



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FIREFIGHTERS' PENSION
SYSTEM OF THE CITY OF
KANSAS CITY, MISSOURI TRUST,

Plaintiff,

v.

FOUNDATION BUILDING
MATERIALS, INC., LONE STAR
FUND IX (U.S.), L.P., LSF9
CYPRESS PARENT 2 LLC, RUBEN
D. MENDOZA, CHRIS MEYER,
RAFAEL A. COLORADO, CHAD R.
LEWIS, CHASE HAGIN, MAUREEN
HARRELL, MATTHEW J. ESPE,
FAREED A. KHAN, JAMES F.
UNDERHILL, AMERICAN
SECURITIES LLC, EVERCORE
GROUP L.L.C., RBC CAPITAL
MARKETS, LLC and
ASP FLAG INTERMEDIATE
HOLDINGS, INC.,

Defendants.

C.A. No. 2022-0466-JTL

**PUBLIC INSPECTION VERSION
FILED NOVEMBER 10, 2022**

AMENDED VERIFIED STOCKHOLDER CLASS ACTION COMPLAINT

TABLE OF CONTENTS

	Page No.
NATURE OF THE ACTION.....	2
PARTIES.....	9
SUBSTANTIVE ALLEGATIONS.....	14
I. Background of the Company and Lone Star’s Investment.....	14
II. The TRA.....	15
III. After the Value of the TRA Declines, Lone Star Initiates a Sale of FBM	19
IV. Meyer Engages Lone Star’s Law Firm and Financial Advisor on Behalf of FBM.....	23
V. Lone Star Continues to Pursue a Sale.....	25
VI. The FBM Board Belatedly Sets Up a Not-So-Special Committee	26
VII. Lone Star Repeatedly Shifts Its Self-Interested Strategy	31
VIII. Lone Star Extracts Bids from American Securities and ██████████ that Comply with Its Demands for a Quick Sale of Its Stock and a Maximum TRA Payment	39
IX. The Lone Star Dominated Board Ends an Active Auction by Granting American Securities Exclusivity.....	51
X. The Special Committee Holds Its First Meeting in Months to Bless the Merger and the Merger Is Approved.....	55
XI. The TRTA and the Termination Payment	58
XII. The Merger Consideration Was Not a Fair Price.....	60
XIII. American Securities ██████████ and Acquires Beacon’s Interior Business to Merge with FBM	62
CLASS ACTION ALLEGATIONS.....	62
COUNT I.....	65

A.	Defendants Deliberately Made It Difficult for Stockholders to Demand Appraisal	65
B.	The Appraisal Notice Violated Section 262 Because It Failed to Provide Notice of Appraisal 20 Days Before Appraisal Demands Were Due.....	67
C.	The December 21, 2020 8-K Was Not a Timely Appraisal Notice	68
D.	The Appraisal Notice Violated Section 262 Because It Was Misleading and Incomplete	73
(1)	Misleading and Incomplete Descriptions Concerning the Central Role of the TRA in the Sale Process	74
(2)	Misleading and Incomplete Discussion of Evercore’s Opinion	75
(3)	Misleading and Incomplete Disclosure of Evercore’s Fee	86
(4)	Misleading and Incomplete Descriptions of the TRA and TRTA	88
(5)	Misleading, Incomplete and Inaccurate Description of Merger Discussions and the TRA	95
(6)	Misleading and Incomplete Descriptions of the Relationship of RBC and GDC with Lone Star and RBC’s Financial Advisor Fees	97
	COUNT II.....	101
	COUNT III	103
	COUNT IV	107
	COUNT V	111
	COUNT VI.....	113
	PRAYER FOR RELIEF.....	118

VERIFIED STOCKHOLDER CLASS ACTION COMPLAINT

Plaintiff Firefighters' Pension System of the City of Kansas City, Missouri Trust ("Plaintiff"), by and through its undersigned attorneys, brings this Verified Stockholder Class Action Complaint (the "Complaint") on its own behalf and on behalf of a class of former holders of defendant Foundation Building Materials, Inc. ("FBM" or the "Company") common stock, other than Defendants (defined below) and their affiliates. Plaintiff asserts claims in connection with the merger through which defendant ASP Flag Intermediate Holdings, Inc. ("ASP Flag"), a subsidiary of defendant American Securities LLC ("American Securities"), acquired FBM for \$19.25 per share (the "Merger"). Plaintiff asserts that FBM, the FBM Board of Directors (the "Board"), the controlling stockholder of FBM, Lone Star Fund IX (U.S.), L.P. ("Lone Star"), and its affiliates, American Securities and ASP Flag violated 8 *Del. C.* § 262 in connection with the Merger.

Plaintiff also alleges claims for breach of fiduciary duty against Lone Star and the six FBM directors affiliated with Lone Star (the "Lone Star Directors") and against FBM's three remaining directors who served on a sham "Special Committee" in connection with the Merger (the "Special Committee Defendants"). Plaintiff also asserts that American Securities and ASP Flag, Evercore Group L.L.C. ("Evercore") and RBC Capital Markets, LLC ("RBC") aided and abetted the fiduciary breaches by Lone Star and FBM's directors. Plaintiff bases the allegations

herein on: (1) books and records FBM produced in response to a demand and extended litigation by Plaintiff pursuant to 8 *Del. C.* § 220 (the “Books and Records”)¹; (2) FBM’s public filings; and (3) other independent research.

NATURE OF THE ACTION

1. The Merger was announced on November 15, 2020 and closed on January 29, 2021. It was the product of unfair dealing. The initiation and timing of the Merger were determined by Lone Star to facilitate its exit from FBM and trigger acceleration of its Tax Receivable Agreement with FBM (the “TRA”). Lone Star, through the Lone Star Directors, controlled and managed contacts and negotiations with potential bidders in order to ensure Lone Star could exit on the terms and timetable it sought, including with a unique benefit – the maximum possible payments under the TRA.

2. Throughout the sale process, the FBM Board was dominated by the Lone Star Directors and was advised by RBC, its conflicted financial advisor, and conflicted legal counsel, Gibson, Dunn & Crutcher, LLP (“GDC”). Lone Star, RBC and Ruben Mendoza (“Mendoza”), who as FBM’s Chief Executive Officer (“CEO”) was an employee of a Lone Star controlled company, commenced sale discussions

¹ *Firefighters’ Pension Sys. of the City of Kansas City, Missouri Tr. v. Foundation Building Materials, Inc.*, Del. Ch. C.A. No. 2021-0001-JRS.

with multiple potential acquirers before any consultation with or authorization from the FBM Board. At the outset, Lone Star and the Board did not condition any transaction, including acceleration of the TRA, on approval by a special committee and disinterested stockholders.

3. Lone Star's conflict of interest because of the TRA was acknowledged at the first FBM Board meeting after receipt of an initial offer on May 23, 2018. The FBM Board, however, did not create a special committee (the "Special Committee") consisting of the three directors purportedly not affiliated with Lone Star, until September 3, 2018. Moreover, the Special Committee included two members who had interests in the TRA, in Lone Star and in a Lone Star long-term incentive plan ("LTIP"). The Special Committee was not independent and did not operate in an independent manner. The Special Committee did not run the sale process and did not negotiate with potential bidders. The Special Committee allowed Lone Star-affiliated directors to control all aspects of the sale process, including the treatment of the TRA. The Special Committee was kept in short pants and merely provided with after-the-fact "updates" on the results of negotiations conducted by Lone Star-affiliated directors and advisors. Notably, the Special Committee was missing in action for months during critical times leading up to the Merger. Indeed, at the most crucial moment in the sale process, it was the FBM Board, not the Special

Committee, that decided to end the auction process and to proceed with a three-week exclusivity agreement with American Securities.

4. The Special Committee was not authorized to, and did not, negotiate with Lone Star over the TRA payments. However, Lone Star and FBM had conditioned any sale of FBM on the recommendation of the Special Committee. Thus, the Special Committee had the leverage to refuse to approve a sale unless Lone Star agreed that some of the money it claimed under the TRA would be shared with FBM's minority stockholders as Merger consideration. The Special Committee made no attempt to use this leverage. Instead, it accepted without question assumptions that made the payment significantly greater than any potential tax benefits FBM might have eventually received.

5. To facilitate and quicken its exit from FBM, Lone Star repeatedly shifted transaction structures among a sale of FBM, a sale of just its FBM shares and a sale of its FBM shares combined with a transaction involving FBM. Lone Star also quickly decided without the Special Committee's involvement against any proposals that would not payout the TRA. Ultimately, Lone Star used a sign and consent structure so it could approve the Merger by written stockholder consent with no vote by other stockholders.

6. Lone Star received an \$8.6 million payment under the TRA in January 2020, shortly before the Merger, and then was paid approximately \$74.8 million as a “Termination Payment” under a Tax Receivable Termination Agreement (the “TRTA”) after the closing of the Merger when FBM was 100% owned by ASP Flag. These payments were essentially additional Merger consideration paid by American Securities to Lone Star. While the TRTA was purportedly between Lone Star and FBM, the agreement’s terms effectively made ASP Flag a party thereto. The TRTA provided that the “[e]ntire [a]greement” included “[t]he Merger Agreement, the TRA and this [a]greement.” The Termination Payment was part of American Securities’ “Financing of the Merger” and was conditioned on and paid after the closing of the Merger, when FBM was 100% owned by ASP Flag.

7. FBM and the FBM Board did not provide timely, accurate and complete notice of appraisal rights as required by 8 *Del. C.* § 262 (“Section 262”). Through the sign and consent structure of the Merger, FBM and the FBM Board caused the 20 day minimum period for demanding appraisal under 8 *Del. C.* § 262(d)(2) to apply. They then manipulated the timing of the notice of appraisal rights (the “Appraisal Notice”) to limit the stockholders’ ability to demand appraisal. They told the stockholders that the Appraisal Notice consisted of the “Notice of Action by Written Consent and Appraisal Rights and Information Statement” (the “Notice”)

and the accompanying information statement (the “Information Statement”), which were both dated December 4, 2020. They claim these documents were first being mailed to stockholders “on or about” Friday, December 4, 2020 such that appraisal demands had to be delivered to the Company by December 24, 2020. There is no public proof that these documents were actually mailed to every FBM stockholder on December 4, 2020 when the United States Postal Service (“USPS”) was experiencing unprecedented delays in delivering the mail even beyond the usual holiday slowdown.

8. On December 21, 2020, just three days prior to the December 24, Christmas Eve deadline for demanding appraisal, FBM filed a Form 8-K with the United States Securities and Exchange Commission (the “8-K”), which said it supplemented and superseded nine sections of the Information Statement. Thus, FBM and its Board significantly changed the Appraisal Notice three days before the appraisal deadline. However, the 8-K was not mailed to stockholders or otherwise transmitted in a manner which 8 *Del. C.* § 262 authorizes for an appraisal notice to stockholders. Nor were stockholders given twenty days from the date of the supplemented Appraisal Notice to demand appraisal.

9. The Appraisal Notice was not only untimely, it was misleading and incomplete, particularly concerning the TRA. In short, FBM and the FBM Board effectively deprived the FBM stockholders of their statutory appraisal rights.

10. Evercore aided and abetted the breaches of loyalty and care by the Special Committee Defendants. Instead of providing the independent and disinterested advice to the Special Committee it had promised to give, it became a full participant in the Special Committee charade. Evercore was purportedly hired because of their expertise in analyzing tax receivable agreements, and, in that context, Evercore was supposed to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For this, Evercore was paid \$7 million in fees.

11. Though Evercore recognized that the TRA created a conflict of interest for Lone Star, Evercore never provided advice to the Special Committee on how to neutralize that conflict or how to use the Special Committee's leverage to reduce or eliminate the TRA payments to Lone Star and increase the Merger consideration to FBM's minority stockholders. Instead, in order to justify the Merger, Evercore

manipulated and misrepresented data concerning tax receivable agreements and endorsed a deliberately misleading and incomplete description of its work in the Information Statement. Moreover, Evercore extracted fees based on the post-Merger Termination Payment FBM made to Lone Star.

12. RBC aided and abetted the fiduciary breaches by Lone Star and its six representatives on FBM's Board. While ostensibly serving as financial advisor to FBM, it actively and primarily pursued achieving Lone Star's twin goals of exiting FBM and obtaining the maximum payout conceivable under the TRA. RBC knew a deal would only happen with the approval of Lone Star and worked closely with Lone Star, its long time client, to secure the transaction that Lone Star desired and collect the lucrative fees set forth in RBC's engagement agreement with FBM. Indeed, the Board and RBC agreed to RBC receiving fees for arranging to have FBM pay Lone Star the \$74.8 million accelerated TRA payment, though the Special Committee, the Board and RBC recognized the TRA created a conflict.

13. American Securities and ASP Flag aided and abetted the fiduciary breaches of Lone Star and the Lone Star Directors by (i) adopting a transaction structure that benefitted Lone Star and restricted the ability of the FBM stockholders to pursue appraisal, (ii) reframing its offer to provide the maximum TRA payment to Lone Star, (iii) contributing to the rushed, misleading and incomplete disclosure

to FBM minority stockholders, and (iv) conspiring with Lone Star to divert the synergies from a combination with the Beacon Roofing Supply, Inc. (“Beacon”) interior business to itself as the post-Merger owner of FBM.

14. Through this action, Plaintiff seeks a quasi-appraisal and/or money damages arising from the violation of Section 262 and the unfair Merger, along with all other relief the Court finds just and proper.

PARTIES

15. Plaintiff was a beneficial owner of FBM common stock at all relevant times, having continuously owned FBM shares from February 10, 2017, through the closing of the Merger.

16. Defendant FBM is one of the largest specialty distributors of wallboard, suspended ceiling systems and metal framing in the United States and Canada. FBM was incorporated in Delaware and headquartered in Santa Ana, California, and the Company’s common stock was listed on the NYSE under the symbol “FBM.” FBM went public through an initial public offering in February 2017, selling 12,800,000 shares of common stock at a price of \$14.00 per share (the “IPO”). FBM was the surviving corporation in the Merger and remains in existence as a Delaware corporation.

17. Defendant Lone Star Fund IX (U.S.), L.P. is a private equity fund that invests globally in real estate, equity, credit, and other financial assets.

18. Defendant LSF9 Cypress Parent 2 LLC (“LSF9”) is a Delaware limited liability company, which is controlled by Lone Star Fund IX (U.S.), L.P. Prior to the Merger, LSF9 was FBM’s controlling stockholder, owning 52.3% of FBM’s outstanding shares. Lone Star Fund IX (U.S.), L.P. and LSF9 are sometimes referred to herein collectively as “Lone Star.”

19. Defendant Mendoza served as FBM’s CEO and a member of the FBM Board from the Company’s IPO through the closing of the Merger. As Defendants recognized, because Mendoza was CEO of a Lone Star controlled entity, he was an employee of, or otherwise affiliated with, Lone Star.

20. Defendant Chris Meyer (“Meyer”) was the chairman of the FBM Board from the Company’s IPO through the closing of the Merger. At the time of the Merger, Meyer was a senior managing director at Lone Star North America Acquisitions, L.P., an affiliate of Lone Star.

21. Defendant Rafael A. Colorado (“Colorado”) served as a member of the FBM Board from April 2018 through the closing of the Merger. At the time of the Merger, Colorado was a managing director and senior counsel at Hudson Advisors L.P. (“Hudson Advisors”), an asset management company affiliated with Lone Star.

22. Defendant Chad R. Lewis (“Lewis”) served as a member of the FBM Board from April 2018 through the closing of the Merger. At the time of the Merger, Lewis was a director at Hudson Americas L.P., an affiliate of Lone Star and Hudson Advisors.

23. Defendant Chase Hagin (“Hagin”) served as a member of the FBM Board from February 2018 through the closing of the Merger. At the time of the Merger, Hagin was a director at Lone Star North America Acquisitions, L.P., an affiliate of Lone Star.

24. Defendant Maureen Harrell (“Harrell”) was appointed to the FBM Board on February 18, 2020 to replace Allison Navitskas, a Lone Star consultant who was appointed to the FBM Board on January 30, 2019 to replace another Lone Star affiliate, Domininc LaValle, who had resigned on December 21, 2018. Harrell remained an FBM Director through the closing of the Merger. At the time of the Merger, Harrell was a managing director at Hudson Americas L.P., an affiliate of Lone Star and Hudson Advisors.

25. Defendant Matthew J. Espe (“Espe”) served as a member of the FBM Board from February 2018 through the closing of the Merger. Espe was elected as the chairman of the Special Committee by the Lone Star dominated Board. Espe is no stranger to private equity. After departing his Chief Executive Officer position

at Radial, Inc. in 2017 (for which he was recruited by private equity firm Sterling Partners) he has concurrently served as an advisor or operating partner to private equity firms Periphas Capital, Strategic Value Partners Global, and Advent International. In FBM's last director election in 2020, Espe received approximately 65% of the public, minority stockholder vote, with approximately 5.6 million shares voting against his re-election.

26. Defendant Fareed A. Khan ("Khan") served as a member of the FBM Board from the Company's IPO through the closing of the Merger. Khan served as a member of the Special Committee that approved the Merger. At the time of the Merger, Khan had an interest in LSF9, the TRA and the LSF9 LTIP. In FBM's last director election in 2020, Khan received approximately 65% of the public, minority stockholder vote, with approximately 5.5 million shares voting against his re-election.

27. Defendant James F. Underhill ("Underhill") served as a member of the FBM Board from the Company's IPO through the closing of the Merger. Underhill served as a member of the Special Committee that approved the Merger. Underhill worked for MRC Global for over 30 years until 2013, serving in a variety of capacities, including Chief Operating Officer and Chief Financial Officer. Since 2008, Underhill has served on numerous boards, including, notably, the board of

AOC, after Lone Star's purchase of the chemical firm for \$2.4 billion in 2021. At the time of the Merger, Underhill had an interest in LSF9, the TRA and the LSF9 LTIP. In FBM's last director election in 2020, Underhill received approximately 65% of the public, minority stockholder vote, with approximately 5.5 million shares voting against his re-election.

28. Defendant American Securities LLC is a private equity firm based in New York, with approximately \$23 billion under management.

29. Defendant ASP Flag Intermediate Holdings, Inc. is a Delaware corporation incorporated on October 2, 2020 and a subsidiary of American Securities. It assumed its current name by a certificate of incorporation amendment on November 12, 2020. ASP Flag was the 100% owner of ASP Flag Merger Sub Inc. ("Merger Sub"), the American Securities Merger vehicle that was extinguished in the Merger. As a result of the Merger, ASP Flag became the 100% owner of FBM. ASP Flag, Merger Sub and American Securities are sometimes referred to collectively as "American Securities."

30. Defendant Evercore Group L.L.C. is a Delaware limited liability company.

31. Defendant RBC Capital Markets, LLC is registered to and qualifies to do business in Delaware, regularly transacts business and performs services in Delaware and has a Delaware registered agent.

32. Defendants Mendoza, Meyer, Colorado, Lewis, Hagin and Harrell are sometimes referred to collectively as the “Lone Star Directors” and are sometimes referred to together with Lone Star and LSF9 as the “Lone Star Defendants.” Defendants Espe, Khan and Underhill are sometimes referred to collectively as the “Special Committee Defendants.” The Lone Star Directors and the Special Committee Defendants are sometimes referred to collectively as the “Board” or the “Director Defendants.” Defendants FBM, Lone Star, LSF9, American Securities, ASP Flag, Evercore and RBC, along with the Director Defendants are collectively referred to as the “Defendants.”

SUBSTANTIVE ALLEGATIONS

I. Background of the Company and Lone Star’s Investment

33. FBM was founded in 2011 by Mendoza and two others. On October 9, 2015, Lone Star acquired FBM for approximately \$560 million. Since 1995, Lone Star and its founder, John Grayken, gained the reputation of quickly flipping their investments. The investment horizon for Lone Star investments is typically three

years or less.² In other words, “[t]he assets come in, are worked out and sold. Buying and holding . . . is for suckers, according to Grayken’s philosophy. At Lone Star there are no pretenses about longer-term investing or any sentimental attachments to assets, even in cases where more profit can be squeezed out over a few more months or years.”³

34. Lone Star took FBM public in February 2017, completing FBM’s IPO of 12,800,000 shares of common stock at a price of \$14.00 per share. RBC served as one of the four joint book-running managers in the IPO.

35. Following the IPO, Lone Star retained 65.4% of the outstanding shares of FBM and controlled the majority of the Board, as seven of the initial eleven members were employees or affiliates of Lone Star.

II. The TRA

36. In connection with the IPO, Lone Star caused FBM, which it then wholly owned, to enter into the TRA providing that FBM would pay Lone Star 90% of the aggregate reduction of U.S. federal, state, local and non-U.S. income tax that the Company realized or was deemed to realize from the utilization of various

² Nathan Vardi, *The Billionaire Banker in the Shadows*, *Forbes* (May 1, 2016), <https://www.forbes.com/sites/nathanvardi/2016/03/01/the-billionaire-banker-in-the-shadows/?sh=112934974a84>.

³ *Id.*

potential tax benefits relating to pre-IPO and IPO-related activities and expenses. Essentially, Lone Star “negotiated” the TRA with itself prior to the IPO. Not surprisingly, the terms heavily favor Lone Star. In the February 13, 2017 IPO prospectus (the “Prospectus”), the Company estimated that payments by the Company to Lone Star under the TRA could aggregate to between \$190 million and \$220 million over 15 years.⁴ For accounting purposes, FBM initially recorded the TRA payments at the estimated midpoint of the range: \$205 million.⁵

37. Under the TRA, Lone Star claimed 90% of any tax reduction related to FBM’s tax assets which included (i) all depreciation and amortization deductions and offsets to taxable income and gain or increase to taxable loss resulting from tax basis, (ii) net operating losses and tax credits, (iii) deductions for LTIP payments, (iv) transaction expenses, (v) debt issuance costs and original issue discounts, (vi) deductions for IPO expenses and (vii) any other tax benefits.⁶ The Prospectus recognized that the estimate of the value of the TRA assumed no material changes in relevant tax law and that FBM’s subsidiary would earn enough income to realize

⁴ Prospectus 16, 46, 58.

⁵ Prospectus 65, 73, F-43.

⁶ Prospectus 16, 46, 152, F-61; TRA Section 1.01 “Pre-IPO and IPO-Related Tax Assets,” Section 2.01, Section 3.01.

all the tax benefits.⁷ Lone Star would retain the TRA payments even if the tax benefits were disallowed by the Internal Revenue Service.⁸

38. The Prospectus recognized that Lone Star could have conflicts of interest because the TRA contained a provision that allowed Lone Star to terminate the TRA and receive an accelerated payment upon a change in control.⁹ The accelerated payment would be based on the assumption that FBM would have sufficient taxable income and tax liability to fully utilize the tax assets.¹⁰ Thus, the accelerated payment to Lone Star in the event of a change in control would be made years in advance of the actual realization of potential tax benefits (if any such benefits were ever realized) and might be significantly greater than any tax benefits FBM might realize.¹¹

39. Moreover, the manner of calculating the payments to Lone Star was structured so payments could significantly exceed the tax benefits FBM might realize.¹² The TRA assumed a 5% state and local tax rate even though FBM's actual

⁷ Prospectus 46.

⁸ Prospectus 46, 154.

⁹ Prospectus 45, 47; TRA Section 4.01(d), 4.03.

¹⁰ Prospectus 47, 153.

¹¹ Prospectus 47, 95, 153.

¹² Prospectus 47, 152-153; TRA Section 1.1 "Valuation Assumptions."

rate might be materially lower. The TRA tax benefits would be assumed to be used before other tax benefits so Lone Star would get paid even if FBM's tax liability would have been materially reduced or eliminated by other tax benefits. Under the TRA, non-taxable transfers of assets would be treated as taxable sales at fair market value resulting in payments to Lone Star even though the transfers would not generate tax benefits to FBM. In short, in multiple respects the TRA represented an unjustified and piggish transfer of value from FBM and its public stockholders to Lone Star.

40. Section 7.016(e) of the TRA provided that FBM directors affiliated with Lone Star "shall be excluded from all deliberations and actions of the Board" related to any Company determinations concerning the TRA.

41. Lone Star's plan to siphon value out of FBM was soon disrupted. The Tax Cuts and Jobs Act of 2017 reduced the federal corporate income tax rate from a maximum rate of 35% to 21% effective January 1, 2018. The reduction in the federal corporate tax rate greatly reduced the value of the TRA because FBM would have to achieve much higher income in order to realize the same tax savings. Effective

as of December 31, 2017, the estimated value of the TRA was reduced by \$68 million from \$203.8 million to \$135.8 million.¹³

III. After the Value of the TRA Declines, Lone Star Initiates a Sale of FBM

42. The Information Statement's discussion of the Background of the Merger repeatedly and misleadingly seeks to downplay the roles of Meyer, Lone Star and RBC in the timing and initiation of discussions for the sale of FBM and to exaggerate the knowledge and role of the FBM Board.

43. With the value and certainty of TRA payments greatly reduced, Lone Star began efforts in early 2018 to exit its stake in FBM and accelerate payments under the TRA. In early 2018, only about a year after the IPO, Meyer, who was both chairman of the Board and a managing director at Lone Star, had several conversations with representatives of [REDACTED] [REDACTED] about [REDACTED] acquiring the Company. The Information Statement claimed these discussions were "in consultation with the Board."¹⁴ However, it does not identify any Board authorization for Meyer to discuss a potential sale of the

¹³ Foundation Building Materials, Annual Report (Form10-K) (Dec. 31, 2017) at 48, 97.

¹⁴ Foundation Building Materials, Inc., Definitive Information Statement at 17 (Schedule 14C) (Dec. 4, 2020) ("IS").

Company a mere year after it went public. Moreover, though Plaintiff's Section 220 demand requested Board Materials relating to a potential sale of FBM, the earliest Board Minutes the Company produced were from May 24, 2018. Thus, Meyer, on behalf of Lone Star, initiated discussions for a sale of FBM without Board authorization.

44. The Information Statement further said that in February 2018, Meyer and "a then-member of the Board" met with ██████ to discuss "the potential strategic fit between the two companies."¹⁵ The Information Statement does not identify the "then" FBM director. However, the two FBM directors in February 2018 who left the Board later in 2018 were Domininc LaValle and Kyle Volluz, both of whom were affiliated with Lone Star. Based on his purported comments at the May 24, 2018 Board meeting, it appears Volluz was the then-director. Thus two Lone Star affiliates conducted these discussions with ██████

45. The Information Statement further claimed that in early 2018 the Board discussed ██████ interest in acquiring FBM with RBC.¹⁶ However, FBM produced no Board Materials reflecting any such Board discussion in early 2018. To the contrary, the minutes of the May 24, 2018 FBM Board meeting said that ██████

¹⁵ IS 17.

¹⁶ IS 17.

Information Statement misleadingly seeks to disguise RBC's early involvement in triggering discussions of a sale of FBM.

47. The Information Statement said that on May 23, 2018, the FBM Board received a non-binding proposal from ██████ to acquire all the outstanding shares of FBM for \$16.75 per share in cash. The May 24, 2018 Board minutes said that Meyer, not the Board, received ██████ May 23, 2018 offer letter. The offer did not include an accelerated TRA payment to Lone Star.

48. On May 24, 2018, the FBM Board convened a telephonic meeting to discuss ██████ offer. Jeffrey Chapman ("Chapman") of GDC, participated in the meeting. According to FBM's General Counsel, Richard J. Tilley ("Tilley"), GDC had ceased being FBM's principal outside counsel by May 2018. Neither the Information Statement nor the May 24, 2018 minutes reveal who invited Chapman to the meeting. Espe did not attend the meeting and Khan left the meeting early. The Lone Star dominated FBM Board agreed to Meyer's suggestion that he contact RBC. Volluz, a Lone Star affiliate who was then an FBM director, stated that any transaction involving the TRA would need a different review and authorization procedure because of the inherent conflict of interest of the Lone Star affiliated members of FBM's Board. Plainly, Lone Star was already focused on obtaining accelerated payment of the TRA in any sale of FBM.

IV. Meyer Engages Lone Star's Law Firm and Financial Advisor on Behalf of FBM

49. After the May 24, 2018 board meeting, Meyer sent an email to Chapman at GDC and Rosenbaum of RBC, two firms with extensive ties to Lone Star.

50. GDC's Chapman has described his work for Lone Star as "a career-altering relationship."¹⁷ Chapman's relationship with Lone Star has been lucrative for himself and his firm.¹⁸ The co-chair of GDC's private equity group, Sean Griffiths, has remarked that "Lone Star has been a real hit for us."¹⁹ Indeed, GDC and Chapman advised Lone Star on billions of dollars in deals, including its \$7.6 billion acquisition of Home Properties, Inc. and its \$1.4 billion acquisition of Hanson Building Products.²⁰ More recently, in 2020, GDC (with RBC) acted as advisor to Lone Star in its divestiture of American Bath Group, LLC.²¹

¹⁷ Private Equity MVP: Gibson Dunn's Jeff Chapman, <https://www.law360.com/articles/732623/private-equity-mvp-gibson-dunn-s-jeff-chapman>.

¹⁸ Andrew McIntyre, Private Equity Group of the Year: Gibson Dunn, Law360 (January 27, 2016) ("Lone Star has provided a steady source of work to [GDC]").

¹⁹ *Id.*

²⁰ *Id.*

²¹ Press Release, American Bath Group, LLC, Centerbridge Partners to Acquire American Bath Group (Oct. 8, 2020), <https://www.prnewswire.com/news-releases/centerbridge-partners-to-acquire-american-bath-group-301148973.html>.

51. Connecting Rosenbaum to Chapman to work together on FBM, Meyer wrote: [REDACTED]

[REDACTED] Accordingly, Meyer saw GDC as Lone Star's counsel, though GDC was retained and paid by FBM and was purportedly advising the FBM Board. The GDC conflict would persist throughout the flawed sale process.

52. RBC has similarly enjoyed a lucrative relationship with Lone Star. For example, RBC's June 4, 2018 memorandum to the Board on Material Relationships Disclosures revealed that [REDACTED]

[REDACTED] The \$5.9 million RBC received from FBM while Lone Star controlled the Company pales in comparison.

53. RBC also knew that, despite its engagement by FBM, its real client was Lone Star, not the FBM Board. RBC first sent its discussion materials for the June 4, 2018 Board meeting and its proposed engagement letter with FBM to Meyer and LaValle, who directed that [REDACTED] Only then did Meyer forward the RBC materials to the Board.

54. The initial drafts of RBC's engagement letter circulated to Meyer, LaValle and others at Lone Star did not include a TRA payment upon a change of

control transaction within the definition of “Aggregate Transaction Value” for purposes of calculating RBC’s transaction fee. After Lone Star commented on the draft, the version sent to the FBM Board included [REDACTED]

[REDACTED] It is a reasonable inference that Lone Star and RBC agreed to have TRA payments included in RBC’s fee calculation to incentivize RBC to have the buyer fund Lone Star’s TRA payments as part of the Merger consideration.

V. Lone Star Continues to Pursue a Sale

55. On June 4, 2018, the FBM Board said [REDACTED] proposal was not high enough but “agreed” to RBC’s recommendation that the Company prepare a three-year budget to share with potential acquirers “as may be appropriate in the near future.” In short, the Company was put up for sale at Lone Star’s instigation.

56. Meyer turned his attention to American Securities in June and July 2018 (without any notification to the Board). The result was a July 24, 2018 proposal by American Securities to acquire all FBM outstanding shares for \$18.00 to \$19.50 per share, which did not mention the treatment of the TRA.

57. On July 30, 2018, LaValle sent a draft of RBC’s engagement letter to Mendoza and Meyer, stating: [REDACTED]

[REDACTED]

████████████████████ which could receive TRA accelerated payments if there was a change of control.

60. The Special Committee was purportedly authorized and empowered to: (1) make an investigation into a possible transaction; (2) evaluate the terms of a possible transaction; (3) participate in negotiations with relevant third-parties regarding a possible transaction; (4) participate in negotiations of the terms of any definitive agreement in regards to a possible transaction; (5) report to the FBM Board with its determination and recommendation of any possible transaction; and (6) determine not to pursue any of the possible transactions. Significantly, the Special Committee was not given exclusive power to or even authorized to conduct sale negotiations, it was only permitted to “participate” in negotiations controlled by Lone Star. Importantly, the Special Committee’s mandate did not include negotiating with Lone Star over TRA payments that might be triggered by Lone Star’s pursuit of a sale of FBM.

61. The Special Committee was not formed until after: (i) ██████████ and American Securities had been involved in discussions with Lone Star; (ii) ██████████ and American Securities had made offers to acquire the Company; and (iii) American Securities had already signed a confidentiality agreement and begun engaging in diligence. The creation of the Special Committee was too little, too late.

62. An examination of the Information Statement and minutes shows the Special Committee failed to control or even participate meaningfully in the investigation, evaluation and negotiation of the transaction. Instead, it just went along, after the fact, with what Lone Star negotiated and the Lone Star dominated, full Board decided. One consequence of allowing Lone Star to control discussions was that Lone Star could make it clear to bidders that their offers should include full accelerated payments under the TRA.

63. The Special Committee met for the first time on September 7, 2018, with Chapman of GDC and the Company's General Counsel Tilley present. It is a reasonable inference that Chapman and Tilley influenced the Special Committee's choice of counsel. By its second meeting on September 21, 2018, the Special Committee had hired Richards, Layton & Finger, P.A. ("RLF") as its counsel. Nothing in the Information Statement or Books and Records indicates that the Special Committee considered any counsel other than RLF. The Committee determined it should retain its own financial advisor because of Lone Star's interest in the TRA, but did not do so. At the third Special Committee meeting, on September 24, 2018, Lone Star-affiliated directors Meyer, Colorado, and LaValle attended, as well as RBC. Thus, a pattern was established early: Lone Star and RBC would conduct the sale discussions and the Special Committee would get occasional

after-the-fact reports. The Special Committee's marginal involvement precluded the possibility that the Special Committee could replicate arm's-length negotiations.

64. On October 1, 2018, [REDACTED] offered \$17.00 per share, including a \$93 million TRA change of control payment to Lone Star. The Information Statement does not mention this offer, the first offer referencing the TRA.

65. On October 2, 2018, the Special Committee discussed that [REDACTED]

[REDACTED]

[REDACTED] The Special Committee recognized the

[REDACTED]

[REDACTED]

[REDACTED] The Information Statement,

FBM's other public documents and the Books and Records contain no indication that the Special Committee (or its counsel RLF with which it discussed the conflict) ever raised this matter with Company management, GDC, Lone Star or other FBM directors. As such, RBC continued to have a financial incentive to support Lone Star's desire to accelerate the TRA in order to facilitate a transaction, rather than seek more consideration for the stockholders.

66. The Special Committee held several meetings in the fall of 2018, but to no real effect. At an October 17, 2018 meeting, the Special Committee considered

a presentation by Evercore that trumpeted the importance of the TRA in the review of FBM's strategic alternatives and stressed Evercore's experience with such agreements. Evercore observed that:

[REDACTED]

67. Evercore also presented the Special Committee with a review of [REDACTED]

[REDACTED]

[REDACTED] Thus, the Special Committee knew early on that a TRA termination payment could be reduced or eliminated in a change-of-control transaction.

68. After Evercore's presentation to the Special Committee, Espe was [REDACTED] while Underhill also [REDACTED]

69. The Special Committee did not hire a financial advisor, but instead acquiesced to Lone Star's preference that a potential transaction should be delayed.

VII. Lone Star Repeatedly Shifts Its Self-Interested Strategy

70. During the fall of 2018, FBM's stock price dropped, closing at \$9.53 at the end of October, \$9.78 at the end of November and \$8.31 on December 31, 2018. The stock continued to struggle in early 2019, trading below \$10 until closing at \$10.52 on February 26, 2019 after FBM reported strong results for the fourth quarter of 2018.

71. Lone Star saw a potential opportunity to exploit the stock drop. On March 6, 2019, Meyer emailed Espe, the Special Committee chairman, that Lone Star was interested in acquiring the minority shares of FBM. Meyer requested that the Special Committee approve waivers allowing GDC and RBC to represent Lone Star. Espe emailed the other Special Committee members, confirming Lone Star's interest in taking the Company private. Underhill responded that [REDACTED]

[REDACTED] On March 6, 2019, FBM's stock closed at \$10.37.

72. At a March 8, 2019 meeting, the Special Committee, with General Counsel Tilley present, discussed Lone Star's request for waivers for GDC and RBC. Tilley, doing Lone Star's bidding, claimed GDC had not been FBM's principal outside counsel for nearly a year.

73. GDC's proposed waiver admitted that [REDACTED]

[REDACTED]

[REDACTED] GDC also
acknowledged [REDACTED]

Yet it claimed [REDACTED]

[REDACTED] It admitted that [REDACTED]

[REDACTED]

[REDACTED] and also acknowledged that [REDACTED]

[REDACTED] However, GDC

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

74. Rather than reacting with outrage to GDC's plainly improper waiver request, the Special Committee [REDACTED]

[REDACTED] Shortly after the meeting, Meyer notified the Special Committee that Lone Star, for unexplained reasons, had determined not to proceed with an acquisition of FBM and would not be seeking waivers for GDC or RBC after-all.

75. In September 2019, after FBM's stock had rebounded, Lone Star switched its strategy once again. Lone Star sold 4.75 million shares of FBM Stock

in a secondary offering at a price of \$17.00 per share, decreasing its aggregate beneficial ownership from 65.3% to 52.6%. RBC served as one of the three joint-book running managers in the offering.

76. Throughout the third and fourth quarters of 2019, Lone Star, with RBC, had a series of discussions with [REDACTED] concerning [REDACTED] potential acquisition of solely Lone Star's FBM shares. [REDACTED] expressed an interest in combining FBM and [REDACTED]. [REDACTED] Meyer told [REDACTED] that Lone Star was not interested in a stock-for-stock combination. Meyer and RBC met with other financial sponsors to discuss a possible transaction during that time.

77. In early January 2020, [REDACTED] or its financial advisor, [REDACTED] sent an email to Meyer and others at Lone Star concerning a potential purchase of Lone Star's FBM stock together with [REDACTED]. On January 12, 2020, Lewis summarized for Meyer calls he (on January 10, 2020) and RBC (on January 12, 2020) had with [REDACTED].

[REDACTED]

[REDACTED]

Thus, Lone Star was plainly using RBC and GDC to further Lone Star's interest in selling its stake without any waivers from FBM.

78. On January 20, 2020, RBC proposed an amendment to its engagement letter to get a fee for a combination of FBM and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] On January 20-21, 2020, first

Meyer, Lewis and Colorado and then Mendoza and Tilley discussed RBC's latest grab for fees, though FBM redacted a good deal of the communications as privileged.

On January 23, 2020, Meyer forwarded the proposed amendment to the engagement letter to Espe. There is no indication Espe or any other member of the Special Committee objected to the amendment. As such, just with RBC's initial engagement letter that provided fees to RBC in connection with a TRA payment, the Special Committee acquiesced and permitted what it knew to be a conflicted financial advisor beholden to Lone Star to run the sale process for the Company.

79. Lone Star's decision to seek a sale of its FBM shares in conjunction with [REDACTED] required modification of the Special Committee's

pursuing additional transactions involving a different third-party acquiring all of its shares in FBM. Thus, Lone Star was able to have its cake and eat it too, causing FBM to pursue [REDACTED] to facilitate [REDACTED] purchase of Lone Star's FBM shares, while retaining Lone Star's ability to sell those shares to some other potential buyer.

81. Immediately after the FBM Board meeting, the Special Committee met for the first time in over ten months and approved a non-disclosure agreement between FBM, Lone Star affiliates, and [REDACTED]. The meeting lasted a mere 15 minutes. Then the Special Committee went back to sleep for another seven months.

82. In late January 2020, [REDACTED]
[REDACTED] Meyer viewed the list through his Lone Star lens as [REDACTED]
[REDACTED]

83. In February 2020, Meyer had a call with a representative of [REDACTED]
[REDACTED] to discuss [REDACTED] interest in acquiring all the outstanding shares of FBM, or only the shares held by Lone Star. No FBM Board nor Special Committee meeting was held to discuss [REDACTED] interest.

84. On February 13, 2020, [REDACTED] made a proposal to acquire all of Lone Star's FBM shares for \$17.90 per share. [REDACTED] proposal provided that while the

transaction as sequenced would not trigger a TRA change of control payment, such a payment would be made, subject to approval of FBM's independent directors. Lone Star had obviously conveyed a message that any deal must include Lone Star getting an accelerated TRA payment. Meyer [REDACTED]

[REDACTED] In subsequent emails between Lewis and Meyer, Lewis [REDACTED]

85. [REDACTED] proposed purchase of Lone Star's FBM shares was cross-conditional on FBM acquiring [REDACTED]. In other words, FBM was being pushed to do [REDACTED] in order to facilitate Lone Star's exit from FBM. No FBM Board or Special Committee meeting was held to discuss [REDACTED] proposal.

86. RBC created a deck analyzing [REDACTED] returns at a few variables, which Lewis sent to Meyer, Harrell, Colorado, and others at Lone Star. Despite the fact that RBC was purportedly the Company's financial advisor and the Special Committee had not granted Lone Star's request for a waiver as to RBC, RBC continued to work and create decks exclusively for Lone Star in its pursuit of selling its Lone Star shares. In other words, RBC was acting as *Lone Star's* financial advisor in connection with the sale process.

87. On February 21, 2020, Lone Star countered [REDACTED] offer and sent a revised proposal. While [REDACTED] proposal had said the transaction sequencing would not trigger a TRA change of control payment, Lone Star's counterproposal said it would and that the TRA payoff must occur concurrently with the closing of the sale of Lone Star's FBM stock. Lone Star's counter also said FBM would not expend significant time and resources on [REDACTED] until there was an agreement for the purchase of Lone Star's FBM stock. Once again, Lone Star placed its interests in exiting its position above the interests of FBM and its other stockholders in a potential transaction for FBM.

88. When the COVID-19 pandemic emerged in March 2020, Lone Star and [REDACTED] decided to place negotiations on hold. The Information Statement says Lone Star and [REDACTED] re-engaged in discussions regarding [REDACTED] purchase of only Lone Star's shares in June of 2020.²² Mendoza met with [REDACTED] on June 28, 2020. In June and July, the two parties exchanged drafts of a term sheet for [REDACTED] purchase of Lone Star's FBM shares, contingent on [REDACTED]

²² IS 20.

89. On July 24, 2020, Mendoza and Penn discussed American Securities re-engaging with FBM. FBM's second quarter 2020 results were announced on August 3, 2020 and showed FBM was weathering the COVID pandemic relatively well. FBM's stock price rose from \$13.73 on July 31, 2020 (the preceding trading day) to \$14.90 on August 3 and \$15.54 on August 4, 2020. Lone Star again changed its strategy because it believed it could get more money for itself if it included the minority shares in the transaction. On August 4, 2020, Lone Star notified [REDACTED] they would not engage in further discussions at [REDACTED] proposed \$16.00 to \$17.00 per share range. On the same day, FBM, without Special Committee or Board approval, entered into a new confidentiality agreement with American Securities.

VIII. Lone Star Extracts Bids from American Securities and [REDACTED] that Comply with Its Demands for a Quick Sale of Its Stock and a Maximum TRA Payment

90. In an August 13, 2020 call, Penn told Meyer that American Securities was interested in acquiring all of FBM's outstanding shares. The next day, Meyer called Espe, informing him of the conversation.

91. On August 17, 2020, the Special Committee held a meeting, its first since January 21, 2020. Despite the Special Committee previously recognizing the conflict of interest Lone Star affiliated directors had in relation to a possible transaction, Meyer and Colorado were present at the meeting. In addition, GDC

attorneys Chapman and Kaplan (who had been representing Lone Star’s interests for the last 8 months) were also present, now purportedly switching hats and attending as “counsel to the Company.” The discussion at the meeting is emblematic of the overall sale process: it was controlled by Lone Star.

92. First, Meyer said that [REDACTED]
[REDACTED]

[REDACTED] Meyer said [REDACTED]
[REDACTED]
[REDACTED]

93. Second, Meyer [REDACTED]
[REDACTED]

94. Third, Meyer told the Special Committee to retain a financial advisor. Obediently, the Special Committee went into “executive session” and determined to retain Evercore as the Special Committee’s advisor.

95. The generic description of the August 17, 2020 Special Committee meeting in the Information Statement said nothing about: (i) [REDACTED]
[REDACTED] (ii) [REDACTED] or

(iii) [REDACTED]

96. On August 19, 2020, [REDACTED] called Meyer and discussed a potential acquisition of all FBM's outstanding shares, still contingent upon the closing of [REDACTED]

97. Between August 20 and August 26, Mendoza, Meyer, Colorado, and Tilley, FBM's Vice President, Secretary, and General Counsel, discussed and shared edits to a revised engagement letter for RBC. The executed revised engagement letter [REDACTED] However, RBC's transaction fee [REDACTED]

[REDACTED] The Special Committee never protected the minority stockholders' interests against the conflict created by RBC's fee structure.

98. On August 26, 2020, American Securities made a proposal to acquire all of FBM's outstanding shares for \$17 per share in cash. The proposal requested a 30-day exclusivity period and, according to the Information Statement, "did not address the treatment of the TRA." Thus, the offer was significantly different from [REDACTED]

99. On August 28, 2020, [REDACTED] made a proposal to acquire all of FBM's outstanding shares for \$18.00 per share, contingent on [REDACTED]

The proposal contemplated that Lone Star's written consent would constitute the required FBM stockholder approval. [REDACTED] proposal also contemplated the acceleration and payment under the TRA. Meyer forwarded [REDACTED] offer to Mendoza, noting: [REDACTED]

100. Later that same day, the FBM Board met. Meyer updated the Board on RBC's engagement letter and the American Securities and [REDACTED] proposals, noting that American Securities [REDACTED]

[REDACTED]

The Board instructed Meyer to let American Securities and [REDACTED] know that RBC would follow up with them on their offers. It told RBC to reject American Securities' request for exclusivity.

101. Five days later, the Special Committee held a September 2, 2020 meeting and supposedly discussed and rejected American Securities' request for exclusivity. However, the FBM Board already determined that "exclusivity [was] not acceptable" five days earlier and directed RBC to tell American Securities that. Thus, the minutes and the Information Statement appear designed to create the misleading impressions that the Special Committee had some meaningful role when in fact Lone Star, RBC and the Lone Star dominated Board were completely running the show. The Special Committee discussed that [REDACTED]

[REDACTED] Thus, the Special Committee acquiesced to sitting in the back seat, just along for the ride, while the Lone Star dominated Board and RBC drove the car.

102. The Special Committee approved the engagement of Evercore. Evercore proposed a fee arrangement which contemplated [REDACTED]

[REDACTED] Despite being aware that having an interest in the TRA created a conflict, Evercore proposed a fee arrangement that, like RBC's fee structure, [REDACTED]

103. For unknown reasons, on September 3, 2020, the Special Committee's counsel forwarded Evercore's proposed engagement letter to GDC, who forwarded it to Colorado, who forwarded it to Meyer, Mendoza and Tilley. Meyer's reaction was [REDACTED] There followed emails among Meyer, Colorado, Mendoza and Tilley concerning Evercore's engagement letter.²³ GDC provided comments on the letter to pass on to the Special Committee's counsel. Thus, Lone Star and GDC

²³ These communications are heavily redacted for "privilege" in the Books and Records.

(whether representing Lone Star or FBM) injected themselves even into the Special Committee's retention of a financial advisor.

104. On September 4, 2020, American Securities submitted a revised proposal to acquire all the outstanding shares of FBM for \$18.00 per share. The proposal requested a 30-day exclusivity period and, according to the Information Statement, did not address the TRA.

105. On September 8, 2020, the FBM Board held a meeting, which the Special Committee's counsel attended. "The Board" noted that [REDACTED]

[REDACTED]

[REDACTED] Thus, as of September 8, 2020, the Board determined that a full termination payment to Lone Star under the TRA was a given term for any merger. There was no push back from the Special Committee Defendants or their counsel. The Information Statement did not mention the TRA discussion at the September 8, 2020 Board meeting. The FBM Board reiterated that RBC would conduct discussions with potential buyers. The Special Committee's role would be limited to reviewing the terms of any transaction agreement and making a recommendation to the full FBM Board.

106. At the September 8 meeting, RBC described the proposals by American Securities and [REDACTED]. Both proposals were structured to accelerate Lone Star's sale

of its FBM shares. [REDACTED] proposed a sign and consent structure: Lone Star would sign a written consent as FBM's majority stockholder within a day of [REDACTED] and FBM signing a merger agreement. American Securities' proposal involved a merger agreement with the Company and a stock purchase agreement with Lone Star. Lone Star would sell its FBM shares to American Securities immediately following antitrust and lender approvals.

107. The FBM Board recognized that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

108. On September 10, 2020, the Special Committee held a meeting with RLF and discussed the engagement of Evercore as financial advisor. The Information Statement stated that Evercore had received approximately \$18 million from American Securities in the two-year period preceding the issuance of Evercore's fairness opinion dated November 13, 2020. However, based on the Books and Records produced by the Company, the Special Committee never received a conflict disclosure letter from Evercore.

109. Consistent with the bystander role assigned by the Lone Star dominated Board, the Special Committee simply rehashed the discussion of proposals and next

inability to close [REDACTED] the purchase price would increase by \$0.005 per share on February 1, 2021, and then an additional \$0.005 per share each day thereafter. The ticking fee equated to approximately \$0.15 per share per month or approximately \$6.5 million per month. The proposal also included a \$50 million reverse termination fee that would increase to \$65 million if the nine-month outside date was extended to twelve months and the transaction was terminated due to a regulatory failure or if [REDACTED] failed to close.

115. Two days later, Meyer updated the FBM Board on [REDACTED] latest offer. RBC reported that the market check produced four additional bidders: [REDACTED]

[REDACTED]

[REDACTED]

116. On October 4, 2020, [REDACTED] Lone Star and FBM amended the original January 21, 2020 confidentiality agreement to include [REDACTED] in order to facilitate due diligence on [REDACTED]

117. On October 8, 2020, the FBM Board met and RBC reported on discussions with potential bidders. RBC noted [REDACTED] proposal to acquire FBM for \$18-\$19 per share contemplated the assignment of the TRA to [REDACTED] for no incremental consideration. This was a non-starter for Lone Star as the TRA would simply remain in place.

118. From October 8 until October 27, 2020, Lone Star and RBC controlled the discussions with prospective acquirers, with the Board only receiving occasional emails and the Special Committee doing nothing. On October 18, 2020, Meyer sent an email updating the FBM Board on the discussions Lone Star and RBC had conducted. He characterized [REDACTED]

[REDACTED]

[REDACTED]

119. Underhill and Khan, members of the Special Committee tasked with the purported power to investigate and negotiate a transaction, thanked Meyer for the update on his activities. Khan even remarked: [REDACTED]

120. A day later, on October 19, 2020, [REDACTED] submitted a letter of continued interest to Meyer, noting that, if [REDACTED] was unable to acquire [REDACTED] [REDACTED] was interested in taking FBM private on a stand-alone basis.

121. On October 20, 2020, Meyer had a teleconference with Penn, who indicated American Securities was again interested in acquiring FBM.²⁴ That day, [REDACTED] submitted a proposal to acquire all of FBM's outstanding shares for a

²⁴ IS at 24.

purchase price ranging from \$18.50-\$20.50 per share and payment of the TRA in accordance with its terms. Meyer's focus, however, turned to American Securities, as it was the quickest path for Lone Star to secure a buyout of the TRA along with Lone Star's stake in FBM.

122. On the morning of October 21, 2020, Meyer, Lewis, and RBC discussed messaging to [REDACTED]. These bidders were told that another party had accelerated its work, timing and certainty. This apparently was based on Meyer's discussions with American Securities. Meyer, Lewis and RBC unilaterally decided to demand that [REDACTED] submit a revised proposal by October 28, 2020. They also sought assurance from [REDACTED] that its offer [REDACTED]. The Special Committee and Evercore, which was supposed to be assisting in the market check, were not consulted.

123. Later that night, RBC relayed the details of its calls with the bidders to Meyer and Lewis. RBC reported that [REDACTED] indicated they would submit a re-affirmation on value and detail on timing on October 28, 2020 and expected to finish due diligence on FBM by the end of the month. [REDACTED] said [REDACTED].

[REDACTED]
[REDACTED] In RBC's words, they were [REDACTED].
Meyer asked RBC whether [REDACTED].

[REDACTED] RBC relayed that [REDACTED] who previously submitted a proposal contemplating assignment of the TRA, [REDACTED]

124. The next day, on October 22, 2020, Meyer sent another email to the FBM Board offering his version of the sale discussions he and RBC had been conducting. Meyer [REDACTED]

125. Meyer said that [REDACTED]

[REDACTED] Apparently, the other bidders were required to comply with American Securities' timetable. It is reasonable to infer that American Securities had become Meyer's preferred bidder.

126. Further illustrating that the Special Committee was a sham, Espe, its chairman, [REDACTED]

[REDACTED] Reinforcing the Special Committee's subservience to Lone Star, Underhill [REDACTED]

a process in which the Special Committee was supposed to be actively participating.²⁵

IX. The Lone Star Dominated Board Ends an Active Auction by Granting American Securities Exclusivity

127. On October 24, 2020, RBC and FBM management met with American Securities, a meeting the Information Statement does not mention. On October 27, 2020, Meyer and Penn discussed a potential transaction between American Securities and FBM.²⁶ Without authorization from the Board or Special Committee, Meyer told Penn that [REDACTED]

[REDACTED] Penn said American Securities was considering a price of \$19.25 per share, but would not be able to go higher and at that price point would require exclusivity. Meyer indicated he would take the \$19.25 offer with exclusivity to the FBM Board. Meyer had essentially negotiated the deal he wanted.

128. Later that day, the FBM Board met for 41 minutes to consider American Securities' \$19.25 sign and consent offer with exclusivity and full payment of the TRA. The Information Statement said that the Board discussed American Securities

²⁵ Underhill: [REDACTED]

²⁶ IS at 24.

was “the highest definitive proposed purchase price and that a transaction with American Securities offered the greatest certainty of closing.”²⁷ The minutes reflect no such discussion. The Information Statement says that the Board instructed RBC to direct potential acquirors to submit best and final offers by October 30, 2020.²⁸ The minutes do not reflect such an instruction. It is apparent that the Information Statement was misleadingly drafted to make the process seem more balanced and to promote the American Securities’ deal.

129. According to the Information Statement, American Securities submitted its updated proposal contemplating a \$19.25 per share price on October 28, 2020.²⁹ The updated proposal included a closing condition that no more than 10% of FBM stockholders exercise appraisal rights.

130. On October 28, 2020, ██████████ submitted a revised proposal to acquire all of FBM’s shares for \$18.50 per share and a payout of the TRA in accordance with its terms.

131. Despite FBM having demanded that ██████████ submit a revised proposal on October 30, 2020, between October 28 and October 30, 2020, GDC negotiated

²⁷ IS 24.

²⁸ *Id.*

²⁹ However, the letter itself is dated October 27, 2020.

an exclusivity agreement with American Securities' counsel, Weil, Gotshal & Manges LLP ("Weil"), and discussed the appraisal condition in American Securities' latest proposal.

132. On October 29, 2020, the FBM Board met and discussed the sales process in an executive session. Meyer, controlling the process, led a discussion regarding what the process would look like over the next several days. This "discussion" is not detailed in the meeting minutes, *nor is the meeting even mentioned in the Information Statement.*

133. On October 30, 2020, American Securities submitted a revised \$19.25 proposal that removed the appraisal condition.

134. That same day, ██████ submitted an offer letter reaffirming its willingness to acquire FBM for \$19.00 per share. The letter stated that ██████ expected to secure financing and sign and announce the transaction during the week of November 9, 2020, and simultaneously expected to achieve the same timeline with respect to ██████ ██████ further stated that depending on the outcome of its discussions with ██████ that by November 4, 2020, ██████ could increase its purchase price above \$19.00 per share. In addition, ██████ increased its ticking fee from \$0.005 to \$0.007 per share per day between February 1, 2021 and

closing, if the closing did not occur by January 31, 2021 due to an inability to obtain regulatory approvals or close ██████████ by such date.

135. The FBM Board met the next day to review the current proposals and the fix was in. *First*, according to the minutes, Meyer ██████████ ██████████ The Information Statement embellished, claiming to finish its due diligence would likely result in American Securities withdrawing from the sale process.³⁰

136. *Second*, Meyer said that ██████████ ██████████ The minutes do not indicate that Meyer (or anyone from the FBM Board) considered whether ██████████ might be able to increase its offer for FBM after ██████████ ██████████ Evercore, which had not engaged in any discussions with the Board since its retention, suddenly interjected itself to emphasize ██████████ ██████████ The minutes do not indicate that Evercore or the FBM Board discussed ██████████ increased ticking fee, which would provide additional value to FBM stockholders and protection from the contingencies surrounding ██████████ offer.

³⁰ IS 25.

137. *Third*, following Meyer and Evercore trashing [REDACTED]

[REDACTED] bids, Meyer and RBC [REDACTED]

[REDACTED] The Board claimed that American Securities might exit the sale process (once again) if not granted exclusivity. The full FBM Board, not the Special Committee, determined to end the auction process and to proceed with a transaction with American Securities, including a three-week exclusivity agreement beginning on October 31, 2020.

X. The Special Committee Holds Its First Meeting in Months to Bless the Merger and the Merger Is Approved

138. On November 10, 2020, the Special Committee held a meeting, the first such meeting since September 10, 2020. The Information Statement claimed there was a review of the process, the American Securities’ proposal, the draft merger agreement, and that Evercore then made a presentation “regarding the financial terms of American Securities’ proposal.”³¹ The minutes reflect, however, that

[REDACTED] The Special Committee scheduled a meeting on November 13, 2020 for Evercore to present a final fairness presentation.

³¹ IS 26.

139. The evening before the Special Committee’s November 13, 2020 meeting, Meyer emailed Espe concerning Evercore’s fee. [REDACTED]

[REDACTED]

[REDACTED] That same evening, RLF transmitted a draft of the “TRA Amendment” to the Special Committee. The draft did not contain Annex A, the spreadsheet showing the calculation of the TRA payment.

140. On November 13, 2020, the Special Committee held a separate meeting and then a joint meeting with the Audit Committee. At the Special Committee meeting, Evercore provided a presentation and opined the take-private by American Securities was fair to FBM’s stockholders. The Information Statement does not reflect that, as the minutes state, Evercore [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Special Committee meeting was then adjourned, and the same three directors reconvened a joint meeting of the Special Committee and the Audit Committee. The Special Committee determined to recommend the merger agreement to the Board and the Audit Committee determined

to recommend the TRA amendment to the Board. The Special Committee also awarded Evercore an additional \$1.5 million discretionary fee. Later that day, Espe expressed to Meyer that the Special Committee Defendants were [REDACTED]

141. On November 14, 2020, the FBM Board approved and entered into the merger agreement and related agreements (the “Merger Agreement”). The Board also awarded RBC a \$1.5 million discretionary fee. Following the Board meeting, Lone Star provided the written consent, granting stockholder approval of the Merger without the participation of any other FBM stockholder.

142. On November 18, 2020, Colorado circulated a draft background of the merger section to Meyer and Lewis, who added comments. RLF and RBC also commented on the Information Statement. The draft definitive Information Statement was circulated to Lone Star, the FBM directors, RLF, Evercore, RBC and GDC.

143. The Information Statement was dated December 4, 2020 and told the FBM stockholders they only had until December 24, 2020 to deliver appraisal demands. The Merger closed on January 29, 2020.

XI. The TRTA and the Termination Payment

144. The Audit Committee recommended a draft “Tax Receivable Agreement Amendment” which did not include the calculation spreadsheet. On November 14, 2020, FBM and LSF9 entered into a “Tax Receivable Termination Agreement,” which was substantially different than the draft amendment the Audit Committee reviewed. It included a calculation spreadsheet that was provided to ASP Flag on November 13, 2020 and changed the payment terms. The TRTA was not recommended or approved by the Special Committee or Audit Committee.

145. After the closing of the Merger, Lone Star received a Termination Payment of approximately \$74.8 million for the termination of the TRA pursuant to the TRTA, in addition to the payment of approximately \$8.6 million pursuant to the TRA in January 2021. The Termination Payment was part of the Merger consideration paid by American Securities. The Information Statement describing the “Financing of the Merger” stated that the Equity Commitment Letter for \$1.45 billion included “the termination payment pursuant to the TRA Termination.”³²

146. The Termination Payment was made by FBM but after it had become 100% owned by ASP Flag. The Merger Agreement indicated in its recitals that the TRTA was being concurrently executed by FBM and Lone Star and that the

³² IS 41.

Termination Payment would be made “immediately after, but subject to, the consummation of the Merger.”

147. The recitals and Section 2 of the TRTA recognized that the closing of the Merger would constitute a change of control that would trigger an early termination payment under the TRA. Section 3 of the TRTA provided for the Termination Payment to be made immediately after the Effective Time of the Merger. The release in Section 3 applied to FBM and “its Affiliates, including Parent.” The TRTA defined “Parent” as ASP Flag. Section 4 of the TRTA provided that the TRTA would terminate if the Merger Agreement was terminated. Section 7 of the TRTA made the Parent (i.e., ASP Flag) an express third party beneficiary of the TRTA while expressly disclaiming any third party beneficiary rights to others, such as FBM’s minority stockholders. It also prohibited amendments, modifications, adjustments and assignments “without the prior written consent of Parent.” Section 10 of the TRTA provided that the entire agreement included “[t]he Merger Agreement, the TRA, and this Agreement.” The TRTA was effectively an agreement for ASP Flag to make the Termination Payment.

148. Based on the number of shares outstanding, FBM stockholders would have received approximately \$1.75 per share more in Merger consideration (or roughly \$21.00 per share) if the Termination Payment had not been paid to Lone

Star and those funds had instead been provided to FBM stockholders (including Lone Star).

XII. The Merger Consideration Was Not a Fair Price

149. Evercore's analysis showed that the TRA should not be deducted in valuing FBM's stock. However, Evercore adopted valuations that deducted the highest conceivable amount payable under the TRA from the value of FBM at the upper end of its value ranges. Evercore's analysis should not have subtracted the TRA value.

150. The structure of the transactions effectively subtracted the highest theoretical amount that could be payable to Lone Star under the TRA, based on numerous assumptions favoring Lone Star, from the amount of Merger consideration payable to the stockholders. In other words, the consideration for FBM's stock was reduced by the \$74.8 million Termination Payment and the January 2021 \$8.6 million TRA payment, which were instead paid to Lone Star.

151. Even assuming the TRA was considered in valuing FBM's stock, the amount deducted from the Merger consideration and paid to Lone Star was unreasonable and excessive. There was no discount reflecting the value to Lone Star of the certainty of immediate payment compared to uncertain payment amounts over many years. The assumptions caused the Termination Payment to Lone Star to far

exceed the speculative benefits FBM might possibly have received over the next decade. The TRA payments to Lone Star were based on estimated future cash payments and balance sheet liabilities under the TRA that were provided by FBM management, which was under the control of Lone Star.

152. The Merger was pursued at Lone Star's instigation because Lone Star wanted to exit FBM. The Merger meant the FBM stockholders would never benefit from the tax assets Lone Star claimed to have conferred on FBM because they would be cashed out. The FBM Board had determined that the Merger would not proceed unless the Special Committee approved the Merger. Therefore, the Special Committee had leverage to insist that Lone Star give up some or all of the potential payments under the TRA. Instead, it allowed Lone Star to extract a total of \$83.4 million in TRA payments (i.e., the \$8.6 million payment in January 2021 and the \$74.8 million Termination Payment).

153. Moreover, late 2020 was not an opportune time to sell FBM because the Company's performance, as acknowledged in its 10-Qs for the second and third quarters of 2020, had suffered significantly as a result of the COVID-19 pandemic.

154. Alternatively, FBM could have pursued a combination with [REDACTED] with FBM's stockholders retaining their equity interest and

benefitting from the synergies resulting from the combination. However, Lone Star insisted on a cash-out transaction.

XIII. American Securities [REDACTED] and Acquires Beacon's Interior Business to Merge with FBM

155. On December 21, 2020, American Securities announced it had entered into a definitive agreement to purchase Beacon's interior business for \$850 million. In the announcement, Penn noted the acquisition of Beacon's interior business was a "follow-on transaction" to its purchase of FBM and noted American Securities' intentions to combine the two businesses. Thus, American Securities combined FBM and Beacon's interior business and reaped the synergistic benefits.

CLASS ACTION ALLEGATIONS

156. Plaintiff brings these claims pursuant to Court of Chancery Rule 23 on behalf of all holders of FBM common stock (except Defendants named herein and any person, firm, trust, corporation, or other entity related or affiliated with them and their successors in interest) who were injured by Defendants' wrongful actions as more fully described herein (the "Class").

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

158. The Class is so numerous that joinder of all members is impracticable. While the exact number of class members is unknown to Plaintiff at this time and can only be ascertained through discovery, Plaintiff believes there are thousands of

members of the Class. According to the Information Statement, as of November 20, 2020, there were 20,185,754 shares of FBM common stock issued and outstanding that were not held by Defendants.

159. Questions of law and fact are common to the Class and predominate over questions affecting any individual member of the Class. The common questions include, *inter alia*, the following:

a. Whether FBM and the Director Defendants violated 8 *Del. C.* § 262(d)(2) because they did not give a timely and complete notice of appraisal rights;

b. Whether Lone Star and the FBM directors affiliated with Lone Star breached their fiduciary duties of loyalty and care to Plaintiff and the Class and failed to satisfy their obligation of entire fairness in connection with the Merger;

c. Whether the Special Committee Defendants breached their fiduciary duties of loyalty and care to Plaintiff and the Class in connection with the Merger;

d. Whether Evercore aided and abetted the Special Committee Defendants' breaches of fiduciary duty;

e. Whether RBC aided and abetted the Lone Star Defendants' breaches of fiduciary duty;

f. Whether American Securities aided and abetted Lone Star's and the Director Defendants' breaches of fiduciary duty; and

g. Whether Plaintiff and other members of the Class are entitled to a quasi-appraisal award and/or damages as a result of Defendants' wrongful conduct.

160. Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and the Class have sustained damages as a result of Defendants' wrongful conduct and are entitled to a quasi-appraisal as alleged herein.

161. Plaintiff will fairly and adequately protect the interests of the Class and has no interests contrary to or in conflict with those of the Class that Plaintiff seeks to represent. Plaintiff successfully prosecuted the Section 220 action to obtain the Books and Records. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature.

162. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude maintenance as a class action.

COUNT I

(Against FBM, the Lone Star Defendants, the Special Committee Defendants, American Securities and ASP Flag for Violation of 8 *Del. C.* § 262)

163. Plaintiff repeats and realleges all of the preceding allegations as if set forth fully herein.

A. Defendants³³ Deliberately Made It Difficult for Stockholders to Demand Appraisal

164. Under Section 262, Plaintiff and the Class had a statutory right to appraisal as a result of the Merger. ASP Flag and FBM as constituent corporations to the Merger, American Securities and ASP Flag as the acquirers of FBM shares in the Merger, and Lone Star and the FBM directors as fiduciaries responsible for protecting the rights of the FBM stockholders, all had an obligation to provide that appraisal right in compliance with Section 262 and Delaware law.

165. Defendants structured the Merger to give FBM's stockholders the minimum amount of time to exercise appraisal rights. If the Merger had been subject to a vote of FBM stockholders at a meeting, under Section 262(d)(1) the notice of appraisal would have to be sent "not less than 20 days prior to the meeting," and stockholders would have been able to demand appraisal "before the taking of the vote on the merger." Therefore, the stockholders could have had more than 20 days

³³ In this Count, "Defendants" does not include RBC or Evercore.

to seek appraisal. Had FBM held a stockholders' meeting to vote on the Merger, the New York Stock Exchange's *Listed Company Manual* Rule 401.03 recommends that the proxy statement, which would contain the notice of appraisal, should be sent to the stockholders a minimum of thirty days before the meeting to provide time for submission of proxies. Thus, FBM stockholders would have had at least thirty days to deliver an appraisal demand.

166. Because Lone Star approved the Merger by written consent, 8 *Del. C.* § 262(d)(2) gave FBM the option of sending the Appraisal Notice “before the effective date of the merger” or, as the surviving corporation, “within 10 days” after the Merger’s effective date of January 29, 2021. Defendants chose to send the Appraisal Notice (i.e., the Notice and Information Statement) long before the effective date of the Merger. Therefore, under Section 262(d)(2), stockholders had to demand appraisal “within 20 days after the date of giving such notice.”

167. The Appraisal Notice was purportedly mailed “on or about December 4, 2020.” Defendants chose to mail the Appraisal Notice during the holiday season when the United States Postal Service was in disarray and choked with holiday mail. Defendants knew that, as was widely reported,³⁴ the USPS was experiencing

³⁴ Steve Hutkins, *The 2020 Mail Delays: States & Charts*, <https://www.savethepostoffice.com/2020-mail-delays-stats-charts/> (Feb. 14, 2021);

unprecedented delays in delivering mail during December 2020. The appraisal deadline Defendants set was December 24, 2020 – Christmas Eve. In short, Defendants timed the Appraisal Notice so that stockholders would have little or no chance to exercise appraisal rights.

B. The Appraisal Notice Violated Section 262 Because It Failed to Provide Notice of Appraisal 20 Days Before Appraisal Demands Were Due

168. Where a merger is approved by written consent pursuant to 8 *Del. C.* § 228, Section 262(d)(2) requires that stockholders be given 20 days after the giving of the notice of appraisal to demand appraisal rights. Defendants had a statutory obligation to provide a notice of appraisal rights that was timely, accurate and complete.

169. The Notice represented that “[t]he information statement is dated December 4, 2020, and is first being mailed to stockholders on or about December 4, 2020.”³⁵ The Notice stated that: “[t]his notice and the accompanying information statement constitute notice to you from the Company of the availability of appraisal rights under Section 262 of the DGCL.”³⁶ The Information Statement stated: “[t]his

Hannah Denham and Jacob Bogage, *USPS ‘Gridlocked’ as Historic Crush of Holiday Packages Sparks Delays*, Washington Post (Dec. 15, 2020).

³⁵ Notice at 2.

³⁶ *Id.*

Information Statement constitutes notice to holders of Company Common Stock concerning the availability of appraisal rights under Section 262.”³⁷ Thus, Defendants designated both the Notice and the Information Statement together as constituting the statutorily required notice of appraisal rights.

170. The Notice and Information Statement both said the 20 day deadline for demanding appraisal was December 24, 2020. The vague and imprecise disclosure that the Information Statement “is first being mailed to stockholders on or about December 4, 2020,” and the similar statement in FBM’s December 21, 2020 8-K, make it reasonably conceivable that the Notice and Information Statement were not mailed to all stockholders on December 4, 2020, and may have been mailed later. Thus, it is reasonably conceivable that at least some stockholders were not given the 20 days’ notice that Section 262(d)(2) requires be given for exercising appraisal rights.

C. The December 21, 2020 8-K Was Not a Timely Appraisal Notice

171. On December 21, 2020, three days before the December 24, 2020 deadline for demanding appraisal, FBM filed the Form 8-K. The 8-K stated that “[w]ith this filing” the Company was “supplementing” the Information Statement, which was part of the Appraisal Notice. The 8-K contained four pages of disclosures

³⁷ IS 69.

including nine separate items replacing or adding numerous paragraphs appearing on multiple pages of the Information Statement. Most of the information in the 8-K, including the information concerning the TRA, was known at the time the Information Statement was mailed, but Defendants chose not to disclose it in the Information Statement. This additional and revised information was an important part of the Appraisal Notice and advising the stockholders of their right to fair value of their shares.

172. The 8-K does not say it is being mailed or otherwise being transmitted to FBM stockholders. The 8-K's statement that FBM was changing the Information Statement's disclosure by "filing" the 8-K indicates that the 8-K was not mailed to the stockholders. The 8-K violated Section 262 (d)(2) because it was part of the Appraisal Notice but was not mailed to the stockholders and did not give the stockholders 20 days from the date of the 8-K to demand appraisal.

173. The filing of the 8-K with the SEC and the posting of the 8-K on FBM's website was not valid notice of appraisal rights. Under 8 *Del. C.* § 232(a) a corporation may provide a notice to stockholders required by the DGCL by directing it to the stockholder's mailing address by mail or courier service or by electronic transmission directed to the stockholder's electronic mail address. The 8-K was not provided by mail, courier, or email. The posting of the 8-K on the SEC website or

FBM website did not satisfy the requirements for electronic notice under 8 *Del. C.* § 232(b). The FBM minority stockholders had not consented to receive notices required by the DGCL through some other form of electronic transmission besides email. Moreover, under Section 232(c)(2), posting on an electronic network is only effective if a separate notice of such posting is sent to the stockholders. No such notice was sent. Furthermore, the Information Statement said that:

Information contained on our Internet website does not constitute part of this Information Statement.

174. Even if some stockholders happened to see the 8-K on December 21, 2020 or shortly thereafter, they would not have had time to act on that information by demanding appraisal. The Information Statement directed that appraisal demands must be sent to FBM's General Counsel and Secretary at FBM's mailing address. The Information Statement and Notice did not expressly designate an information processing system for delivery of demands to the Company by electronic transmission as permitted by Section 262(d)(2). Thus, physical delivery of demands to FBM's mailing address was required. Even if a FBM stockholder became aware of the 8-K on or shortly after December 21, 2020, it would be nearly impossible to deliver a demand to FBM by December 24, 2020, particularly given Section 262's requirement that demands must come from a record holder. Getting a demand to FBM by mail through USPS on December 24 would have been absolutely

impossible and even attempting delivery by FedEx, UPS or other courier would have been difficult and uncertain given the huge number of holiday packages.

175. Defendants could have sent the 8-K to the FBM minority stockholders as an amended notice of appraisal rights and given the stockholders twenty days from the giving of such notice to demand appraisal. For example, if the 8-K had been sent to the FBM stockholders on December 21, 2020, the stockholders would have been able to demand appraisal until January 10, 2021. Notice of appraisal rights under Section 262(d)(2) can be given at any point before the effective date of the merger and even up to ten days after the effective date.

176. By December 21, 2020, Defendants knew the Merger was not going to close before January 10, 2021. The Information Statement and Section 1.2 of the Merger Agreement acknowledged that American Securities was not obligated to close the Merger before January 31, 2021. The Merger did not close until January 29, 2021. In short, Defendants could have sent the 8-K to the FBM stockholders and given them 20 days from receipt of the 8-K to demand appraisal, but instead chose to render the 8-K information useless.

177. The 8-K contained information that was necessary to remedy the misleading and incomplete partial disclosure in the Information Statement. The 8-K said that the new and different information in the 8-K “shall supersede or

supplement” the Information Statement. The Information Statement said FBM would make the \$75.5 million Termination Payment “in addition to regular payments” made between the signing and closing of the Merger Agreement. It did not reveal the total amount potentially payable under the TRA or the basis for that amount. The 8-K several times indicated that the total potential TRA payment amount reported on the FBM balance sheet as of September 30, 2020 was \$90 million, which represented “approximately 0.5% x LTM and NTM EBITDA.”

178. The 8-K provided specific information revealing how Evercore accounted for the TRA in its discounted cash flow valuation including the amount Evercore had deducted as estimated TRA liabilities in its high end cash flow analysis (“\$59 million as of December 31, 2024”). It also disclosed that Evercore calculated the discounted value of estimated TRA cash payments from fiscal year 2025 under the Perpetuity Growth Method as “ranging between \$32 million and \$31 million.” The 8-K disclosure on TRA payments showed that Evercore assumed that FBM would pay the entire \$90 million maximum amount on the TRA (\$59 million plus \$31 or \$32 million) with no discount for the risk and uncertainty that the TRA payments would be made.

179. The 8-K also provided substantial non-TRA related information concerning Evercore’s financial analysis including: (i) FBM’s estimated net debt,

(ii) Evercore's calculation of FBM's unlevered free cash flows during the projection period and terminal period under different plans; and (iii) other aspects of Evercore's valuation scenarios.

180. The information in the 8-K concerning Evercore's analyses of the TRA and the value of FBM would have enabled FBM's minority stockholders to make a much more informed evaluation of the strength of Evercore's analysis and the weight to accord Evercore's fairness opinion in determining whether to demand appraisal. Stockholders never got that opportunity.

D. The Appraisal Notice Violated Section 262 Because It Was Misleading and Incomplete

181. The Appraisal Notice also contained misleading and incomplete statements that deprived the stockholders of information material to their decision of whether to seek appraisal. Colorado, Meyer and Lewis participated in drafting the Background of the Merger section of the Information Statement.³⁸ The Special Committee reviewed drafts of the Information Statement and, through its counsel, provided comments. Mendoza, RBC and Evercore also reviewed drafts of the Information Statement. The blatant and numerous omissions, misrepresentations and misleading statements in the Appraisal Notice make it reasonably conceivable

³⁸ FBM has redacted all drafts they reviewed and comments they made as privileged.

that Defendants deliberately chose to conceal and misstate information material to the stockholders' evaluation of the Merger and determination of whether to seek appraisal rights.

(1) *Misleading and Incomplete Descriptions Concerning the Central Role of the TRA in the Sale Process*

182. The Information Statement fails to inform stockholders concerning the TRA's central importance in the formation of the Special Committee and in the sale process. The Information Statement describes the creation of the Special Committee on September 3, 2018 but does not state why it was created.³⁹ A unanimous written Board Consent acknowledges that seven of ten directors then on the FBM Board were affiliated with Lone Star and that a Special Committee was necessary because a possible sale of FBM could trigger an accelerated TRA payment to Lone Star.

183. As early as May 24, 2018, the Board minutes stated that the FBM Board realized there was a conflict of interest in any transaction involving the TRA. The May 24, 2018 Board minutes recognized that [REDACTED]

[REDACTED]

[REDACTED]

³⁹ IS 18.

and the transactions contemplated thereby.⁴² The Information Statement⁴³ represented that Evercore:

reviewed (a) the TRA, and related terms regarding payment upon early termination, furnished to Evercore by management of the Company, and (b) the approach of equity analysts to incorporating the impact of liabilities associated with tax receivable agreements into their target prices for selected public companies[.]

186. The Information Statement represented that in Evercore's Selected Public Company Analysis, "Evercore considered liabilities under the TRA" as part of the calculation of total enterprise value ("TEV") as a multiple of estimated earnings before interest, taxes, depreciation and amortization ("EBITDA"). It then stated that:

Because it is unclear whether or how investors factor these liabilities into the Company's valuation, Evercore did not consider any TRA liabilities to be debt-like items when calculating the low ends of the TEV/EBITDA multiples for the Company, and included the TRA liabilities as reported on the balance sheet as debt-like items when calculating the high ends of the TEV/EBITDA multiples for the Company.⁴⁴

⁴² IS 28, 31.

⁴³ IS 32.

⁴⁴ IS 34.

187. Evercore used the same “bookend” approach in calculating the low end and high end of its TEV/EBITDA range in deriving implied per share equity values for FBM’s stock and in its Illustrative Present Value of Future Share Price Analysis.⁴⁵

188. Evercore also used the bifurcated low end/high end approach to the TRA in its discounted cash flow analysis:

In arriving at implied per share equity value ranges for the Company, Evercore considered the impact of the Company’s TRA based on estimated future cash payments and balance sheet liabilities under the TRA that were provided by management of the Company. Under the Exit Multiple Method, Evercore did not treat the estimated TRA liabilities on December 31, 2024 as debt-like items when utilizing the low end of its reference range of exit TEV/EBITDA multiple and did treat the estimated TRA liabilities on December 31, 2024 as debt-like items when utilizing the high end of its reference range of exit TEV/EBITDA multiple. Under the Perpetuity Growth Method, using discount rates ranging from 9.0% to 10.0%, Evercore calculated the discounted value as of December 31, 2024 of the estimated cash payments under the TRA from fiscal year 2025 on. The terminal value of the Company as of December 31, 2024 using the Perpetuity Growth Method was then adjusted downward using the range of these calculated values for remaining TRA payments.⁴⁶

⁴⁵ IS 34-35.

⁴⁶ IS 36.

189. The Information Statement’s discussion of Evercore’s opinion also stated:

In light of the TRA between the Company and the Principal Stockholder, Evercore also reviewed and considered selected public market trading price targets with respect to initial public offerings of companies party to tax receivable agreements over the past three years. Evercore determined that, although each situation is unique and there are many company specific factors to consider, in a majority of cases, equity research analysts appear to ignore liabilities associated with tax receivable agreements when deriving price targets. Evercore also noted that three of the equity research analysts that cover the Company incorporated the TRA in their price targets while four did not, and that equity research analysts’ price targets for the Company ranged from \$16.00 to \$20.00 per share. The Company trading price targets were not considered part of Evercore’s financial analyses in connection with rendering its opinion.⁴⁷

190. FBM’s December 21, 2020 8-K contained several revised statements concerning Evercore’s TRA analysis:⁴⁸

Evercore reviewed the total enterprise value (“TEV”) of the selected public company as a multiple of estimated earnings before interest, taxes, depreciation and amortization (“EBITDA”) for the next twelve months (“NTM”) and the last twelve months (“LTM”). The financial data of the Company and the selected public company used by Evercore for this analysis were based on Company filings and other publicly available information.

⁴⁷ IS 38.

⁴⁸ 8-K at 2-3.

In addition, Evercore considered liabilities under the TRA **in the amount of \$90 million as reported on the balance sheet of the Company as of September 30, 2020, which represents approximately 0.5x LTM and NTM EBITDA.** Because it is unclear whether or how investors factor these liabilities into the Company's valuation, Evercore did not consider any TRA liabilities to be debt-like items when calculating the low ends of the TEV/EBITDA multiples for the Company, and included the TRA liabilities as reported on the balance sheet as debt-like items when calculating the high ends of the TEV/EBITDA multiples for the Company.

* * *

Evercore first used the Company's historical TEV/NTM EBITDA multiples for the three years ending on November 12, 2020, based on Company filings and other publicly available information, and derived an NTM multiple reference range of 6.25x to 7.75x. Based on the Company's estimated net debt **of (i) \$200 million under the Risk Plan, (ii) \$175 million under the Base Organic Plan and (iii) \$445 million under the Acquisitions Plan** (calculated as total debt less cash and cash equivalents **and including capital lease obligations in the amount of \$5 million**), **in each case as of January 1, 2024 and based on Forecasts provided in the Management Plan,** Evercore derived the theoretical future stock price for the Company at the beginning of each fiscal year through 2024. Evercore did not treat the TRA liabilities **(in the amount of \$90 million as reported on the balance sheet of the Company as of September 30, 2020)** as debt-like items when utilizing the low end of its reference range of TEV/EBITDA and did treat the TRA liabilities as debt-like items when utilizing the high end of its reference range of TEV/EBITDA. Evercore then discounted the projected per-share equity value as of January 1, 2024, to December 31, 2020 using discount rates of 13.5% to

14.5% for each of the three plans. The discount rates were based on Evercore's judgment of the estimated range of cost of equity for the Company based on its professional judgment given the nature of the Company's business and its industry.

* * *

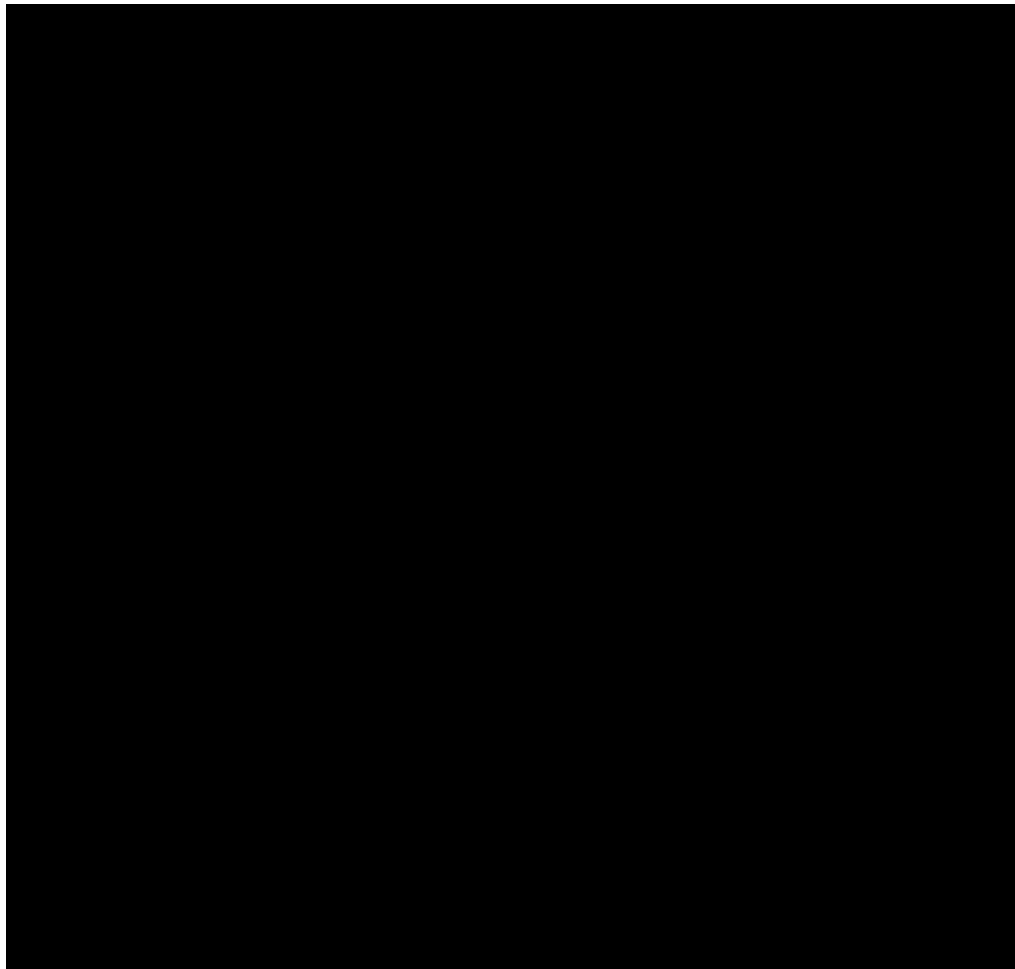
In arriving at implied per share equity value ranges for the Company, Evercore considered the impact of the Company's TRA based on estimated future cash payments and balance sheet liabilities under the TRA that were provided by management of the Company. Under the Exit Multiple Method, Evercore did not treat the estimated TRA liabilities on December 31, 2024 as debt-like items when utilizing the low end of its reference range of exit TEV/EBITDA multiple and did treat the estimated TRA liabilities **of \$59 million as of December 31, 2024** as debt-like items when utilizing the high end of its reference range of exit TEV/EBITDA multiple. Under the Perpetuity Growth Method, using discount rates ranging from 9.0% to 10.0%, Evercore calculated the discounted value as of December 31, 2024 of the estimated cash payments under the TRA from fiscal year 2025 on, **ranging between \$32 million and \$31 million.** The terminal value of the Company as of December 31, 2024 using the Perpetuity Growth Method was then adjusted downward using the range of these calculated values for remaining TRA payments.

This information was not timely and was not sent to FBM stockholders.

191. The Information Statement's description of Evercore's treatment of the TRA in its analysis and opinion was misleading and incomplete partial disclosure. The Information Statement said Evercore used its bifurcated low end/high end

approach to the TRA “[b]ecause it was unclear whether or how investors factor [potential TRA] liabilities into the Company’s valuation.” It further said that Evercore had reviewed market trading prices of companies with TRAs that did IPOs in the last three years. Evercore’s November 10 and November 13, 2020 presentations to the Special Committee demonstrate that these statements are misleading and incomplete partial disclosure.

192. Evercore’s November 10 and November 13 presentations contained the following statements:



[REDACTED]

193. If told that [REDACTED]

[REDACTED]

[REDACTED] a reasonable

stockholder might question whether [REDACTED]

[REDACTED]

194. The Information Statement stated that Evercore reviewed price targets of companies with TRAs who went public in the last three years. Given this partial disclosure, the results of Evercore's review should have been disclosed. Specifically, [REDACTED]

[REDACTED]

[REDACTED] This was a deliberate misrepresentation of the data.

195. The disclosure of Evercore's bookend approach is also misleading and incomplete because the approach is a non-sequitur. Even assuming there was uncertainty as to whether and how investors consider potential TRA payments, it does not follow that the TRA should be treated differently at the low end from the high end. Evercore cites no evidence that stockholders or analysts take such a bifurcated view based on the different ends of a valuation range and cites no authority for its bookend approach.

196. Evercore employed the disparate treatment of the TRA so that the low end of its valuation ranges would not be significantly below FBM's current stock price and the high end would be below the \$19.25 merger price. In the Management Acquisition Plan, Evercore's implied per share equity value range at the high end with the TRA excluded would be \$19.38 to \$21.35. By subtracting the TRA out, the range drops to \$17.47 to \$20.43. With the TRA excluded at the low end of the range the implied equity value range was \$13.45 to \$15.25, which bracketed the market price of FBM's stock. However, inclusion of the TRA drops the low end of the range to \$11.54 to \$14.36, entirely below FBM's then current market price.

197. Under the "Management Risk Plan", Evercore's low end valuation range with the TRA included extended from \$6.85 to \$9.60, far below the market price of FBM's stock. This strongly indicates that the market does not treat the TRA as debt in valuing FBM.

198. FBM's own quarterly earnings releases indicate that adjusted EBITDA and adjusted EBITDA margin, which do not treat TRA payments as debt liabilities to be deducted from value, "are important metrics used by management as a means by which it assesses financial performance" and "are also frequently used by

analysts, investors and other interested parties to evaluate companies in the Company's industry."⁴⁹

199. The Information Statement said four times with respect to Evercore's various public company analyses that:

Evercore compared ranges to the closing price of the shares of Company Common Stock on November 12, 2020 of \$14.91 and the Merger Consideration of \$19.25.⁵⁰

Thus, it is apparent that Evercore used its bifurcated approach to including/excluding the TRA in order to make its comparisons to market price and the Merger consideration work out favorably to justify the Merger.

200. The Information Statement represented that three of seven analysts covering FBM "incorporated the TRA in their price targets." Evercore's November 10, 2020 and November 13, 2020 presentations to the Special Committee also represented that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁹ *E.g.* FBM November 2, 2020 Third Quarter 2020 Earnings Release at 2.

⁵⁰ IS 35-37.

201. These Evercore presentations claim that [REDACTED]

[REDACTED]

[REDACTED]

In fact, [REDACTED] contains no such statement and bases its analysis on EBITDA. The reference to [REDACTED] indicate Evercore was quoting some analysis RBC had done as FBM’s financial advisor to try to justify the merger price, not the report of independent RBC research analysts. Yet Evercore claimed that the “Source” of the quotes and the other information in this portion of its presentation was “Wall Street research and Fact Set as of 11/12/2020.”⁵¹

202. Barclay’s November 3, 2020 analyst report stated that its price target “removes the \$81 mm present value of the TRA payments from equity value” and specifically subtracts out the “TRA liability (PV Est.)” In contrast, Stephens November 3, 2020 report stated that its valuation “includes the Company’s estimated present value of their TRA, which is currently ~ \$60 million.”

⁵¹ *Id.*

(3) *Misleading and Incomplete Disclosure of Evercore's Fee*

203. The Information Statement discloses that FBM has agreed to pay a \$1.5 million fee for its fairness opinion, a discretionary fee of up to \$1.5 million and a transaction fee of “approximately \$4.0 million, based upon a percentage of the transaction value of the Merger.”⁵² The disclosure misleadingly indicates the fees are based on the Merger, but a portion of those fees was tied to the \$75 million Termination Payment to Lone Star. A reasonable stockholder would find it material that Evercore’s engagement letter provided for a larger fee if the transaction resulted in a termination of the TRA. This meant Evercore got the same fee whether the \$75 million went to the stockholders as Merger consideration or to Lone Star as the Termination Payment. Thus, the financial advisor that was supposed to assist the Special Committee in representing the interests of the minority stockholders had no financial incentive to push back on the TRA payments going to Lone Star and, in fact, Evercore and the Special Committee did not push back.

204. Specifically, the Information Statement said:

The company has also agreed to pay Evercore an additional transaction fee, estimated to be approximately

⁵² IS 39.

\$4.0 million, based upon a percentage of the transaction value of the Merger⁵³

The “Merger”, as described in the Information Statement, did not include the Termination Payment. However, the calculation of Evercore’s “Transaction Fee” is based on the “Transaction Value” which includes “the total amount paid upon a change of control to settle the company’s existing tax receivable agreement.”

205. The Information Statement also stated that Evercore might receive “a discretionary fee of up to \$1.5 million based upon, among other things, the resources expended by Evercore in the course of the engagement, the satisfaction of the Special Committee with Evercore’s services and the benefit to the Company of the successful conclusion of the engagement.”⁵⁴ Having made partial disclosure concerning Evercore’s Discretionary Fee, Defendants were required to provide a complete and accurate account. They did not. The Information Statement did not disclose that the Special Committee had already approved the \$1.5 million fee at its November 13, 2020 meeting.⁵⁵ Nor did it disclose [REDACTED] [REDACTED] or that the

⁵³ IS 39.

⁵⁴ *Id.*

⁵⁵ IS 26, 39.

Special Committee and Board had determined to pay each of Evercore and RBC an additional \$1.5 million in fees.

206. The Information Statement repeatedly cited the Special Committee receiving the presentations and opinions from Evercore as a basis for the Special Committee's approval and recommendation of the Merger.⁵⁶ In assessing the weight to assign to Evercore's opinions and analyses, including the extensive discussion in the Information Statement, a reasonable stockholder would want a complete and accurate account of the bases for Evercore's fee and the views of FBM directors of Evercore's performance. Instead, the stockholders got misleading partial disclosure.

(4) Misleading and Incomplete Descriptions of the TRA and TRTA

207. The Information Statement does not contain a complete and accurate summary of the TRA. Buried in the back is partial disclosure in two sentences vaguely describing the TRA in only the most very general way:

In connection with its initial public offering in 2017, the Company entered into the TRA with the Principal Stockholder, in which the Company agreed to make specified future payments to the Principal Stockholder relating to tax attributes generated to the Company's benefit. The TRA generally provides for the payment by the Company to the Principal Stockholder of 90% of the net cash savings, if any, in the U.S. and Canadian federal, state, provincial and local income taxes, that the Company and its subsidiaries actually realize (or are deemed to

⁵⁶ IS 5, 26, 28, 31-39.

realize in certain circumstances described below) in periods after the initial public offering as a result of certain enumerated tax assets (*e.g.*, tax basis), with the Company retaining the benefit of the remaining 10% of these cash savings.⁵⁷

208. The Information Statement did not describe the nature or extent of the “tax attributes generated to the Company’s benefit.”⁵⁸ It did not describe the assumptions (such as an assumed state and local tax rate of 5%) that would make the TRA payments greater than any tax benefit FBM would realize, nor even mention that the TRA payments might exceed the supposed tax benefits.⁵⁹ The Information Statement stated that there were tax benefits the Company would be “deemed to realize in certain circumstances described below,” but it did not identify those benefits and there is no description “below” of the “certain circumstances.”

209. The Information Statement did not describe the provisions of the TRA regarding early termination and acceleration upon a change of control (including Lone Star’s right to elect to terminate) or the early termination payment.⁶⁰ It also did not describe the obligation of Lone Star affiliated directors to exclude themselves

⁵⁷ IS 65.

⁵⁸ *Cf.* Prospectus 16; TRA Section 1.01 “Pre-IPO and IPO Related Tax Assets;” FBM 10-K FYE 12/31/19 at 27.

⁵⁹ *Cf.* Prospectus 47; TRA Whereas Clause, Section 1.01 “Valuation Appraisal.”

⁶⁰ TRA Section 4.01(d), Section 4.03.

from all deliberations and actions of the FBM Board related to determinations under the TRA,⁶¹ including an agreement for early termination, the determination of the early termination payment and any termination of the TRA, such as the TRTA.

210. The Information Statement's disclosures concerning the interests of the FBM directors in the Merger, TRA and Termination Payment are misleading and incomplete partial disclosure. The Information Statement acknowledged that "[c]ertain members of our Board have an interest" in the TRA, but claimed that Kahn and Underhill have "a de minimis interest in the TRA that each has confirmed not to be material to him."⁶² The Information Statement does not disclose the nature or amount of their TRA interests. The stockholders were entitled to the facts concerning Kahn and Underhill's interests in the TRA and to make their own assessments of whether those interests were de minimis and material to the stockholders, not to have to rely on the self-interested opinions of Kahn and Underhill as to what was material to them.

211. On pages 43-44, the Information Statement indicates that Khan and Underhill each had 5,000 Units in the LSF9 LTIP and that the Merger was expected to result in a cash payout monetization event for the LTIP. On page 64 the

⁶¹ TRA Section 7.16(e).

⁶² IS 6, 45, 65.

Information Statement indicated Kahn and Underhill each were the beneficial owner of 13,743 FBM shares with a footnote stating that each “[o]wns interests in entities which own direct or indirect non-controlling interests in LSF9 Cypress Parent 2 LLC and therefore expressly disclaims any beneficial ownership of our common stock owned by LSF9 Cypress Parent 2 LLC.” The expected value of Khan and Underhill’s LTIP pool units was \$14,700 each. That would equal an additional \$1.07 for each of their 13,743 FBM shares. In effect, they received \$20.32 for their shares, while the minority stockholders got \$19.25.

212. The Information Statement also admitted that “certain members of the Board” affiliated with Lone Star had an interest in the TRA,⁶³ but does not identify the specific directors or the nature or amount of this interest. Numerous directors had a direct monetary interest in the TRA, an interest not shared with the FBM minority stockholders.

213. The Information Statement’s disclosure concerning the TRTA was also misleading and incomplete partial disclosure. The Merger Agreement in its recitals says that the TRTA is “attached hereto as Exhibit A.” However, the TRTA is not attached to the Merger Agreement, which is Annex A to the Information Statement.

⁶³ IS 6, 45, 65.

While referenced in a few spots in the Information Statement, the TRTA was only described in a single paragraph toward the end of the Information Statement:

In connection with the execution and delivery of the Merger Agreement, the Company and the Principal Stockholder entered into the TRA Termination Agreement, pursuant to which such parties agreed to terminate the TRA, immediately after the Effective Time, on the terms set forth in the TRA Termination Agreement. In connection with the termination of the TRA, the Company will pay a termination payment to the Principal Stockholder in an amount calculated in a manner consistent with the methodology specified in the TRA (the “TRA Termination Payment”). It is currently estimated that the TRA Termination Payment will be, in the aggregate, approximately \$75.5 million in addition to regular payments made between signing and closing under the terms of the TRA. The estimate of the TRA Termination Payment is based on certain assumptions, including the anticipated timing of the closing and the applicable LIBOR rate. The TRA Termination Agreement also provides that upon the payment of the TRA Termination Payment, the Principal Stockholder will release the Surviving Corporation, Parent and their affiliates from all claims and obligations related to the TRA. In the event the Merger Agreement is terminated, the TRA Termination Agreement will no longer be of any force and effect.⁶⁴

214. The partial disclosure that the Termination Payment was “calculated in a manner consistent with the methodology specified in the TRA” was misleading and incomplete. The Information Statement did not provide the calculation or the

⁶⁴ IS 65.

method of calculation. A stockholder could not tell whether the calculation was “consistent with the methodology specified in the TRA” because the Information Statement did not describe the TRA’s methodology. The meaning of the vague statement that the calculation was “in a manner consistent with” the TRA’s methodology does not tell a stockholder whether the calculation was done in the same manner and by the same methodology as the undescribed terms of the TRA.

215. Section 3 of the TRTA specified that the Termination Payment would be “calculated using the spreadsheet entitled ‘FBM LTIP Payout Calculation’” that was provided to ASP Flag on November 13, 2020 and that a summary example of the spreadsheet output was attached to the TRTA as Annex A. The TRTA that FBM filed with the November 2020 8-K did not include the Annex. The spreadsheet and Annex were not included in the Information Statement and were never publicly available.

216. Section 3 of the TRTA also provided that “the Termination Payment shall be calculated using a tax rate of 26%.” The Information Statement contained no summary or description of the calculation of the TRA payment, including assumed tax rate and other assumptions used in that calculation.

217. The Information Statement said the Termination Payment would be, “in the aggregate, approximately \$75.5 million in addition to regular payments made

between signing and closing under the terms of the TRA.” This disclosure does not include the amount of those “regular payments” though the payment could be readily calculated or estimated. The reference to “in the aggregate” is confusing as it does not say what is being aggregated and suggests multiple payments are being combined. Section 3 of the TRTA also provides that the Termination Payment could be as much as \$84,643,870. This information was also missing from the Information Statement.

218. The Information Statement acknowledged that the estimated Termination Payment “is based on certain assumptions” and cites time of closing and the LIBOR rate. However, it fails to mention the more fundamental assumptions under the TRA, such as the 5% assumed tax rate for state and local taxes or the assumed combined federal, state and local tax rate of 26%. Furthermore, it does not mention the most important assumption regarding the accelerated payment: the assumption that FBM would have sufficient taxable income and tax liability to fully utilize all the purported tax benefits.⁶⁵ And the Information Statement did not include the extremely material fact that the accelerated payment “made years in

⁶⁵ Cf. Prospectus 47; FBM 10-K fye 12/31/19 at 27.

advance of the actual realization, if any, of the anticipated future tax benefits ... may be significantly greater than” the tax benefits FBM realizes.⁶⁶

219. As the references to the disclosures in the Prospectus and 10-Ks illustrate, Defendants already had drafted and in hand material information concerning the TRA and TRTA that could and should have been provided to the FBM stockholders in the Information Statement. They deliberately chose not to provide it.

(5) *Misleading, Incomplete and Inaccurate Description of Merger Discussions and the TRA*

220. The Information Statement does not contain a complete and accurate summary of discussions and negotiations leading to the Merger Agreement and Termination Payment. A comparison of the Information Statement with Board and Special Committee meeting minutes and other Books and Records shows that material facts were misstated or omitted. Numerous examples are cited herein.

221. For example, as described above, the Information Statement omitted important information Meyer conveyed at the August 17, 2020 Special Meeting, including that [REDACTED]

[REDACTED] Meyer also knew [REDACTED]

⁶⁶ Prospectus 47; FBM 10-K (December 31, 2019) at 27.

223. As discussed above, the descriptions in the Information Statement deliberately and repeatedly omitted references to the TRA during Lone Star's merger discussions and Board and Special Committee meetings.

(6) *Misleading and Incomplete Descriptions of the Relationship of RBC and GDC with Lone Star and RBC's Financial Advisor Fees*

224. The Information Statement either fails to provide material information or provides misleading partial disclosures concerning FBM's advisors in the Merger. The Information Statement discloses that RBC and GDC "each...has...a long-standing relationship with the Company."⁶⁷ Yet, the Information Statement provides no information as to the nature of those relationships. Worse, the Information Statement is completely silent as to Lone Star's relationships with GDC and RBC. The disclosure of the Company's long relationships with GDC and RBC was a misleading partial disclosure without the disclosure that GDC and RBC also had long-standing (and much deeper) relationships with Lone Star.

225. The Information Statement shows that RBC and GDC were extensively involved in the Merger negotiations and states that the Special Committee's recommendation of the Merger was based on the terms having been negotiated

⁶⁷ IS 17.

“among sophisticated parties and their respective legal and financial advisors.”⁶⁸ Indeed, RBC and GDC frequently attended Special Committee meetings.⁶⁹ In contrast, the role of the Special Committee’s legal and financial advisors was quite limited. Given the central roles of GDC and RBC, full disclosure concerning relationships and compensation was material.

226. The Information Statement stated that FBM had agreed to pay RBC a fee of approximately \$8.3 million “for its services as financial advisor to the Company in connection with the Merger.” It did not disclose that part of RBC’s fee was based on the \$74.8 million Termination Payment paid to Lone Star.

227. The Information Statement documented the extensive involvement of RBC and GDC in bringing about the Merger and stated that the Special Committee relied on the terms of the Merger having been negotiated by the Company’s legal and financial advisors.⁷⁰ It revealed that RBC would receive a fee estimated at \$8.3 million for services as the Company’s financial advisor.⁷¹ The Information Statement also said the Board consulted “outside legal and financial advisors” in

⁶⁸ IS 17-27, 29.

⁶⁹ IS 18-19, 21.

⁷⁰ IS 17-27, 29.

⁷¹ IS 41.

evaluating and recommending the Merger.⁷² A reasonable stockholder would find the amounts FBM and Lone Star had paid RBC in the past material, especially considering: (i) RBC headed the sales process and interacted with potential acquirers; and (ii) RBC's conflict because of its fee interest in the Termination Payment. A reasonable stockholder would find it material that Lone Star paid RBC, the advisor purportedly representing the Company, [REDACTED] [REDACTED] compared to receiving just \$5.9 million from the Company in the same time period. Yet, this information is nowhere to be found in the Information Statement.

228. The Information Statement is silent as to the relationship between Lone Star and GDC. A reasonable FBM stockholder would find it material that GDC has represented Lone Star in billions of dollars in deals in the past, including Lone Star's \$7.6 billion acquisition of Home Properties, its \$1.4 billion acquisition of Hanson Building Products, and its divestiture of American Bath Group, LLC. At the March 8, 2019 Special Committee meeting, FBM's General Counsel stated that [REDACTED] [REDACTED] and

⁷² IS 31.

another firm was the Company's outside counsel. The Information Statement's description of the meeting omits that information.⁷³

229. The Information Statement states that Lone Star in March 2019 proposed waivers so RBC and GDC could represent Lone Star but that after Lone Star abandoned acquiring FBM's remaining shares there were no more waiver discussions.⁷⁴ The Information Statement describes the January 21, 2020 Board meeting and indicates that GDC was there.⁷⁵ It omits that GDC had attended as

[REDACTED] The Information Statement fails to make clear whether, during various points in the sales process, GDC and RBC were representing FBM or Lone Star. The Special Committee never granted Lone Star a waiver of any kind, and the two advisors were representing the Company. A reasonable stockholder would find it material to have complete and accurate information about whom RBC and GDC were representing and when.

230. Defendants' violation of Section 262 and disclosure violations effectively denied appraisal rights to the stockholders. Plaintiff and the Class are entitled to a quasi-appraisal remedy.

⁷³ IS 19.

⁷⁴ *Id.*

⁷⁵ IS 20.

COUNT II

(Against the Lone Star Defendants for Breach of Fiduciary Duty)

231. Plaintiff repeats and realleges all of the preceding allegations as if fully set forth herein.

232. As FBM's controlling stockholder, Lone Star owed the Company's public stockholders the fiduciary duties of loyalty and care. As a result, in connection with the Company's sale, Lone Star had a duty not to benefit itself at the expense of FBM's common stockholders. The Lone Star affiliated directors had the same duties.

233. Entire fairness applies when a controlling stockholder stands on both sides of a transaction. Lone Star and the Lone Star affiliated directors stood on both sides of the Merger because it triggered the \$74.8 million Termination Payment to Lone Star. Entire fairness also applies when a controlling stockholder and its affiliates exploit their position of leverage on the sell-side to extract different consideration or derive some unique benefit from the transaction not shared ratably with the other the stockholders. The Lone Star Defendants used their position of leverage to extract a transaction where Lone Star would receive \$74.8 million under the TRTA that was not shared with the other stockholders. Lone Star's gain was the other stockholders' loss.

234. Despite admitting their conflict of interest, the Lone Star Defendants controlled the sale process from start to finish. They initiated and timed the transaction and extracted a structure that would result in Lone Star receiving \$74.8 million under the TRTA. They negotiated with bidders and relegated the Special Committee to the status of passive observers.

235. The Lone Star dominated Board approved the transactions and then Lone Star consented to the transaction using its majority voting power. Because there was no majority of the minority vote, the existence of the Special Committee (even if it had been disinterested and functioned effectively) cannot avoid entire fairness review. The Information Statement contains misleading partial disclosures concerning the initiation, timing, negotiation, and structure of the Merger.

236. The Merger was deliberately structured and the Appraisal Notice was deliberately timed to give the stockholders little or no chance to exercise appraisal rights. As discussed above, the Appraisal Notice was untimely, misleading and incomplete. It was both noncompliant with Section 262(d)(2) and a breach of the Lone Star Defendants' duty of loyalty.

237. As a result of the Lone Star Defendants' breach of fiduciary duty, Plaintiff and the Class suffered substantial harm, as alleged herein, for which there is no adequate remedy at law.

COUNT III

(Against the Special Committee Defendants for Breach of Fiduciary Duty)

238. Plaintiff repeats and realleges all of the preceding allegations as if fully set forth herein.

239. As FBM directors, the Special Committee Defendants owed the Company's public stockholders the fiduciary duties of loyalty and care. As a result, in connection with the Company's sale, the Special Committee Defendants had an obligation to maximize stockholder value. They were likewise required to refrain from benefitting themselves at the expense of FBM's common stockholders.

240. The Special Committee was not disinterested because Kahn and Underhill had a direct financial interest in the Termination Payment and LTIP that was adverse to the interest of FBM's minority stockholders in maximizing their Merger consideration.

241. Despite the Special Committee's authority to participate in negotiations and say no to a deal, and the Special Committee's *raison d'être* to protect against the conflict of the TRA, the Special Committee Defendants acquiesced to Lone Star's control of the sale process and a payout of the TRA in connection with the Merger. The Special Committee Defendants depended entirely on reports from Lone Star and its conflicted advisors, RBC and GDC. The Special Committee did not

assert control over its sources of information and relied on advisors (RBC and GDC) whose loyalties were divided between Lone Star and the Lone Star dominated FBM Board, and did not run to the Special Committee.

242. The Special Committee was dominated by the influence of the controlling stockholder resulting in its members being more independent in appearance than in substance. It did not evidence any ability to push back against the asserted will of the controller. The failure to even ask for a majority-of-the-minority vote does not inspire confidence that the Special Committee was willing or even able to push back on Lone Star. No member of the Special Committee ever objected to Lone Star's repeated shifts in transactions pursued or Lone Star's insistence on controlling all contacts with potential transaction partners. Instead, they acquiesced to playing an extremely limited, almost invisible, role in the sale process. Furthermore, the Special Committee never sought any concession from Lone Star on the TRA in exchange for supporting Lone Star's desire to exit the Company.

243. The Special Committee had an obligation to get the highest value reasonably attainable for the minority stockholders. It failed in that duty. It never directly engaged with potential bidders or Lone Star and never sought to have less of the overall consideration go to Lone Star and more go to the minority

stockholders. It agreed without question to Lone Star's calculation of the maximum conceivable payment under the TRA that Lone Star could possibly extract. It never sought to use the leverage created by Lone Star's desire to exit FBM or the Special Committee's power to say no to a sale to extract concessions from Lone Star concerning the TRA. Nor did the Special Committee consider that Lone Star should compromise because of the certainty of an accelerated TRA payment compared to potential payments over time that were dependent on future income and other variables.

244. The discussions between Lone Star and the Special Committee were not vigorous and spirited, consistent with arm's-length negotiations. There was no evidence that the Special Committee was not colluding with Lone Star to the detriment of the minority stockholders. The Merger was unfair to FBM's minority stockholders and the Special Committee Defendants failed to protect the interests of those stockholders.

245. The availability of appraisal rights was purportedly a material factor in the Special Committee's recommendation.⁷⁶ Yet the Special Committee Defendants did not protect the minority stockholders' right to appraisal. They did not ensure

⁷⁶ IS 28.

that FBM and the Board complied with Section 262's requirement for timely, accurate and complete notice of appraisal rights. Moreover, the Special Committee's counsel received drafts of the Information Statement which they were duty bound to forward to the Special Committee Defendants for review. Thus, the glaring omissions, misrepresentations and partial disclosures in the Information Statement, particularly relating to the discussions of the TRA, the terms of the TRA and TRTA and Evercore's analysis, were known to the Special Committee Defendants. However, in violation of their duty of loyalty, they chose not to correct them.

246. The Special Committee Defendants also were complicit in the manipulative timing of the Appraisal Notice, which did not comply with Section 262(d)(2). They agreed to the "sign and consent" structure of the Merger though that would necessarily restrict the time for the minority stockholders to seek appraisal. They breached their fiduciary duty to the minority stockholders they were supposed to represent by giving those stockholders little or no chance to exercise appraisal rights.

247. The Special Committee further failed to protect the appraisal rights of the minority stockholders by failing to provide them with twenty days to demand appraisal after the 8-K was filed and failing to have the 8-K sent to the stockholders.

248. As a result of the actions of the Special Committee Defendants, Plaintiff and the Class have been harmed.

249. Plaintiff and the other members of the Class have no adequate remedy at law.

COUNT IV

(Against Evercore for Aiding and Abetting the Special Committee Defendants' Breaches of Fiduciary Duty)

250. Plaintiff repeats and realleges all of the preceding allegations as if fully set forth herein.

251. Evercore aided and abetted the breaches of fiduciary duty by the Special Committee Defendants.

252. The Special Committee Defendants had a fiduciary relationship and, as alleged above, breached their fiduciary duties of loyalty and care. Evercore knowingly participated in fiduciary breaches of care and loyalty by the Special Committee Defendants. As a result of Evercore's aiding and abetting, Plaintiff and the Class were deprived of additional Merger consideration from the sale of FBM from third parties and from a reduction or elimination of TRA payments to Lone Star. Evercore's aiding and abetting also deprived Plaintiff and the Class of an opportunity to make an informed choice concerning appraisal rights.

253. Evercore contracted to provide the Special Committee with financial advisory services as to a possible merger. Evercore’s obligations included providing advice to the Special Committee on an appropriate transaction process, assisting the Special Committee’s consideration of proposals and “recommending the appropriate course of action to the Special Committee.” Thus, Evercore was contractually obligated to participate in the Special Committee process.

254. In seeking to be retained by the Special Committee, Evercore made representations concerning its understanding of and expertise in tax receivable agreements and their impact on stock price and value. It identified the benefit of an accelerated TRA payment to Lone Star as a key issue for the Special Committee. Evercore acknowledged that the benefit of such an accelerated payment could result in Lone Star’s interests not being aligned with the minority stockholders. Evercore’s TRA experience and analysis was a key reason Evercore was retained to advise the Special Committee.

255. In seeking to be retained by the Special Committee, Evercore also represented that it would deliver independent advice, stating that [REDACTED]

[REDACTED]

[REDACTED]

256. Evercore understood that “the Role and Function of the Special Committee” included:

[REDACTED]

It also understood that the Special Committee must remain independent, consider and evaluate all material information, be fully informed of all relevant factors and get advice from financial advisors. Further, Evercore understood that the Special Committee must effectively negotiate on behalf of FBM and the minority stockholders, including [REDACTED]

[REDACTED]

257. Though Evercore recognized that Lone Star having an interest in an accelerated payment under the TRA and TRTA would create a conflict, it insisted that its transaction fee include a percentage of the amount of Lone Star’s accelerated payment. This undermined its independence, rendered it interested and conflicted and eliminated any incentive to seek, and advise the Special Committee to seek, more Merger consideration for the minority stockholders and a lower TRA payment for Lone Star. Evercore proposed the conflicting fee arrangement and entered into the engagement letter though both Evercore and the Special Committee Defendants

recognized that the fee structure was contrary to the Special Committee Defendants' duties of loyalty and care.

258. Evercore knew the duties of the Special Committee, had an obligation to advise and recommend an appropriate course of action to the Special Committee and knew or had reason to know that the Special Committee Defendants had not complied with their fiduciary duties. Therefore, Evercore had actual or constructive knowledge that the conduct of the Special Committee Defendants was legally improper and knowingly participated in the breaches of care and loyalty by the Special Committee Defendants.

259. Evercore participated in and directly contributed to the Special Committee's wrongful decisions. By presenting inaccurate and incomplete information and manipulated data, it facilitated and induced the Special Committee's fiduciary breaches of loyalty and care. Evercore's assistance was a substantial factor in the fiduciary breaches by the Special Committee. Its silence, analysis and opinion gave the Special Committee Defendants cover for their wrongful decision to approve and recommend the Merger Agreement, and, as the Audit Committee, to recommend approval of the TRTA and TRA payments.

260. Evercore was also a knowing participant in the breach by the Special Committee Defendants of their duty to disclose completely and accurately

Evercore's opinion and analysis. Evercore's September 10, 2020 engagement letter provided that Evercore's written prior consent was required with respect to the form and substance of the description of its opinion in disclosure documents filed with the SEC and mailed to FBM's stockholders. Evercore knew that the disclosure of its opinion and analysis was neither accurate nor complete.

261. Plaintiff and the other members of the Class have been harmed by Evercore's aiding and abetting which resulted in Plaintiff and the Class receiving less Merger consideration and in depriving them of material information relevant to their decision whether to exercise appraisal rights. Plaintiff and the Class have no adequate remedy at law.

COUNT V

(Against RBC for Aiding and Abetting the Lone Star Defendants' Breaches of Fiduciary Duty)

262. Plaintiff repeats and realleges all of the preceding allegations as if fully set forth herein.

263. The Lone Star Defendants owed fiduciary duties of care and loyalty to FBM's minority stockholders, and, as described above, breached those duties.

264. RBC aided and abetted the breaches of fiduciary duty by the Lone Star Defendants.

265. Because of its long, close and lucrative relationship with Lone Star, RBC had a conflict of interest in serving as financial advisor to FBM. It compounded that conflict by negotiating with the Lone Star Defendants an engagement letter with FBM which gave RBC a direct financial interest in amounts Lone Star received from FBM as a result of a change of control under the TRA. Thus, RBC had a financial interest in Lone Star extracting money from RBC's purported client, FBM.

266. RBC collaborated with Lone Star to extract acquisition offers that suited Lone Star's preferences as to timing, structure and stockholder approvals. RBC knowingly participated in the Lone Star Defendants' breaches of fiduciary duty by assisting Lone Star in obtaining the maximum achievable payment under the TRA. As FBM's financial advisor, RBC should have been seeking to eliminate or minimize any payments by FBM to Lone Star to maximize the amount of Merger consideration received by FBM's stockholders.

267. RBC at times represented Lone Star, including in Lone Star's efforts to sell its FBM stock. Yet, it charged FBM large fees for services actually rendered to Lone Star.

268. Plaintiff and the Class have been harmed by RBC's aiding and abetting which resulted in Plaintiff and the Class receiving less Merger consideration and in

depriving them of information material to their decision whether to exercise appraisal rights. Plaintiff and the Class have no adequate remedy at law.

COUNT VI

(Against American Securities and ASP Flag for Aiding and Abetting the Lone Star Defendants' and Special Committee Defendants' Breaches of Fiduciary Duty)

269. Plaintiff repeats and realleges all of the preceding allegations as if fully set forth herein.

270. Lone Star and the Lone Star Directors owed fiduciary duties of care and loyalty to FBM's minority stockholders, and as described above, breached those duties.

271. American Securities aided and abetted the Lone Star Defendants by knowingly participating in concocting a transaction structure that benefitted Lone Star, gave the minority stockholders no vote, restricted the ability of FBM minority stockholders to seek appraisal and provided incomplete and misleading disclosure that kept minority stockholders from making a fully informed decision on exercising appraisal rights.

272. American Securities knew Lone Star had a conflict of interest because of the TRA. To accommodate Lone Star, it revised its offer to provide for Lone Star to receive the maximum conceivable TRA related payment, rather than offering

more consideration to the stockholders. Because FBM would make the accelerated TRA payment after consummation of the Merger, American Securities could have negotiated with Lone Star to reduce or eliminate such a payment and raise the Merger consideration. American Securities knew the Special Committee had been created because of the TRA, but never contacted the Special Committee concerning the TRA. Instead, it joined with the Lone Star Defendants in placing Lone Star's self-interest above the interest of FBM and the stockholders. And it also aided and abetted the Special Committee Defendants' failure to protect the interests of FBM's minority stockholders with respect to the TRA.

273. American Securities also revised its proposal to provide for the sign and consent structure that would allow Lone Star to consent through the Merger and reduce the time for and the ability of FBM minority stockholders to seek appraisal. As the future 100% owner of FBM, the surviving corporation in the Merger, American Securities had a financial interest in restricting the ability of FBM minority stockholders to seek appraisal and denying them information pertinent to whether to seek appraisal. Indeed, American Securities had proposed a closing condition that no more than 10% of FBM stockholders exercise appraisal rights. Instead, American Securities agreed with Lone Star on a structure and timing for the transactions it knew would limit the ability to seek appraisal. Under Section 2.5 of

the Merger Agreement, American Securities would have the right to acquire the shares of any FBM minority stockholder who did not make a timely appraisal demand.

274. Section 5.5(b) of the Merger Agreement required the preliminary Information Statement to be filed within 10 days of the Merger Agreement. Under Section 5.5(b), FBM and American Securities agreed that the Information Statement would be mailed to stockholders as promptly as practicable and no more than two business days after the tenth calendar day following the filing of the preliminary Information Statement.

275. Under Section 5.6(a) of the Merger Agreement, American Securities had access, from the date the Merger Agreement was signed, to the officers, employees and books and records of FBM. Section 5.5(b) required American Securities to cooperate in the preparation of the preliminary Information Statement, the Information Statement and any supplement. It also gave American Securities and its counsel the right to review and comment on these disclosure documents. It further provided for FBM to prepare any supplement “in consultation with and subject to review by American Securities.”

276. American Securities conspired with Lone Star so that Beacon’s interior business, [REDACTED]

Statement containing misleading and incomplete partial disclosure concerning the TRA and TRTA.

278. American Securities had knowledge, through its numerous private conversations with Meyer and others affiliated with Lone Star, that it was aiding and abetting Lone Star's and the Director Defendants' breaches of their fiduciary duties owed to FBM stockholders, and thus knowingly participated in such breaches. American Securities leveraged Lone Star's control of FBM and the sale process to achieve a deal through direct negotiations with Meyer that benefitted both American Securities' and Lone Star's interests, including through the acceleration of the TRA.

279. As a result of American Securities' aiding and abetting the Lone Star Defendants and the Special Committee Defendants' breaches of fiduciary duties, Plaintiff and the other members of the Class were damaged.

280. Plaintiff and the other members of the Class have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter an Order:

- a. Declaring that this action is properly maintainable as a class action;
- b. Declaring that Defendants violated Section 262 and Delaware disclosure law and awarding Plaintiff and the Class a quasi-appraisal remedy;
- c. Declaring that Lone Star breached its fiduciary duties of loyalty and due care and failed to satisfy its obligation of entire fairness;
- d. Declaring that the Director Defendants breached their fiduciary duties by agreeing to the Merger and are liable to Plaintiff and the Class;
- e. Declaring that American Securities aided and abetted the Lone Star Defendants' and the Special Committee Defendants' breaches of fiduciary duty;
- f. Declaring that Evercore aided and abetted the Special Committee Defendants' breaches of fiduciary duty;
- g. Declaring that RBC aided and abetted the Lone Star Defendants' breaches of fiduciary duty;
- h. Certifying the proposed Class;
- i. Awarding damages to Plaintiff and the Class;

j. Awarding Plaintiff the costs and disbursements of this action, including attorneys', accountants', consultants' and experts' fees; and

k. Granting such other and further equitable relief as this Court may deem just and proper.

PRICKETT, JONES & ELLIOTT, P.A.

OF COUNSEL:

KESSLER TOPAZ MELTZER
& CHECK, LLP
Lee D. Rudy
J. Daniel Albert
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

/s/ Samuel L. Closic
Michael Hanrahan (DE Bar No. 941)
Samuel L. Closic (DE Bar. No. 5468)
Jason W. Rigby (DE Bar. No. 6458)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500

*Counsel for Firefighters' Pension System
of the City of Kansas City, Missouri Trust*

Dated: November 2, 2022

CERTIFICATE OF SERVICE

I, Jason W. Rigby, do hereby certify on this 10th day of November, 2022, that I caused a copy of the foregoing *Public Version of Amended Verified Stockholder Class Action Complaint* to be served via File & ServeXpress on the following counsel of record:

Bradley R. Aronstam, Esq.
S. Michael Sirkin, Esq.
Elizabeth M. Taylor, Esq.
ROSS ARONSTAM &
MORITZ LLP
1313 North Market Street, Suite 1001
Wilmington, DE 19801

Daniel A. Mason, Esq.
Elizabeth Wang, Esq.
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032

William B. Chandler III, Esq.
Brad D. Sorrels, Esq.
Benjamin M. Potts, Esq.
Leah E. León, Esq.
WILSON SONSINI GOODRICH &
ROSATI, P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware, 19801

A. Thompson Bayliss, Esq.
Stephen C. Childs, Esq.
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807

Raymond J. DiCamillo, Esq.
Matthew D. Perri, Esq.
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801

Elena C. Norman, Esq.
James M. Yoch, Jr., Esq.
YOUNG CONAWAY STARGATT &
TAYLOR, LLP
1000 North King Street
Wilmington, DE 19801

/s/ Jason W. Rigby
Jason W. Rigby (#6458)