HC2 at the cost of the Company and its minority stockholders.

60. 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 as well as the president and CEO of financially strained HC2.

61. 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 were 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.

62. Before May 2020, the overwhelming number of directors at DBM were also employees and directors of HC2. Even today, HC2's directors dominate DBM. Moreover, one of these "new" HC2 directors on DBM's Board is a long-time associate of Falcone and Glazer (HC2's new chair). They have an inherent conflict of interest in taking positions that benefit HC2 at the expense of DBM.

63. DBM's employee directors also acted disloyally by violating their fiduciary duties to DBM to instead take actions benefiting HC2 or to acquiesce in those actions.

64. [REDACTED]

65. [REDACTED]

66. The Board's acquiescence in or approval of HC2's unfair actions continues to the present, as they continue to approve of transactions that benefit HC2 at the expense of DBM and its minority stockholders, and continue to disenfranchise DBM's minority stockholders by refusing to call an annual stockholder meeting.

CLASS ALLEGATIONS

67. 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.

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

69. 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.

70. 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 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 over corporate matters.

71. 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.

72. 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.

73. 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.

74. 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

75. 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.

76. 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 at least 2017 and will continue to hold DBM stock through the resolution of this action.

77. 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.

78. 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 seven-member Board is capable of making an independent and disinterested decision to institute and prosecute this action. Of the current Board, all seven directors suffer such disabling conflicts.

79. Hurley and Yagoda suffer from a disabling conflict because they

[REDACTED]

[REDACTED]. Yagoda and Hurley cannot impartially or disinterestedly evaluate these duty of loyalty claims against them.

80. Yagoda, in addition, suffers from a disabling conflict because of his long business association with DBM. In a June 2020 press release announcing the recent Board changes, DBM disclosed that he has been “associated with [DBM] as a consultant since 1996.” His business association with DBM for almost a quarter of a century indicates that indicates that DBM’s business constitutes a material portion of his income, as well as personal loyalties, and for this reason, he would not be able to impartially and disinterestedly consider a litigation demand.

81. Stahl, Curtis, and Leffler suffer from disabling conflicts because they are 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.

82. Stahl, in addition, is the Vice President of Investments at HC2, and therefore, cannot impartially or disinterestedly evaluate claims against HC2 because his livelihood depends on HC2.

83. 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 Corp., shortly after the Glazer family took control, and continued to serve on its board after the Glazer family's interest in Zapata Corp. 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 and Glazer's actions.

84. Roach and Hill suffer from disabling conflicts because they are employees of DBM. Because DBM is controlled by HC2, Roach and Hill's livelihood depends 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 Duty of Loyalty

(Against the Director Defendants, Directly on Behalf of DBM Minority Stockholders and Derivatively on Behalf of the Company)

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

86. As directors of DBM, the Director Defendants owed duties of care, good faith, and loyalty to the Company and its stockholders.

87. The Director 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.

88. 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 or have lost priority in having cash paid to them in dividends in favor of preferred stock dividends being issued to HC2.

89. Moreover, the Director 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 guarantee loans that benefit HC2 without providing any benefit to DBM.

90. 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)

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

92. 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.

93. 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.

94. 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, Yagoda, Hurley, Stahl,
Courtis, and Leffler, Directly on Behalf of
DBM Minority Stockholders)

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

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

97. 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.

98. 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.

99. Defendants Roach, Hill, Yagoda, Hurley, Stahl, Curtis, 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.

100. 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 his 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 his 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: October 6, 2020

Of Counsel:

**SCOTT+SCOTT
ATTORNEYS AT LAW LLP**
Geoffrey M. Johnson
12434 Cedar Road, Suite 12
Cleveland Heights, OH 44106
Telephone: (216) 229-6088
Facsimile: (860) 537-4432
Email: gjohnson@scott-scott.com

Jing-Li Yu (DE Bar No. 6483)
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
Email: jyu@scott-scott.com

*Counsel for Plaintiff Fair Value
Investments, Inc.*

COOCH & TAYLOR, P.A.

s/ Blake A. Bennett
Blake A. Bennett (DE Bar No. 5133)
The Nemours Building
1007 N. Orange St., Suite 1120
Wilmington, DE 19801
Telephone: (302) 984-3800
Facsimile: (302) 984-3939
Email: bbennett@coochtaylor.com

*Counsel for Plaintiff Fair Value
Investments, Inc.*