

[KKR vs. Bain Capital - Competing TOBs for FUJISOFT \(Part 3\)](#)**Blakemore & Mitsuki Further Analyzes Legal Issues Related to KKR and Bain Capital's Competitive TOBs of FUJISOFT¹****November 26, 2024****I. The Problems at This Point in Time****1 Is It Legal to Make Up the Difference?**

The Tender Offeror (referring to FK Corporation; the same shall apply unless otherwise specified) plans to compensate for the difference between the first tender offer price and the second tender offer price to those who have lost their shareholder rights by selling their shares to the Tender Offeror. We believe that a sufficient legal explanation is necessary.

2 Negotiate a Raise for Bain Capital

Since the public shareholders are willing to sell at a higher price, the Special Committee's opinion to the Board that it should not negotiate a raise for Bain Capital would be detrimental to the interests and rights of the public shareholders.

3 Is a Request to Bain Capital to Destroy Confidential Information Legal?

The Special Committee is of the opinion that the request to Bain Capital to destroy the confidential information, but this is also made for the purpose of preventing Bain Capital from offering a higher tender offer price, which may be evaluated as undermining the interests and rights of general shareholders.

4 Regarding the Special Committee's Statement That the Tender Offer by Bain Capital Will Not Be Initiated

Making such a determination is problematic.

¹ A document entitled "KKR vs. Bain Capital/Time Series Table (Part 3)" ("**Time Series Table Part 3**") is attached to this document as Annex A3. Terms defined in Time Series Table Part 3, 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.

It is possible that Bain Capital will issue a notice of commencement of a tender offer higher than the price of the second tender offer made by the side of KKR and seek the approval of FUJISOFT's board of directors. Although Bain Capital has set the approval of FUJISOFT's board of directors as a condition for the commencement of the tender offer, it is possible that Bain Capital may waive such condition and commence the tender offer without the approval of the board of directors.

5 It Is Problematic for the Special Committee to Express a Dissenting Opinion without Negotiating a Raise with Bain Capital.

The Special Committee states that "since it is reasonably expected that shareholders would expect to sell at the highest price," and "there are no circumstances in which such a conclusion would be contrary to the reasonable intentions of shareholders, and there is no violation of the principle of shareholder's intentions," but it is the shareholders' desire that a higher tender offer by Bain Capital be initiated, and it is not appropriate for the Special Committee to express opposition to Bain Capital's tender offer without approaching Bain Capital about raising the tender offer price. The general shareholders are only interested in selling their shares at a higher price, and they do not care if there are multiple controlling shareholders or if the company does not go private.

Especially, since Bain Capital even states that

“Nevertheless, if the Tender Offeror reasonably determines that there is a high probability that a material disadvantage will be caused to the remaining shareholders of the Target Company and the Stock Acquisition Right Holders, such as in the event that a material disagreement between the Tender Offeror and FK regarding the operation of the Target Company causes a hindrance to the Target Company's business operation that may materially damage the Target Company's corporate value, the Tender Offeror will make a reasonable withdrawal to the remaining shareholders and Stock Acquisition Right holders of the Target Company by such methods as conducting the Tender Offer again under the same conditions as the Tender Offer so as not to cause such disadvantage to the remaining shareholders and Stock Acquisition Right holders of the Target Company,”

for the board of directors to request Bain Capital to raise a tender offer price constitutes the fulfillment of its duty of care, and if it did not do so, it could be charged with a breach of its duty of care.

6 The Fact That It Would Be a Partial Tender Offer Can Not Be a Reason Not to Support Bain Capital's TOB.

Bain Capital says, "In the FK Amended Tender Offer Registration Statement, the Special Committee of the Target Company² pointed out that 'even if the tender offer by Bain Capital is implemented, a new scenario can be assumed as the final shareholder composition of the Company³ in which the Offeror (Note: FK) holds the above number of shares and Bain Capital also holds a certain number of shares,' the Target Company is aware that the FK Tender Offer may only result in a partial purchase, and that there is a possibility of delisting due to a violation of the listing maintenance standards and a possibility of differences of opinion among shareholders, and nonetheless, the Special Committee supports the Tender Offer by FK. Therefore, the possibility of the Tender Offer being only a partial purchase should not be deemed to constitute a reason for the Target Company (FUJISOFT) not to support such Tender Offer." We agree to that.

7 3D⁴-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.

8 Doubts remain about Bain Capital citing FUJISOFT's board of directors' 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

² Refers to FUJISOFT.

³ Refers to FUJISOFT.

⁴ 3D means 3DPI. The same applies hereafter.

believe that the decision making of the Special Committee and the Board of Directors 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 64.89% 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. If Bain Capital conducts TOB at a price higher than the current tender offer price on KKR's side, since it appears almost obvious that the above 64.89% shareholders will apply for the TOB, it is possible to acquire 64.89% (or close to that shareholding ratio) of the shares, and after doing so, either (1) negotiate with the KKR side or (2) after conducting a legitimate capital increase, acquire 66.68% of the shares, Bain Capital can then either (1) negotiate with KKR, or (2) raise capital legally and then squeeze out the remaining minority shareholders. 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 Special Committee and 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.

II. Future Development**1 Possible Scenarios****(a) Scenario A:**

Bain Capital announces TOB abandonment one to two weeks prior to December 19 (Thursday) (the last day of the second tender offer on the part of KKR) due to (1) failure to obtain an affirmative opinion from FUJISOFT's board of directors and (2) demand to destroy information obtained under the nondisclosure agreement with FUJISOFT.

In this case, (i) Bain Capital could have taken FUJISOFT private under the scenario they had depicted if they had made a TOB without consent at a higher price than KKR's side and could have increased FUJISOFT's business value, but they did not do so, and even if they could avoid lawsuits from the general shareholders, they could have discredited many individuals and corporations participating in the Japanese stock market, and (ii) FUJISOFT's board of directors and Special Committee would be at risk of being sued for damages or shareholder derivative suits by the general shareholders for intentionally or negligently preventing Bain Capital from raising the tender offer price without reasonable cause.

(b) Scenario B:

Bain Capital may raise the TOB price ((i) by not destroying the information obtained under the nondisclosure agreement with FUJISOFT, even if it is requested to do so (since such destruction would damage the interests and rights of FUJISOFT's shareholders and constitute a breach of the duty of care of a good manager by FUJISOFT's board of directors, and the request for destruction is not lawful)), or (ii) by calculating the TOB price based on publicly available information (although it will destroy the information obtained under the nondisclosure agreement)) and continue to seek the approval of FUJISOFT's board of directors.

(c) Scenario C:

Bain Capital initiates an unsolicited TOB with an increased TOB price.

2 Valuation of Above Scenarios

Bain Capital may take scenario A, but it has much to lose in that case.

If Scenario B is adopted, we believe that the number of shareholders who would apply for the second TOB by KKR's side would be almost zero (0). If this is the case, the game will be narrowed down to price alone, and the board of directors of FUJISOFT will likely be forced to give its opinion in favor of the company that offers the higher tender offer price.

Scenario °C has the potential to resolve the issue once and for all in Bain Capital's favor, but it seems likely that the company would be hesitant to make an acquisition without consent in the Japanese market due to some misgivings about doing so.

In conclusion, it appears likely that Scenario B will be adopted. In this case, Bain Capital would be faced with the choice of whether or not to destroy the information obtained under the nondisclosure agreement (if it agrees to destroy the information, it would be asked whether or not it is willing to give notice that it will launch a TOB based solely on information already in the public domain without using such information).

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