

[KKR vs. Bain Capital - Competing TOBs for FUJISOFT \(Part 2\)](#)

Blakemore & Mitsuki Analyzes Legal Issues Related to KKR's and Bain Capital's Competing TOBs for FUJISOFT¹

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1. Basic Composition of the Case and Issues

1 Main Discussion

The basic problem in this case is that KKR is working with 3D² and Farallon to acquire FUJISOFT at a lower price than Bain Capital.

Usually, if the target company's management team decides against taking its own initiative in managing the company and receives takeover offers from two acquirers, A and B, it would be reasonable for such management to agree to the offer of the acquirer with the higher takeover price and also recommend that the company's shareholders apply for the offer.

In this case, however, the target company's board of directors agreed to the acquirer's proposal with a lower purchase price and also recommended that the shares be tendered to such acquirer. At the very least, if the management of the target company has given up its intention to manage the company on its own initiative, the shareholders should be given the right to choose whether to take option A or option B. If such right of choice is taken away from the shareholders, they will claim damages for breach of such management's duty of care.

The reason why FUJISOFT has not changed its decision to support KKR's takeover bid and recommend that it be tendered is that (i) KKR has already concluded tender

¹ A document entitled "KKR vs. Bain Capital/Time Series Table (Part 2)" ("**Time Series Table Part 2**"; no English version has been prepared by Blakemore & Mitsuki) is attached to this document as Annex A2. Terms defined in Time Series Table Part 2, the Time Series Table (defined in a Briefing of our firm titled "KKR vs. Bain Capital - Competing TOB for FUJISOFT" (dated September 12, 2024; the "**Briefing dated September 12, 2024**"), the Tender Offer Registration Statement (dated September 5, 2024) and the Amendment Statements filed thereafter in connection with the tender offer by FK Corporation for FUJISOFT, and the Opinion Report on such tender offer (dated September 5, 2024) (the "**Opinion Report**") and the amendments thereto filed thereafter, shall, when used in this document, shall have the meanings ascribed to them in such documents, unless otherwise defined herein.

² In this document, the term "**3D**" means 3DPI.

agreements with 3D and Farallon and holds 32.68% of the shares, and even if Bain Capital conducts a TOB, it would be difficult to acquire two-thirds of the shares (approximately 66.67%), and (ii) in such a case, FUJISOFT would not be able to go private because it would not be able to squeeze out, and therefore, Bain Capital's TOB would be a failure.

As for the recommendation to tender, not recommending a higher purchase price may be possible if there is a high possibility that the TOB will not be successful, but as for Bain Capital's TOB, since neither a minimum nor a maximum limit to the number of shares to be purchased has been set, it is unlikely that the TOB will not be successful once the TOB has been initiated. If the directors were to do so, they would be charged with a breach of the duty of care of a good manager by the directors.

As for the support of KKR side's TOB, KKR's side has not been able to show whether or not it will be able to acquire, in its TOB(s), the remaining 33.99% after holding 32.68% (3D and Farallon's shares), while Bain Capital has indicated its intention to acquire the shares at a price as high as JPY 650 per share, so it is unclear whether or not KKR's side will succeed in FUJISOFT going private.

In the first place, as stated in the Briefing dated September 12, 2024, FUJISOFT's board of directors has not decided or resolved that going private is absolutely necessary to increase FUJISOFT's business value. Even if going private is a means to increase FUJISOFT's business value, the board itself does not completely deny the possibility of increasing FUJISOFT's business value without going private.

2 Application agreements that do not include a Fiduciary Out clause

Although KKR claims that it is certain that it will acquire 32.68%, the combined ownership of 3D and Farallon, because 3D and Farallon have entered into tender agreements that do not include a fiduciary out clause, such agreements would be deemed invalid (unenforceable) because they are contrary to the provisions of Article 27-12, paragraph (1) of the Financial Instruments and Exchange Act (Act No. 25 of 1948, as amended) (“A tendering shareholder, etc. (meaning a person that accepts an offer to purchase, etc. the share certificates, etc. involved in a tender offer or that offers to sell, etc. them; hereinafter the same applies in this Section) may cancel a contract involving a tender offer at any time during the tender offer period (including the period that is required to be extended pursuant to Article 27-8, paragraph (8); the same applies in paragraphs (1) and (4) of the following Article, Article 27-14, paragraph (1), and Article 27-21, paragraph (1), item

(ii) and paragraph (2), item (ii)).”³.

Therefore, even if Bain Capital conducts a TOB, it would be difficult for KKR to acquire 66.67% of the total ownership of 3D and Farallon, since KKR would acquire 32.68%, which is the total ownership of 3D and Farallon. KKR's argument that the TOB would fail would itself not stand.

To begin with, Bain Capital's TOB does not set a minimum or maximum number of shares to be purchased, so the TOB will not fail due to the inability to take the company private through squeeze-out.

3 3D-proposed Outside Directors

The composition of the members of the Special Committee is "FUJISOFT-proposed directors: 4 vs. 3D-proposed directors: 2," but 3D is tied to KKR (it has concluded a tender agreement that does not include a Fiduciary Out clause). Therefore, those who were appointed as outside directors under the 3D proposal have a conflict of interest (i.e., the interests of 3D conflict with the interests of FUJISOFT's shareholders other than 3D and Farallon). Therefore, we believe that it would be reasonable for them to resign from the Special Committee. In addition, the two outside directors proposed and sent by 3D should be removed from negotiating, deliberating, and resolving on either KKR's or Bain Capital's TOB as a member of the board of directors.

4 Doubts remain about FUJISOFT's board of directors citing an approval resolution as a prerequisite for Bain Capital to initiate TOB

Since 3D and Farallon are on KKR's side and the two members of the 3D proposal are members of the Special Committee (total number of members: 6) and the Board of Directors (total number of directors: 12; total number of outside directors: 7), there is a possibility of a conflict of interest with respect to these two members. Therefore, we believe that the decision making of the Special Committee and the Board of Directors

³ Article 27-12, paragraph (3) of the Financial Instruments and Exchange Act (Act No. 25 of 1948, as amended) provides that “If a tendering shareholder, etc. cancels a contract pursuant to paragraph (1), the tender offeror may not request the tendering shareholder, etc. to pay damages or penalties, and if the tender offeror is having a financial instruments business operator or a bank, etc. manage the tendered share certificates, etc. (meaning share certificates, etc. that the tendering shareholders, etc. sell, etc. in response to the tender offer; hereinafter the same applies in this Section), the tender offeror bears the cost required to return them.” and, as a result, prohibits a tender offeror from claiming damages or penalties due to cancellation of the tender offer.

may be viewed as being in favor of KKR. We believe that the 3D-proposed outside directors should resign from the Special Committee and refrain from participating in the negotiations, deliberations, and resolutions by the Board of Directors regarding the TOB by KKR's side or Bain Capital.

Since what the shareholders with 67.32% ownership other than 3D and Farallon want at present is to transfer their shares at a higher price, Bain Capital should not make the approval resolution of FUJISOFT's board of directors a prerequisite for the TOB. The current board of directors of FUJISOFT has given up on increasing the value of the business under its own initiative and is aiming to increase the value of the business under KKR's initiative, so it is highly likely that the members of the current board of directors of FUJISOFT will be replaced after KKR acquires control. Therefore, it is considered that there is no substantial value in obtaining the approval of the members of FUJISOFT's current board of directors. Under these circumstances, there is no rational reason to hesitate to execute the acquisition without consent. However, even if such preconditions are attached, they can be waived, so Bain Capital can, at its discretion, conduct the TOB without the approval of FUJISOFT's board of directors. Even if 3D and Farallon tendered to KKR side's TOB and KKR became a 32.68% shareholder, it would be almost obvious that shareholders other than 3D and Farallon would tender their shares to Bain Capital's TOB, whose TOB price is 650 yen higher, so KKR could acquire 67.32% of the shares and squeeze out KKR after doing so. It is hard to see any rational reason for Bain Capital not to go through with it. Although it would be an acquisition without consent, the reason for such acquisition without consent to occur should be deemed to be FUJISOFT's board of directors' failure to make a rational decision, and Bain Capital would have no reason to be criticized for making an acquisition without consent. The fact that two outside directors of the 3D proposal are currently on the board of directors of FUJISOFT, and that they are still involved in the negotiations, deliberations and resolutions of the issues related to KKR's side's and Bain Capital's TOBs is, in our opinion, a problem.

Based on the current share price of FUJISOFT, we suspect that almost zero (0) of its shareholders, excluding 3D and Farallon, will tender their shares in the first tender offer on the part of KKR's side.

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