IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
RTI HOLDING COMPANY, LLC, *et al*,[1]	)	Case No. 20-12456 (JTD)
	)	(Jointly Administered)
Reorganized Debtors.	)	

Hearing Date: May 18, 2021, 2:00 p.m. (prevailing Eastern Time)
Objection Deadline: May 11, 2021, 4:00 p.m. (prevailing Eastern Time)

OBJECTION TO PROOFS OF CLAIM NOS. 10425 AND 10426 FILED BY LAURENCE LEBOW

Ruby Tuesday Operations LLC ("RTO"), successor-in-interest to Ruby Tuesday, Inc. ("RTI"), pursuant to the *Debtors' Second Amended Chapter 11 Plan, as Modified* [Docket No. 1135] (the "Plan") and one of the reorganized debtors (the "Reorganized Debtors"),[2] hereby objects (the "Objection") to Proofs of Claim numbered 10425 and 10426 (collectively, the "Claims") filed by Laurence Lebow (the "Claimant"), pursuant to sections 105(a), 502(b), 510(b), 1122(a) and 1141(a) of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"), and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and as contemplated by the *Findings of Fact, Conclusions of Law and*

[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's U.S. tax identification number are as follows: RTI Holding Company, LLC (4966); Ruby Tuesday, Inc. (5239); Ruby Tuesday, LLC (1391); RTBD, LLC (6505); RT of Carroll County, LLC (8836); RT Denver Franchise, L.P. (2621); RT Detroit Franchise, LLC (8738); RT Distributing, LLC (6096); RT Finance, LLC (7242); RT FL Gift Cards, Inc. (2189); RT Florida Equity, LLC (7159); RT Franchise Acquisition, LLC (1438); RT of Fruitland, Inc. (1103); RT Indianapolis Franchise, LLC (6016); RT Jonesboro Club (2726); RT KCMO Franchise, LLC (7020); RT Kentucky Restaurant Holdings, LLC (7435); RT Las Vegas Franchise, LLC (4969); RT Long Island Franchise, LLC (4072); RT of Maryland, LLC (7395); RT Michiana Franchise, LLC (8739); RT Michigan Franchise, LLC (8760); RT Minneapolis Franchise, LLC (2746); RT Minneapolis Holdings, LLC (7189); RT New England Franchise, LLC (4970); RT New Hampshire Restaurant Holdings, LLC (7438); RT New York Franchise, LLC (1154); RT Omaha Franchise, LLC (7442); RT Omaha Holdings, LLC (8647); RT One Percent Holdings, LLC (6689); RT One Percent Holdings II, LLC (2817); RT Orlando Franchise, LP (5105); RT Restaurant Services, LLC (7283); RT South Florida Franchise, LP (3535); RT Southwest Franchise, LLC (9715); RT St. Louis Franchise, LLC (6010); RT Tampa Franchise, LP (5290); RT Western Missouri Franchise, LLC (6082); RT West Palm Beach Franchise, LP (0359); RTTA, LP (0035); RTT Texas, Inc. (2461); RTTT, LLC (9194); Ruby Tuesday of Allegany County, Inc. (8011); Ruby Tuesday of Bryant, Inc. (6703); Ruby Tuesday of Columbia, Inc. (4091); Ruby Tuesday of Frederick, Inc. (4249); Ruby Tuesday of Linthicum, Inc. (8716); Ruby Tuesday of Marley Station, Inc. (1641); Ruby Tuesday of Pocomoke City, Inc. (0472); Ruby Tuesday of Russellville, Inc. (1601); and Ruby Tuesday of Salisbury, Inc. (5432). The Debtors' mailing address is 333 East Broadway Ave., Maryville, TN 37804.

[2] The pre-Effective Date debtors and debtors in these chapter 11 cases are defined herein as the "Debtors" and each individually as a "Debtor".

Order Confirming the Debtors' Second Amended Chapter 11 Plan, as Modified, entered February 17, 20121 [Docket No. 1144] (the "Confirmation Order"),[3] and in support thereof, state the following:

Preliminary Statement

1. The Claimant was a shareholder of RTI that exercised his rights under applicable state law to dissent from the 2017 merger (the "Merger") of RTI with a subsidiary of Debtor RTI Holding Company, LLC ("Holding"), through which transaction RTI became a private company. As a consequence, as contemplated by Georgia law, RTI named Claimant and other dissenting pre-Merger shareholders as defendants in a state court action for a determination of the fair value of their respective shares, which action was stayed pretrial following the commencement of these cases. Each of Claimant's two proofs of claim asserts a nonpriority general unsecured claim related to his rights as a pre-Merger shareholder.

2. All of the dissenters' claims (including the Claims) were classified in Class 7 of the Plan, which contains claims that are subordinated pursuant to Bankruptcy Code section 510(b) and did not and will not receive a Plan distribution.[4]

[3] Capitalized terms not expressly defined herein shall have the meanings ascribed to such terms in the Confirmation Order and/or the Plan.

[4] As quoted in paragraph 15 herein, paragraph 25 of the Confirmation Order specifically excludes the application of Bankruptcy Rule 3007(b) ("A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding."). Nevertheless, even in the absence of the parenthetical in paragraph 25(a) of the Confirmation Order, a plan may subordinate a claim without the need to commence a separate adversary proceeding. Fed. R. Bankr. P. 7001(8) ("The following are adversary proceedings . . . (8) a proceeding to subordinate any allowed claim or interest, except when a . . . chapter 11 . . . plan provides for the relief."); *see In re Peregrine Systems*, 2004 Bankr. LEXIS 346, at *4 and 7 (Bankr. D. Del. Mar. 30, 2004) (addressing motion to subordinate claims, held that claim under merger agreement tied to stock transaction was properly classified in Class 9 of the confirmed chapter 11 plan because it was subordinated pursuant to Bankruptcy Code section 510(b)), citing *In re Alta+Cast, LLC*, 301 B.R. 150, 155 (Bankr. D. Del. 2003) for similar facts (motion to subordinate claim) and conclusion that subordination was warranted. Similarly, subordination may be the subject of an objection to claim:

> An adversary proceeding is only required for claim subordination if subordination is not provided for under a chapter 11 plan. In this case, the Debtors' plan has provided for a class of subordinated claims. Therefore, an adversary proceeding is not required to reach the issue of claim subordination, and the Court will consider it in the context of the Debtors' Objection to Tranquility's claim.

In re Washington Mutual, Inc., 462 B.R. 137, 145 (Bankr. D. Del. 2011).

3. Section 510(b) of the Bankruptcy Code provides, in part, that, "[f]or purposes of distribution …, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security … shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security …." 11 U.S.C. § 510(b). As the United States Court of Appeals for the Third Circuit recognized in *Baroda Hill Inv. v. Telegroup, Inc. (In re Telegroup, Inc.)*, 281 F.3d 133, 142 (3d Cir. 2001), section 510(b) was enacted specifically to prohibit a shareholder from "bootstrapping" its alleged equity losses into a higher priority general unsecured claim.

4. This objection is necessary to prohibit such bootstrapping and to ensure the proper classification of claims of dissenting shareholders as subordinated to the priority of common stock under the confirmed Plan. By this Objection, the Reorganized Debtors seek an order stating that the Claims are indeed properly classified as subordinated Class 7 Claims.

Jurisdiction and Statutory Authority

5. This Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief sought herein are sections 105(a), 502(b), 510(b), 1122(a) and 1141(a) of the Bankruptcy Code, and Bankruptcy Rule 3007, as well as paragraph 25 of the Confirmation Order.

Background

6. Prior to December 21, 2017 (the "Merger Date"), RTI was a public company with its common stock trading on the New York Stock Exchange. On October 15, 2017, the board of directors of RTI unanimously approved an Agreement and Plan of Merger

dated as of October 16, 2017 (the "Merger Agreement"),[5] among RTI, Holding and RTI Merger Sub, LLC ("Merger Sub") with Holding and Holding's then merger subsidiary, Merger Sub:

> The Board of Directors' approval was the culmination of more than a year-long process during with [sic] the Merging Corporation [i.e., RTI] evaluated numerous strategic opportunities and received formal proposals from eleven different bidders. The merger agreement approved by the Board of Directors was an arms [sic]-length transaction that resulted from extensive and protracted negotiations. It provided for each outstanding shareholder of Ruby Tuesday at the time of the merger to receive $2.40 per share.

Petition for Appraisal and Other Relief (the "Appraisal Petition"), Georgia Superior Court (Fulton County) (the "Georgia Court"), *Ruby Tuesday, Inc. v. Cede & Co.*, No. 2018-cv-304101 (the "Dissenters Action") ¶ 13 at 3.[6] Under the terms of the Merger Agreement, RTI would become a privately-owned company.

7. On November 20, 2017, RTI sent its shareholders, including Claimant, its Proxy Statement soliciting a shareholder vote for the proposed merger, describing why its board of directors thought $2.40 per share was fair and included a fairness opinion from RTI's financial advisor UBS Securities LLC. *Id.* ¶ 14 at 4. The Proxy Statement also stated that shareholders would be entitled to dissenter's rights per the Georgia Code. *Id.* ¶ 15 at 4.

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[5] The execution version of the Merger Agreement is attached to the Schedule 14A Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 filed on November 20, 2017 (the "Proxy Statement"), with the Securities and Exchange Commission ("SEC"). The Proxy Statement with the annexed Merger Agreement is available at: https://www.sec.gov/Archives/edgar/data/0000068270/000119312517347719/d474183ddefm14a.htm#toc The Reorganized Debtors respectfully request that this Court take judicial notice of RTI's publicly available filings with the SEC, which are available on the SEC's EDGAR filings and form webpage at www.sec.gov/edgar. Fed. R. Bankr. P. 9017, incorporating Fed. R. Evid. 201. *See New Century Trs Holdings v. New Century Trs Holdings (In re New Century TRS Holdings)*, 502 B.R. 416, 424 (Bankr. D. Del. 2013) ("A court may take judicial notice of a properly authenticated public disclosure document filed with the SEC. *In re NAHC, Inc. Securities Litigation*, 306 F.3d 1314, 1331 (3d Cir. 2002), citing *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000)."). A true and correct copy of a relevant excerpt from the Proxy Statement is attached as **Exhibit "1"** to the Request for Judicial Notice, filed concurrently herewith (the "Request for Judicial Notice").

[6] The Reorganized Debtors respectfully request that the Court take judicial notice of publicly-available filings in the Dissenters Action. Fed. R. Bankr. P. 9017, incorporating Fed. R. Evid. 201. *See Cooley v. DiVechhio*, 307 F. App'x 611, 614 (3d Cir. 2009) ("Based upon our review of the state court docket, which is public . . . [w]e may 'take judicial notice'. . . . "). A true and correct copy of the Appraisal Petition is attached as **Exhibit "2"** to the Request for Judicial Notice.

8. On February 1, 2018, Claimant rejected RTI's offer and made a demand for payment for his 520,629 shares of common stock at a price of $2.88 per share (now $4.00 per share, as set forth in the Claims)[7] and deposited his certificates as required by Georgia statute, O.C.G.A § 14-2-1322(a) and (b)(1).[8] *See Id*. ¶¶ 22 at 5 and 29 at 6; *Defendants Answer to Petition for Appraisal and Other Relief*, Dissenters Action (the "Answer")[9] ¶¶ 22, 24, 25, 26, 29, 32 and 35 at 5-7.

9. On February 2, 2018, RTI timely sent an offer of payment (of $2.40 per share plus interest) as required by Georgia statute. *Id*. ¶¶ 24-28 at 5-6. See O.C.G.A § 14-2-1323. Claimant rejected RTI's offer of fair value. Answer ¶ 29 at 6.

10. On April 19, 2018, as required by the Georgia Code, RTI commenced the Dissenters Action by filing and serving the Appraisal Petition. *See* O.C.G.A § 14-2-1330(a)("If a demand for payment under Code Section 14-2-1327 remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest."). The Appraisal Petition sought an order of the Georgia Court: (a) determining the fair value of Claimant's and other respondents' shares to be the merger price of $2.40 per share and (b) awarding a "fair and equitable interest rate, and assess the cost and expenses, including reasonable attorneys' and

[7] The Debtor objects to the Claimant's increased demand from $2.88 per share in his notice under Section 14-2-1327 of the Georgia Code to $4.00 per share in his Claims, which increase is arguably untimely under subsection (b) of such section of the Georgia Code.

[8] In the Appraisal Petition, RTI stated that: "32. In fact, none of the respondent's demands provided any basis for the share price or demands." Id. ¶ 32 at 7. Significantly, in the Answer, "Defendants admit this averment insofar as they refer to LAWNRENCE [sic] N. LEBOW, LAURENCE LEBOW and MIRIAM D. ROTH." Id. ¶ 32 at 7.

[9] A true and correct copy of the Answer is attached as **Exhibit "3"** to the Request for Judicial Notice.

experts' fees, in favor of RTI and against the respondents who the Georgia Court determines acted arbitrarily, veraciously or not in good faith." Appraisal Petition at 8.

11. On May 7, 2018, Claimant filed his Answer.

12. The Dissenters Action was stayed by the Georgia state court before trial.

13. On October 7, 2020 (the "Petition Date"), the Debtors filed their voluntary chapter 11 petitions. On and after the Petition Date through the Effective Date of the Plan, the Debtors operated their businesses and managed their affairs as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On October 26, 2020, the Office of United States Trustee appointed an official committee of unsecured creditors (the "Creditors' Committee") in these cases. No trustee or examiner was ever appointed in the cases.

14. On January 5, 2021, the Debtors filed the *Debtors' Objection for Voting Purposes to Proofs of Claim Nos. 10425 and 10426 filed by Laurence Lebow* [Docket No. 820] (the "Objection for Voting Purposes"), pursuant to which the Debtors sought to temporarily disallow Claimants' Claims for purposes of voting on the Debtors' Plan on substantially similar grounds as set forth in this Objection. The Claimant did not oppose the Objection for Voting Purposes. On January 28, 2021, the Court sustained the Objection for Voting Purposes in its *Order Re: Debtors Objection for Voting Purposes to Proofs of Claim Nos. 10425 and 10426 Filed by Laurence Lebow* [Docket No. 964].

15. On February 17, 2021, the Court entered the Confirmation Order. By agreement among the Debtors and Claimant, paragraph 25 of the Confirmation Order states:

> Notwithstanding any provision of the Plan or this Confirmation Order to the contrary, by agreement between the Debtors and the Holders of Dissenters Claims, (a) the Debtors shall not seek to subordinate and extinguish the Dissenters Claims pursuant to the

> Plan; **instead, the Debtors may seek to subordinate Dissenters Claims after confirmation by filing objections to such Claims (notwithstanding Fed. R. Bankr. P. 3007(b))**; (b) the Holders of Dissenters Claims shall be deemed to have opted out of granting the releases set forth in section X.C. of the Plan; and (c) the Holders of Dissenters Claims withdraw this objection to confirmation of the Plan.

Confirmation Order ¶ 25 (emphasis added).

16. On February 24, 2021 (the "Effective Date"), the Plan became effective [Docket No. 1163].

The Claims

17. On December 13, 2020, Claimant filed two nonpriority general unsecured Claims:

a. Claim 10426, in the amount of $1,249,509.60, calculated using the $2.40 per share of Merger consideration that Claimant would have been entitled to on account of 520,629 shares as of the Merger Date had it not dissented. No supporting documentation is attached to this Claim;[10] and

b. Claim 10425, in the amount of $2,015.958.44, based on Claimant's assertion of a fair value of $4.00 per share plus interest and attorneys' fees for a total of $3,265,468.04, less the $1,249,509.60 of Merger consideration at $2.40 per share claimed in Claim 10426. No supporting documentation is attached to this Claim.[11]

[10] A true and correct copy of Claim 10426 is attached as **Exhibit "4"** to the Request for Judicial Notice.

[11] A true and correct copy of Claim 10425 is attached as **Exhibit "5"** to the Request for Judicial Notice.

Request for Relief

18. The Reorganized Debtors object to the Claims because they are subordinated to Class 4 general unsecured claims under the Plan pursuant to Bankruptcy Code section 510(b) and, in any event, are entirely unsubstantiated.

Basis for Relief Requested

A. The Claims Are Subject to an Objection Dissallowing Them and, Alternatively, Seeking their Subordination

19. Section 502(a) of the Bankruptcy Code provides that a proof of claim "is deemed allowed, unless a party in interest objects." 11 U.S.C. § 502(a). Pursuant to section 502(b) of the Bankruptcy Code, if an objection to a claim is made, the court, after notice and a hearing, must determine the amount of the claim fixed as of the date of the filing of the petition. 11 U.S.C. § 502(b). As noted above, by agreement between the Debtors and Claimant, paragraph 25 of the Confirmation Order anticipates this Objection seeking subordination of the Claims under Bankruptcy Code 510(b), and classification and treatment thereof in Class 7 of the Plan.

B. The Claims Are Unsupported and, Consequently, Invalid

20. The Claims do not have *prima facie* validity because they fail to attach any evidence in support of the claim. Fed. R. Bankr. Proc. 3001(c)(1) ("when a claim . . . is based on a writing, a copy of the writing shall be filed with the proof of claim."). *See Sass v. Barclays Bank PLC (In re American Home Mortgage Holdings)*, 501 B.R. 44, 62 (Bankr. D. Del. 2013) ("Pursuant to Federal Rule of Bankruptcy 3001, where a proof of claim does not provide the facts and documents necessary to support the claim, it is not entitled to the presumption of

prima facie validity.") (citing *In re All-American Auxiliary Ass'n*, 95 B.R. 540, 544 (Bankr. S.D. Ohio 1989)).

21. In the absence of any supporting documentation, the Claims lack the presumption of validity and may be disallowed in their entireties on this basis alone.

C. Claimant Bears the Burden of Substantiating His Claims

22. A claimant has the ultimate burden of persuasion when an objection to its claim has been filed; the objector has only the initial burden to produce evidence sufficient to negate the *prima facie* validity of the filed claim. *In re Allegheny Int'l*, 954 F.2d 167, 173-74 (3d Cir. 1992); *Chatlos Syst. v. Kaplan (In re TIE/Communications)*, 163 B.R. 435, 440-41 (Bankr. D. Del. 1994).

23. RTI produced such sufficient evidence when it (a) filed its *Schedules of Assets and Liabilities* [Docket No. 521 at 1579 of 1871 (PDF at 1640 of 2109)], in which it listed Claimant's scheduled claim as a disputed, unliquidated, and contingent nonpriority general unsecured claim for "Dissenters' Shareholder Rights Dispute" in an unknown amount and (b) provided evidence in support of this Objection, including (without limitation) the evidence referenced in the Request for Judicial Notice. Therefore, the burden is now on Claimant to substantiate his Claims for all purposes.

D. The Claims Are Subject to Subordination Under Section 510(b) of the Bankruptcy Code

24. Bankruptcy Code section 510(b) provides:

> For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the

> claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b).

25. Regarding such section, the treatise *Collier* states:

> **Section 510(b) provides for the mandatory subordination of claims "arising from" a securities transaction**. Courts have viewed this language as ambiguous, generally interpreting the provision broadly to include a wide variety of causes of actions arising out of securities transactions. Under this broad reading, the claim need not flow directly from the securities transaction or arise contemporaneously with the purchase or sale of a security, but **will be viewed as "arising from" a securities transaction if the transaction is part of the causal link leading to the injury.** For example, the Court of Appeals for the Third Circuit has held that a claim arising from the failure to register shares, clearly occurring after the securities transaction had been completed, must be subordinated under section 510(b).

4 *Collier* ¶ 510.04[3] (emphasis added; citing, among others, *Telegroup*, 281 F.3d at 142 ("More important than the timing of the actionable conduct, from a policy standpoint it is the fact that the claims in this case seek to recover a portion of claimants' equity investment. In enacting § 510(b), Congress intended to prevent disaffected equity investors from recouping their investment losses in parity with general unsecured creditors in the event of bankruptcy.")).

26. Notably, in *Telegroup*, the Third Circuit stated that

> [I]t is, in our view, more natural, as a textual matter to read 'arising from' as requiring **some nexus or causal relationship** between the claims and the purchase of the securities, but not as a limiting nexus to claims alleging illegality in the purchase itself. In particular, the text of § 510(b) is reasonably read to encompass the claims in this case, since the claims would not have arisen **but for** the purchase of Telegroup's stock and allege a breach of a provision of the stock purchase agreement.

Id. at 138 (emphasis added), *discussed in Frankun v. International Wireless Commc'ns (In re International Wireless Commc'ns)*, 68 F. App'x 275, 278 (3d Cir. Apr. 16, 2003). Accordingly, courts have determined that claims arising from shareholders' rights of appraisal or other determinations regarding the value of shares are properly subordinated under Bankruptcy Code section 510(b).

27. For example, in *Official Committee of Unsecured Creditors v. FLI Deep Marine LLC (In re FLI Deep Marine Holdings)*, the claimants were minority shareholders that refused an offer for their shares in a merger who were also parties to stayed Delaware Chancery Court litigation challenging the price offered as being below fair value. 2011 Bankr. LEXIS 579 (Bankr. S.D. Tex. Jan. 19, 2011). The United States Bankruptcy Court for the Southern District of Texas granted the debtor's motion for summary judgment, stating:

> "The Defendants sought appraisal rights for their shares but the Debtors filed for bankruptcy before that process got very far. '. . . **Through the Delaware Litigation, the Defendants sought to exercise their statutory appraisal rights for the shares**. . . .
>
> These claims are causally linked to Defendants' status as DMTI's shareholders. Given the circuit court precedent [e.g., *Telegroup*] and § 510(b)'s underlying policies, **the Court finds mandatory subordination is required**.

2011 Bankr. LEXIS 579, at *19-21 (emphasis added; quoting defendant papers).

28. Similarly, in *Liquidating Trust of U.S. Wireless Corp. v. Wax (In re U.S. Wireless Corp.)*, the United States Bankruptcy Court for the District of Delaware stated that:

> This finding required the arbitrator to **determine the value of the stock** and various other equity interests Wax would have received if U.S. Wireless had not breached the employment agreement. **The damages Wax received were based on this determination**. . . .
>
> Based on the claims asserted by Wax at state court and upon which the arbitrator based Wax's recovery, **it is clear that Wax's claim is for damages arising from the purchase or sale**

> **of the Equity Package. Accordingly, the Court is required to subordinate Wax's claim … under section 510(b) of the Bankruptcy Code**.

384 B.R. 713, 727-28 (Bankr. D. Del. 2008) (emphasis added).[12] Thus, case law shows that courts have rebuffed attempts by disgruntled equity holders to place form over substance and have repeatedly and consistently subordinated such claims to the level of prepetition equity.

29. In the present case, "but for" Claimant's purchase of the pre-Merger shares, he would not have had shareholder fair value appraisal rights under Georgia law. Also, there is a clear "nexus and causal connection" between such rights and Claimant's ownership of such shares. Claimant is a minority shareholder that refused the Debtor's offer of $2.40 per share as "fair value" in a merger, and he is a party to a stayed prepetition action seeking a determination of whether fair value for Claimant's shares is the offered price or a higher amount.

30. Also, an examination of applicable state law reaffirms the inextricable link between the Claims and Claimant's status as a shareholder. The Claims at issue here are Georgia statutory claims. The Georgia Code specifies a process pursuant to which a merging Georgia corporation (such as RTI) sends a notice to its shareholders regarding their right to dissent and demand fair value for their shares. *See* O.C.G.A §§ 14-2-1320 and 1322. To dissent, a shareholder must make a timely written demand for payment of its stated fair value amount and deposit its certificated shares; if the company contests such amount, the company must bring an action in Georgia state court for an appraisal of fair value, which may result in a judgment for the

[12] *See also Peregrine Sys.*, 2004 Bankr. LEXIS 346, at *7 ("[Claimant's] alleged $ 15 million claim is based on the fact that he entered into the merger agreement, through which he allegedly lost money. Regardless of the fact that he now contends he was defrauded into making the exchange, **in reality his complaint is tied to the stock transaction** . . . . For these reasons, proof of claim number 1126 shall be classified in Class 9 and subordinated pursuant to § 510(b).") (emphasis added); *In re Kaiser Group Int'l.*, 260 B.R. 684, 688-89 (Bankr. D. Del. 2001)("Nor is the Merger Agreement in any sense of the word a 'debt' instrument. . . . For the foregoing reasons, we conclude that the claims of the ICT Shareholders are for damages arising from the purchase of stock of the Debtors. Consequently, they are subordinated to the claims of creditors pursuant to section 510(b)"), *aff'd*, 2001 U.S. Dist. LEXIS 25574 (D. Del. Nov. 29, 2001).

dissenter in the amount of fair value determined by the court.[13] O.C.G.A §§ 14-2-1327 and 1330.

31. Under the Georgia Code, a dissenting shareholder's shares are *not* cancelled as of the merger. Instead, the dissenter retains its rights as a shareholder subject to modifications made by the terms of the merger. Section 14-2-1323(b) makes clear that "[a] record shareholder who demands payment and deposits his shares under subsection (a) of this Code section retains all other rights as a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action [e.g., a merger]." O.C.G.A § 14-2-1323; *see* Comment to section 14-2-1323 ("A shareholder who deposits his shares retains all other rights of a shareholder until those rights are modified by effectuation of the proposed corporate action.").[14]

32. The Georgia Code also provides that the action brought in a Georgia court is a "nonjury equitable valuation" in which "[e]ach dissenter made a party to the proceeding is entitled to judgment for the amount which the court finds to be the fair value of the shares, plus interest to the date of judgment." O.C.G.A § 14-2-1330. Such section also states that the Georgia court action has "the effect of an action quasi in rem against their shares," which indicates that dissenters' deposited shares are not cancelled while the action is pending. *Id*.

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[13] *See generally*, B. Byrd, *Dissenters' Rights: Litigating 'Fair Value*,' https://cdn.ymaws.com/www.atlantabar.org/resource/resmgr/section_newsletters/Litigation/Ben_Byrd_article_-_dissenter.pdf.

[14] The determination that dissenters' shares remain extant is consistent with the purpose for depositing the shares at the time a given dissenter's fair value demand is made. The official comment to O.C.G.A. § 14-2-1323 explains the reason for depositing shares for one purpose only:

> The deposit of share certificates is necessary to prevent dissenters from giving themselves a 30-day option to take payment if the market price of the shares goes down, but sell their shares on the open market if the price goes up. If this kind of speculation were possible, all sophisticated investors might be expected to file demands that they would not intend to carry through unless the price should fall.

Comment to section 14-2-1323; s*ee VSI Enterprises, Inc. v. Edwards*, 238 Ga. App. 369, 372, 518 S.E.2d 765, 769 (1999) ("the intent of the legislature for the tender of the stock certificate was to prevent a specific abuse"; it prevents "a dissenter from using the dissent as a way to hedge against the market by restricting transfer from the date of the demand.").

33. Here, the dissenters' shares, including those belonging to Claimant, were not cancelled by the terms of the Merger:

> [E]ach share of Ruby Tuesday common stock the holder of which has properly demanded dissenters' rights in accordance with Georgia law **will not be canceled and converted into the right to receive the merger consideration** unless and until such holder fails to perfect or withdraws or otherwise loses its dissenters' right.[15] If any holder of Ruby Tuesday common stock that demands dissenters' rights properly perfects such rights, such holder will be entitled to the fair value of such shares as determined by the superior court of Georgia plus interest, if any, on the amount determined to be the fair value…

(Emphasis added).[16]

34. Also, the conclusion that dissenters' shares have not been cancelled is consistent with the terms of the Merger Agreement which provide that—except for dissenter shares—the shares of other shareholders are cancelled and converted into a right to payment. Section 2.02(a) of the Merger Agreement states:

> Except as otherwise provided in Section 2.02(b) or Section 2.04, each share of Company Stock outstanding immediately prior to the Effective Time shall be converted into the right to receive $2.40 in cash, without interest (the "Merger Consideration"). As of the Effective Time, all such shares of Company Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and shall thereafter represent only the right to receive the Merger Consideration to be paid in accordance with Section 2.03, without interest.

Merger Agreement § 2.02(a). Section 2.04 of the Merger Agreement addressed the shares of dissenters, stating in pertinent part that:

> shares of Company Stock outstanding immediately prior to the Effective Time and held by a holder who has not voted in favor of

[15] In contrast, with regard to a dissenter that accepts an offer of payment from RTI: "Upon payment, the dissenting stockholder will cease to have any interest in his or her shares of Ruby Tuesday common stock." Proxy Statement at 83.

[16] As noted above, a true and correct copy of a relevant excerpt of the Proxy Statement is attached as **Exhibit "1"** to the Request for Judicial Notice.

> the Merger or consented thereto in writing and who is entitled to demand and has demanded and properly exercised appraisal rights for such shares in accordance with the GBCC [Georgia Business Corporation Code ("GBCC")] shall not be converted into the right to receive the Merger Consideration, but instead shall only be entitled to such rights as are granted by the GBCC, unless such holder fails to perfect, withdraws or otherwise loses the right to appraisal.

Id. § 2.04.

35. Finally, the nature of the relief sought by Claimant in the Dissenters Action that forms the basis for the Claims is the *sine qua non* of equity ownership. Claimant seeks the valuation of his interests in RTI arising under Georgia law, which "provide[s] an opportunity for shareholders who think that they are entitled to a higher share price to dissent from the merger and obtain 'fair value' of their shares . . . ." Appraisal Petition ¶ 15 at 4. The Claims relate to RTI's offer to purchase Claimant's shares at the Merger price, instead of at the higher purchase price demanded by Claimant.[17] In essence, the Claims are for the "damages" Claimant believes it suffered if RTI were permitted to purchase Claimant's shares at the Merger price. A valuation in excess of the price at which Claimant originally acquired such shares represents Claimant's "upside" while value less than such amount would represent Claimant's loss on the investment.[18]

36. The Claims relate directly to the Claimant's status as a shareholder. With respect to the Plan, the Claims should not compete with the claims of Class 4 general unsecured

[17] *See* Answer ¶ 29 at 6.

[18] *International Wireless*, 68 F. App'x at 278 ("Just as shareholders accept gladly the upside potential of increases in their shares' value (whatever the reason), they should also assume the risk of decline in value for whatever reason, including (but not limited to) fraud in the issuance, by having their claims subordinated—shorthand for the result that because they purchased stock, they are at the end of the line in bankruptcy distribution priority."). *Cf. Kaiser*, 260 B.R. at 689 ("Even during the restricted period, the ICT Shareholders retained the 'upside' in any value of the Debtor's stock. The Merger Agreement provided that if the stock price went above the Merger Value during the restricted period, the ICT Shareholders would require the Debtors to buy the stock from them or arrange its sale. Thus, they retained their essential rights as shareholders at all times.").

creditors, but instead should be subordinated in Class 7 under Bankruptcy Code section 510(b). Therefore, the Claims should be subordinated and disallowed as requested herein.

General Reservation of Rights

37. This Objection is without prejudice to the rights of the Reorganized Debtors to raise amended or additional objections to the Claims or any other claim, and the Reorganized Debtors expressly reserve all substantive or procedural objections that they may have, including, without limitation, in reply to any response submitted by Claimant. Should one or more of the grounds of objection stated in this Objection be dismissed, the Reorganized Debtors reserve their rights to object on other stated grounds or on any other grounds.

38. Except as expressly provided herein, nothing in this Objection nor any actions taken pursuant to such relief is intended or should be construed as: (a) an admission as to the validity of any prepetition claim against any Reorganized Debtor; (b) a waiver of any party's right to dispute any prepetition claim on any grounds; (c) a promise or requirement to pay any prepetition claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Objection or any order granting the relief requested by this Objection; (e) a request or authorization to assume any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver of any Reorganized Debtor's rights under the Bankruptcy Code or any other applicable law; or (g) a waiver of the Reorganized Debtors' rights to file counterclaims against the holders of the Claims or any other claim.

Notice

39. The Reorganized Debtors will serve copies of this Objection on: (a) Claimant, (b) the Office of the United States Trustee, (c) counsel to the Creditors' Committee, (d) the Plan Administrator, and (e) all parties who have requested notices in these cases pursuant

to Bankruptcy Rule 2002. The Reorganized Debtors respectfully submit that, in light of the nature of the relief requested herein, that no further notice need be given.

No Previous Request

40. No previous request for the relief sought herein has been made to this or to any other Court.

Conclusion

WHEREFORE, RTO respectfully requests that the Court enter its order, in substantially in the form attached hereto as **Exhibit A**, (i) sustaining the Objection; (ii) subordinating and disallowing the Claims; and (iii) granting RTO such other and further relief as is just and proper.

Dated: April 16, 2021
Wilmington, Delaware

PACHULSKI STANG ZIEHL & JONES LLP

/s/ James E. O'Neill

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