

[KKR vs. Bain Capital - Competing TOBs for FUJISOFT \(Part 4\)](#)

Blakemore & Mitsuki Further Analyzes Legal Issues Related to KKR and Bain Capital's Competitive TOBs of FUJISOFT¹

December 23, 2024

I. The Problems at This Point in Time

1 Regarding Outside Directors² Proposed by 3D³

The composition of the members of this Special Committee is “4 for FUJISOFT's proposal vs. 2 for 3D's proposal”, but 3D is not only linked to KKR (having concluded an application agreement that does not include a Fiduciary Out clause), but also is to be compensated for the difference between the FK 2nd and 1st Tender Offer prices, on the condition that the FK 2nd Tender Offer is successful, so there is a strong suspicion that they will act to ensure the success of the FK 2nd Tender Offer, even if it damages the interests of general shareholders, and so it is thought that the two people who were appointed as outside directors as a result of the proposal by 3D have a conflict of interest (the interests of 3D and those of the shareholders of FUJISOFT other than 3D and Farallon are in conflict), so it is thought that it would be reasonable for them to resign from the position of member of the Special Committee. In addition, the two outside directors proposed by 3D and sent to the Company should immediately be prohibited from negotiating, deliberating or voting, as a member of the board of directors, with respect to any TOB made by either KKR or Bain Capital.

2 Regarding the other three outside directors⁴ appointed at the extraordinary general meeting of shareholders on December 4, 2022 (held at the request of 3D

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.

² Specifically, this refers to Mr. Yuya Shimizu and Mr. Shintaro Ishimaru. Strictly speaking, these two individuals were proposed by 3D Opportunity Master Fund, but in this document, the expression “proposed by 3D” is used.

³ This refers to 3DIP. The same shall apply hereinafter.

⁴ Specifically, this refers to Mr. Hikaru Imai, Mr. Takao Tsuji, and Mr. Hidetaka Nishina.

Briefing**Opportunity Master Fund):**

Bain Capital’s press release (dated December 18, 2024) says, “the other three (Hikaru Imai, Takao Tsujii, and Hidetaka Nishina) were also candidates proposed by the Target Company in response to a request from 3D OPPORTUNITY MASTER FUND to convene an extraordinary general shareholders meeting (although we are not aware of any objective facts that suggest that those three individuals were selected as candidates proposed by the Target Company, based on instructions, etc. from 3DIP), and as such, the Tender Offeror believes that it cannot be said that 3DIP has had no influence.”

Under the circumstances where the above doubts cannot be dispelled, the Board of Directors of FUJISOFT should consider asking the above three people to resign as Special Committee members (or dismiss them) and appointing new members. In addition, at the same time as the above resignations (or dismissals), the Board of Directors should consider excluding the above three people from negotiations, deliberations and resolutions, at the Board of Directors, regarding either the tender offer by FK or the tender offer by Bain Capital.

In particular, with respect to Mr. Imai, Charman of the Special Committee, since the magazine “*Sentaku*” (December 2024 issue, pp. 70-71) has reported that (1) in 2022, an employee of the Bank of Yokohama (called “Mr. T”; he had transferred from Deutsche Bank to the Bank of Yokohama) was transferred to FUJISOFT in the form of a secondment from the Bank of Yokohama, and Mr. Mitsu Imai (who had been Mr. T’s boss (President) at RECOF, a M&A intermediary company, before Mr. T joining Deutsche Bank), who was transferred from Merrill Lynch Japan Securities as Deputy President to become the Deputy President of RECOF, becoming its President five months later), was pushed by Mr. T into the position of outside director of FUJISOFT at a special general meeting of shareholders (held on December 4, 2022) called by 3D⁵, by obtaining 3D’s⁶ approval despite Mr. Imai being proposed by FUJISOFT, (2) the true aim of the Bank of Yokohama and Mr. T was to get on board with 3D’s strategy, ultimately delisting FUJISOFT, and thereby taking control of the financing that would accompany the delisting and to seize the position of main bank at a stroke, (3) Mr. T planned for each fund to raise funds from the Bank of Yokohama, and in fact, the Bank of Yokohama acted as lead arranger for the bank loan (290 billion yen) to KKR, and it

⁵ Quotation as it is.

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was decided that the bank itself would provide a loan of 100 billion yen, as part of such bank loan, to KKR, (4) Mr. Imai of the Special Committee would have no reason to seriously consider the Bain proposal now, and (5) the opinion paper of the Special Committee, which was revealed on November 15, not only recommended against the Bain proposal, but also prohibited the board of directors from entering into negotiations with Bain to raise the price, FUJISOFT should investigate whether or not these matters are true (it is possible that a third-party committee could be asked to investigate), and if they are true, FUJISOFT immediately should dismiss Mr. Imai from his position as a Special Committee member, and prohibit him from being involved in any deliberation or resolution at board meetings with respect to any TOB from either FK or Bain Capital.

3 It is not reasonable for the Special Committee to oppose Bain Capital's TOB by reason of there being a risk of deadlock that would make going private impossible

To begin with, it has not been explicitly resolved at a board meeting that going private is the best way to improve the corporate value of FUJISOFT (at least, there is no mention in past disclosure materials that it was explicitly resolved at a board meeting).

Bain Capital's proposal is that, in the event that a deadlock situation arises that is disadvantageous to general shareholders, “the Tender Offeror plans to provide the remaining shareholders of the Target Company and the Stock Acquisition Rights Holders reasonable opportunities to exit by such methods as conducting another tender offer under practically the same terms and conditions as the Tender Offer again so that the remaining shareholders of the Target Company and the Stock Acquisition Rights Holders will not be subject to such disadvantage,” there is nothing wrong with the proposal from Bain Capital, from the perspective of general shareholders.

4 Regarding the fact that the Special Committee is opposing the TOB by Bain Capital on the grounds that there is no significant difference in price when taking into account the time value

We agree with Bain Capital’s statement “Lack of a significant price difference, including the consideration of the time value of money has been cited as one of the rationales for its opposition. However, we believe that shareholders may apply different criteria in evaluating proposals.” It is a matter for each shareholder to decide.

Briefing

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