IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GFI GROUP INC.	)	CONSOLIDATED
STOCKHOLDER LITIGATION	)	C.A. No. 10136-VCL

RESPONSE OF FRANK FANZILLI, JR. AND RICHARD MAGEE TO THE OBJECTION OF QUAKER INVESTMENT TRUST TO THE PROPOSED SETTLEMENT

OF COUNSEL

WHITE & CASE LLP
Glenn M. Kurtz
Andrew W. Hammond
Robert E. Tiedemann
1155 Avenue of the Americas
New York, NY 10036
Telephone: (212) 819-8200

Samuel A. Nolen (#971)
Kevin M. Gallagher (#5337)
Rachel E. Horn (#5906)
Matthew D. Perri (#6066)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
Telephone: (302) 651-7700

Attorneys for Frank Fanzilli, Jr. and Richard Magee

Dated: November 19, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Frank Fanzilli, Jr. and Richard Magee, former members of the independent Special Committee of the GFI Group Inc.'s Board of Directors (collectively, the "Special Committee"), respectfully submit this Response to the Objection of Quaker Investment Trust ("Quaker") to the Proposed Settlement (the "Quaker Objection").

PRELIMINARY STATEMENT

In the Quaker Objection, Quaker contends that the proposed settlement is unfair because (i) it would release the defendants named in an action styled *Quaker Investment Trust v. GFI Group et al.*, C.A. No. 11427-VCL, who are not currently named as defendants in this action, and (ii) it would release actions "taken several months after the close of the Tender Offer by the GFI Board of directors…." (Quaker Obj., p. 1) Quaker's objections to the release of Messrs. Fanzilli and Magee are meritless.

First, Quaker admits that it did not hold stock of GFI Group Inc. ("GFI") when the GFI Board of Directors (the "GFI Board") approved the Tender Offer Agreement with BGC Partners, Inc. ("BGC") on February 19, 2015 (the "BGC Tender Offer Agreement"). Accordingly, Quaker has no standing to object to a release of claims relating to the GFI Board's decision to enter into the BGC Tender Offer Agreement. Recognizing this obvious defect in its objection, Quaker readily

acknowledges that it is only "challenging post-BGC Tender Offer actions." (Quaker Obj., p. 29) Messrs. Fanzilli and Magee, however, were not directors of GFI at that time, and even a cursory examination of the public filings would have demonstrated this to Quaker. Indeed, Messrs. Fanzilli and Magee resigned their positions as directors of GFI on or about February 26, 2015. (Ex. A, p. 2)[1] Accordingly, Quaker cannot state a claim against Messrs. Fanzilli and Magee for "post-BGC Tender Offer actions," and, therefore, has no basis to challenge the release of Messrs. Fanzilli and Magee on this ground.

Second, Quaker's argument that the proposed settlement is somehow not fair because it would release persons who are not currently defendants in this action is equally baseless. Non-parties, particularly where they are current or former directors, are routinely released in connection with settlements of claims relating to the actions of a board of directors. And a release is particularly appropriate here given that the actions of Messrs. Fanzilli and Magee were thoroughly vetted by the Plaintiffs in this action. Messrs. Fanzilli and Magee were defendants in the underlying action for almost a year, they were served with multiple rounds of document requests, produced thousands of pages of documents, and both were deposed. Following a diligent investigation, Plaintiffs chose not to pursue claims against Messrs. Fanzilli and Magee in their Amended Complaint. Under the

[1] Exhibit citations "Ex. __" refer to exhibits to the Affidavit of Rachel E. Horn filed herewith.

circumstances, where substantial consideration is being provided to resolve an action involving the conduct of GFI's Board that has been thoroughly investigated by plaintiffs' counsel, a general release that includes former directors Magee and Fanzilli is entirely appropriate to ensure global peace for GFI, which continues to owe indemnification obligations to Messrs. Fanzilli and Magee. For these and the reasons set forth more fully below, Quaker's objection as it applies to Messrs. Fanzilli and Magee should be overruled and the proposed settlement should be approved.

BACKGROUND

In early 2014, the CME Group, Inc. ("CME") joined with Jersey Partners, Inc. ("JPI"),[2] the largest stockholder of GFI, to put together a bid for all outstanding shares of GFI stock. A special committee consisting of Marisa Cassoni, Richard Magee and Frank Fanzilli, Jr. was formed to negotiate that proposal and to explore strategic alternatives.[3] The Special Committee ultimately negotiated a deal with CME at $4.55 per share for GFI stock (the "CME Transaction"), representing a 46% premium to the unaffected trading price of GFI stock on the last day of trading before the announcement of the CME Transaction,

[2] Michael Gooch, the founder of GFI, together with Colin Heffron, Nick Brown, and certain other parties, beneficially owned approximately 38.1% of the total issued and outstanding shares of GFI common stock through JPI. Mr. Gooch had voting control over the shares of GFI held by JPI.

[3] Ms. Cassoni resigned from the Special Committee on or about December 5, 2014.

subject to a fiduciary out and a "majority of the minority" approval provision. (Ex. B) Through the CME Transaction, GFI would become a wholly-owned subsidiary of CME, by merger, and CME would subsequently sell GFI's inter-dealer brokerage business to JPI and a consortium of GFI Management (the "Management Consortium").[4] JPI entered into a support agreement to vote in favor of the CME Transaction and against the approval of any other alternative business combination for a period of 12 months following termination of a merger agreement with CME.[5] (Ex. C)

Following the announcement of the CME Transaction, BGC emerged as a competing bidder for GFI, and the Special Committee quickly engaged to foster a robust competitive auction between the two well-financed competitors. The Special Committee leveraged the competitive process to increase the consideration available to GFI stockholders in the CME Transaction from $4.55 to $5.25 per share, representing a 69% premium to the unaffected stock price of GFI when the CME Transaction was originally announced. (Ex. D, p. 1) BGC then made a topping tender offer of $5.45 per share, representing a 74% premium to the unaffected stock price of GFI, which bid was ultimately matched by CME. (Ex. E, pp. 5-7)

[4] Messrs. Heffron, Brown and Gooch are members of the Management Consortium. Messrs. Heffron and Gooch also served on GFI's Board of Directors.
[5] The Special Committee negotiated to reduce the length of the voting tail from 18 months to 12 months, but it was unable to eliminate the voting tail altogether.

Over the following weeks, the bidding continued to escalate. Each time that CME and the Management Consortium matched BGC, BGC increased its offer. The bidding ultimately culminated on or about January 20, 2015, when BGC delivered an executed tender offer agreement (the "Tender Offer") to the GFI Board that would provide GFI's stockholders with $6.10 per share in cash, and $6.20 per share in cash if the Board took steps to trigger the "match period" under GFI's merger agreement with CME (the "Merger Agreement") by 11:59 p.m. on January 20. (Ex. E, pp. 9-10) The transaction, if consummated, would represent a 96 percent premium to the unaffected stock price of GFI.

The Special Committee – Messrs. Fanzilli and Magee – quickly assembled and determined that the BGC proposal at $6.20 per share was "reasonably likely to lead to a Superior Proposal" pursuant to the terms of the Merger Agreement and recommended that GFI's Board of Directors adopt the Special Committee's recommendation in order to trigger the match period. (Ex. E, p. 10) GFI's Board, however, did not convene a meeting on January 20 to vote on the Special Committee's recommendation, and BGC's offer was reduced to $6.10 per share in cash in accordance with the terms of its January 20 proposal. (*Id.*) When GFI's full Board did finally convene to address BGC's revised proposal on January 22, 2015, it rejected the Special Committee's recommendation to find that the BGC proposal was reasonably likely to lead to a Superior Proposal (as such term was

defined in the Merger Agreement). Rather, the non-Special Committee members continued to support the CME Transaction, which offered GFI stockholders $5.85 per share in stock and cash as compared to the $6.10 in cash then being offered by BGC. (*Id.*) The CME Transaction was ultimately submitted for approval at a special meeting of GFI stockholders held on January 30, 2015. GFI stockholders did not approve the proposed CME Transaction at the special meeting.

After the CME Transaction failed to gain approval from GFI stockholders, GFI and CME terminated the previously announced Merger Agreement. GFI then pursued a transaction with BGC. In negotiations, the Special Committee renewed its efforts to obtain the $6.20 per share offered by BGC on January 20. The Special Committee requested that JPI and/or its affiliates pay to GFI's non-JPI stockholders the 10 cent difference between the $6.20 offered by BGC on January 20 and the $6.10 then being offered. (Ex. F, p. 13) JPI refused to pay the 10 cent difference.

Unable to negotiate an increase to the merger consideration being offered to stockholders of GFI, and wanting to lock in at least the $6.10 share price, the Special Committee recommended and the GFI Board approved entering into a tender offer agreement with BGC that would provide GFI stockholders with $6.10 per share in cash. BGC's Tender Offer expired at 5:00 p.m. on February 26, 2015, and approximately 54.6 million shares were tendered to BGC pursuant to the offer.

(Ex. A, p. 1) All outstanding conditions to the Tender Offer were met, and BGC accepted the shares. As provided for in the BGC Tender Offer Agreement, Messrs. Fanzilli and Magee resigned from the GFI Board on or about February 26, 2015, after the Tender Offer closed. (*Id.*, p. 2)

Throughout the sales process, the Special Committee utilized a competitive, market-driven process to deliver a value-maximizing opportunity for stockholders. Indeed, the evidentiary record reflects that the Special Committee advocated fiercely on behalf of independent GFI stockholders to attempt to secure the highest and best price, frequently finding itself at odds with the Management Consortium. The Special Committee did not breach any duties in connection with its evaluation of the competing bids, and certainly did not breach any duties of loyalty as it consistently supported the best deal available for stockholders, regardless of whether the best outstanding offer was submitted by BGC or the Management Consortium and CME.

The Plaintiffs in this action thoroughly investigated the actions of the Special Committee. Following the announcement of the CME Transaction, six lawsuits were filed in Delaware and Messrs. Fanzilli and Magee, among others, were defendants in those actions. These actions were ultimately consolidated. Messrs. Fanzilli and Magee produced thousands of pages of documents to Plaintiffs in response to multiple sets of document requests. Messrs. Fanzilli and

Magee both testified at deposition. On July 13, 2015, after having been defendants in the action for almost a year and having fully participated in substantial discovery, Messrs. Fanzilli and Magee were dropped as defendants when Plaintiffs filed their amended complaint. *See* Amended Verified Class Action Complaint, Civil Action No. 10136-VCL (Del. Ch.).

In late July, the parties to this action entered into intense settlement negotiations. These negotiations also included Messrs. Fanzilli and Magee. A memorandum of understanding documenting the terms of the proposed settlement was finalized on or about August 24, 2015. On August 25, 2015, Quaker filed *Quaker Investment Trust v. GFI Group, Inc., et al.*, C.A. No. 11427-VCL, which challenges events "occurring months after the close of the Tender Offer," well after Messrs. Fanzilli and Magee resigned from the GFI Board. (Quaker Obj., p. 13) A Stipulation of Settlement was filed with the Court on September 17, 2015.

ARGUMENT

This Court must make an "informed judgment whether the proposed settlement is fair and reasonable in light of all relevant factors." *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 966 (Del. Ch. 1996); *see also Polk v. Good*, 507 A.2d 531, 536 (Del. 1986). Quaker argues that the proposed settlement is not reasonable because, among other things, it would release claims that Quaker purports to have against Messrs. Fanzilli and Magee with respect to events

occurring months after the close of the Tender Offer, and because Plaintiffs determined not to pursue claims against Messrs. Fanzilli and Magee following their diligent investigation. Quaker's objection as it applies to Messrs. Fanzilli and Magee is meritless.

I. There Is No Basis To Exclude Messrs. Fanzilli And Magee From The Settlement Because They Are Not Defendants

Quaker objects to the settlement on the grounds that the settlement would provide a release to non-parties (Fanzilli and Magee) "who are named as defendants by Quaker…." (Quaker Obj., p. 24)

As an initial matter, it is common and customary for releases in a settlement agreement to release non-parties such as Messrs. Fanzilli and Magee, who served as independent directors of GFI during the events that were the subject of the underlying litigation. *See, e.g., In re Dr. Pepper/Seven Up Cos., S'holders Litig.*, 1996 WL 74214, at *6 (Del. Ch. Feb. 27, 1996) (approving release covering various non-parties, including Defendants' financial advisors, accountants and present or former officers and directors); *In re Times Mirror Co. S'holders Litig.*, 1994 WL 1753203, at *6 (Del. Ch. Nov. 30 1994) (same); *Hartley v. Peapod, Inc.*, 2002 WL 31957458, at *2 (Del. Ch. Mar. 27, 2002) (same). Accordingly, the mere fact that Messrs. Fanzilli and Magee are no longer defendants in the underlying

action is no basis to carve them out of the proposed release, and Quaker has cited no caselaw to the contrary.

In any event, releasing Messrs. Fanzilli and Magee is particularly appropriate under the current circumstances. As noted above, Messrs. Fanzilli and Magee were Defendants in the underlying action for more than 10 months. In that capacity, they were served with multiple sets of document requests, produced thousands of pages of documents, and each provided deposition testimony. The actions of Messrs. Fanzilli and Magee have been thoroughly vetted by Plaintiffs' counsel. Following a thorough investigation, the Plaintiffs elected not to include Messrs. Fanzilli and Magee in their Amended Complaint filed on July 13, 2015. *See, e.g.*, Pls.' Brief in Support of Motion for Final Approval of Proposed Settlement, at pp. 14-15 (noting the Special Committee's efforts to compel the GFI Board of Directors to convene to act on its recommendations regarding BGC's superior proposals); p. 32 (noting that the Special Committee "repeatedly called for Gooch and Heffron to make up the $0.10 per share difference"). The fact that, following an investigation and litigation, Plaintiffs determined that Messrs. Fanzilli and Magee had committed no wrongdoing is no basis for subjecting them alone to another lawsuit.

Here it is clear that the claims against Messrs. Fanzilli and Magee that are being released were thoroughly investigated. *See In re Riverbed Tech., Inc.*

S'holders Litig., 2015 WL 5458041, at *6 (Del. Ch. Sept. 17, 2015) (approving release of claims that had been "carefully considered" by Plaintiffs' counsel). The evidence showed that Messrs. Fanzilli and Magee were acting with complete independence in deeply difficult circumstances. *See In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1187 (Del. 2015) (granting independent directors' motion to dismiss where there were "no facts to support an inference that any of the independent directors breached their duty of loyalty…."); *In re Morton's Restaurant Grp., Inc. S'holders Litig.*, 74 A.3d 656, 662-63 (Del. Ch. 2013) (granting motion to dismiss where plaintiffs did not plead a non-exculpated breach by a board of independent and disinterested directors). Accordingly, providing a release to Messrs. Fanzilli and Magee to end the litigation is entirely appropriate. *See In re Phila. Stock Exchange, Inc.*, 945 A.2d 1123, 1137 (Del. 2008) (affirming order and final judgment of the Court of Chancery approving settlement where such settlement afforded "complete peace").

II. Quaker Does Not Have Standing To Bring Claims Against Messrs. Fanzilli And Magee

Quaker next complains that the Settlement precludes "the remaining GFI stockholders from exercising their rights, including to seek redress for claims for breach of fiduciary duties against the Board (including its new BGC members) and its controlling stockholder, BGC." (Quaker Obj., pp. 23-24) However, Quaker has no standing or basis to pursue any claims against Messrs. Fanzilli and Magee.

As set forth in the Quaker Objection, Quaker accumulated 280,000 shares of GFI between January 15, 2015 and January 29, 2015. Quaker sold this position in GFI from February 4, 2015 and February 9, 2015. (Quaker Obj., p. 10) After selling its position, Quaker did not begin acquiring shares of GFI again until March 27, 2015. (Quaker Obj., p. 11) Accordingly, Quaker did not hold any shares of GFI between February 9, 2015 and March 27, 2015.

As an initial matter, Quaker does not challenge any conduct that occurred during the time frame that Messrs. Fanzilli and Magee served as directors of GFI. Indeed, as Quaker points out, "Plaintiffs are challenging pre-BGC Tender Offer actions. Objector is challenging post-BGC Tender Offer Actions." (Quaker Obj., p. 29) Quaker further concedes that the events that they are complaining of occurred "***several months*** following the Tender Offer…." (Quaker Obj., p. 24) (emphasis in original) However, Messrs. Fanzilli and Magee resigned as directors of GFI in connection with the close of the Tender Offer on or about February 26, 2015. Accordingly, Quaker could not as a matter of law have any claims against Messrs. Fanzilli and Magee resulting from post-tender offer actions (when Messrs. Fanzilli and Magee were no longer directors).

Likewise, Quaker concedes that it did not hold stock in BGC at the time the BGC Tender Offer Agreement was entered into on February 19, 2015, or when the Tender Offer closed on or about February 26, 2015. Accordingly, Quaker does not

have standing to object to a release of claims against Messrs. Fanzilli and Magee in connection with the BGC Tender Offer Agreement, entered into and consummated when Quaker was not a stockholder.[6] *See, e.g.*, *In re Beatrice Cos., Inc. Litig.*, 1987 WL 36708, at *3 (Del. Feb. 20, 1987) (denying standing to an objector on the grounds that the "plaintiff must have been a stockholder at the time the terms of the merger were agreed upon…."); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169 n.11 (Del. Ch. 2002) (noting that stockholder-plaintiffs are barred from asserting claims that they purchase after the board of directors has approved a transaction and the transaction has been disclosed). Accordingly, because Quaker did not hold GFI stock at the time that the BGC Tender Offer Agreement was entered into, and Messrs. Fanzilli and Magee were not directors of GFI following the close of the Tender Offer, Quaker has identified no legitimate basis to object to the release of claims against Messrs. Fanzilli and Magee.

CONCLUSION

For the foregoing reasons, Messrs. Fanzilli and Magee respectfully request that the Court approve the Settlement.

[6] Likewise, Hilary Shane, the Hilary Shane Revocable Trust UAD 11/28/2007, and ODS Capital, LLC, which filed a joinder to the Quaker Objection on November 18, 2015, purchased stock after the BGC Tender Offer Agreement was entered into and after the Tender Offer closed. Accordingly, these entities also do not have standing to object to a release of claims against Messrs. Fanzilli and Magee.

RICHARDS LAYTON
& FINGER, P.A.

OF COUNSEL:

/s/ Samuel A. Nolen
Samuel A. Nolen (#971)
Kevin M. Gallagher (#5337)
Rachel E. Horn (#5906)
Matthew D. Perri (#6066)
One Rodney Square
920 North King Street
Wilmington, DE 19801
Telephone: (302) 651-7700

WHITE & CASE LLP
Glenn M. Kurtz
Andrew W. Hammond
Robert E. Tiedemann
1155 Avenue of the Americas
New York, NY 10036
Telephone: (212) 819-8200

Attorneys for Frank Fanzilli, Jr. and Richard Magee

Dated: November 19, 2015