

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

WEI-HSIN FU, Individually and on Behalf  
of All Others Similarly Situated,

Plaintiff,

v.

JAMBA, INC., MICHAEL A. DEPATIE,  
LORNA DONATONE, RICHARD L.  
FEDERICO, ANDREW R. HEYER,  
DAVID A. PACE, JAMES C. PAPPAS,  
and GLENN W. WELLING,

Defendants.

Civil Action No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**COMPLAINT – CLASS ACTION FOR  
VIOLATIONS OF SECTIONS 14(a) AND  
20(a) OF THE SECURITIES EXCHANGE  
ACT OF 1934**

**JURY TRIAL DEMANDED**

Plaintiff Wei-Hsin Fu (“Plaintiff”), by and through his undersigned counsel, alleges upon personal knowledge with respect to himself, and upon information and belief based upon, *inter alia*, the investigation of counsel as to all other allegations herein, as follows:

**NATURE OF THE ACTION**

1. This is a class action brought by Plaintiff on behalf of himself and all other similarly situated public shareholders of Jamba, Inc. (“Jamba” or the “Company”) against Jamba and the members of the Company’s board of directors (collectively, the “Board” or “Individual Defendants,” and, together with Jamba, the “Defendants”) for their violations of Sections 14(d)(4), 14(e), and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78n(d)(4), 78n(e), 78t(a), and U.S. Securities and Exchange Commission (“SEC”) Rule 14d-9, 17 C.F.R. §240.14d-9(d) (“Rule 14d-9”), in connection with the tender offer (“Tender Offer”) by Focus Brands Inc. (“Focus”), through its wholly-owned subsidiary Jay Merger Sub, Inc. (“Merger Sub”), to acquire all of the issued and outstanding shares of Jamba (the “Proposed Transaction”)

2. On August 1, 2018, Jamba entered into an Agreement and Plan of Merger (the “Merger Agreement”), whereby each shareholder of Jamba common stock will receive \$13.00 per share (the “Offer Price”).

3. On August 15, 2018, in order to convince Jamba shareholders to tender their shares, the Board authorized the filing of a materially incomplete and misleading Schedule 14D-9 Solicitation/Recommendation Statement (the “Recommendation Statement”) with the Securities and Exchange Commission (“SEC”). In particular, the Recommendation Statement contains materially incomplete and misleading information concerning: (i) Jamba’s financial projections; (ii) the valuation analyses performed by the Jamba’s financial advisor, North Point Advisors LLC (“North Point”); and (iii) the potential conflict of interests North Point faced as a result of its prior dealings with Focus.

4. The Tender Offer is scheduled to expire at one minute following 11:59 p.m. (12:00 midnight), Eastern Time, on September 12, 2018 (the “Expiration Date”). It is imperative that the material information that has been omitted from the Recommendation Statement is disclosed to the Company’s shareholders prior to the forthcoming Expiration Date so they can properly determine whether to tender their shares.

5. For these reasons, and as set forth in detail herein, Plaintiff seeks to enjoin Defendants from closing the Tender Offer or taking any steps to consummate the Proposed Transaction, unless and until the material information discussed below is disclosed to Jamba shareholders or, in the event the Proposed Transaction is consummated, to recover damages resulting from the Defendants’ violations of the Exchange Act

### **PARTIES**

6. Plaintiff is, and at all relevant times has been, a holder of Jamba common stock.

7. Defendant Jamba is a Delaware corporation and maintains its headquarters at 3001 Dallas Pkwy, Suite 140, Frisco, Texas 75034. Jamba develops and retails blended beverages, juices, and snacks. The Company offers whole fruit smoothies, fresh squeezed juices, hot oatmeal, breakfast wraps, sandwiches and mini-wraps, frozen yogurt, and a variety of baked goods and snacks. Jamba's common stock trades on the Nasdaq under the ticker symbol "JMBA".

8. Defendant Michael A. Depatie is, and been at all relevant times, a director of the Jamba.

9. Defendant Lorna Donatone is, and been at all relevant times, a director of the Jamba.

10. Defendant Richard L. Federico is, and been at all relevant times, a director of the Jamba, and currently serves as Chairman of the Board.

11. Defendant Andrew R. Heyer is, and been at all relevant times, a director of the Jamba.

12. Defendant David A. Pace is, and been at all relevant times, a director of the Jamba, and currently serves as the Company's Chief Executive Officer.

13. Defendant James C. Pappas is, and been at all relevant times, a director of the Jamba.

14. Defendant Glenn W. Welling is, and been at all relevant times, a director of the Jamba.

15. The defendants identified in paragraphs 8 through 14 are collectively referred to as the "Individual Defendants" or the "Board," and together with Jamba, the "Defendants."

### **JURISDICTION AND VENUE**

16. This Court has subject matter jurisdiction pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331 (federal question jurisdiction) as Plaintiff alleges violations of Section 14(e) and 20(a) of the Exchange Act.

17. Personal jurisdiction exists over each Defendant either because the Defendant conducts business in or maintains operations in this District, or is an individual who is either present in this District for jurisdictional purposes or has sufficient minimum contacts with this District as to render the exercise of jurisdiction over Defendant by this Court permissible under traditional notions of fair play and substantial justice.

18. Venue is proper in this District under 28 U.S.C. § 1391, because Jamba is incorporated in this District, some of the transaction and wrongs complained of herein, including Defendants' primary participation in the wrongful acts detailed herein, occurred in this District, and Defendants have received substantial compensation in this District by doing business here and engaging in numerous activities that had an effect in this District.

### **CLASS ACTION ALLEGATIONS**

19. Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23 on behalf of himself and the other public shareholders of Jamba (the "Class"). Excluded from the Class are Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any Defendant.

20. This action is properly maintainable as a class action because:

- a) The Class is so numerous that joinder of all members is impracticable. As of August 6, 2018, there were approximately 15.64 million shares of Jamba common stock issued and outstanding, held by hundreds to thousands of

individuals and entities scattered throughout the country. The actual number of public shareholders of Jamba will be ascertained through discovery;

- b) there are questions of law and fact that are common to the Class that predominate over any questions affecting only individual members, including the following:
  - i. whether Defendants have misrepresented or omitted material information concerning the Proposed Transaction in the Recommendation Statement, in violation of Sections 14(d)(4) and 14(e) of the Exchange Act;
  - ii. whether the Individual Defendants have violated Section 20(a) of the Exchange Act; and
  - iii. whether Plaintiff and other members of the Class will suffer irreparable harm if compelled to tender their shares based on the materially incomplete and misleading Recommendation Statement.
- c) Plaintiff is an adequate representative of the Class, has retained competent counsel experienced in litigation of this nature, and will fairly and adequately protect the interests of the Class;
- d) Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff does not have any interests adverse to the Class;
- e) the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual

members of the Class, which would establish incompatible standards of conduct for the party opposing the Class;

- f) Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole; and
- g) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

### **SUBSTANTIVE ALLEGATIONS**

#### **I. Background of the Company and the Proposed Transaction**

21. Jamba, through its subsidiary, Jamba Juice Company, owns, operates, and franchises Jamba Juice stores. The Company's restaurants provides blended whole fruit and vegetable smoothies, bowls, juices, cold-pressed shots, boosts, snacks, and meal replacements. As of April 3, 2018, the Company operated approximately 800 franchised and company-owned Jamba Juice stores worldwide.

22. Focus is an affiliate of the Atlanta-based private equity firm, Roark Capital Group ("Roark"), which currently owns the Schlotzsky's, Carvel, Cinnabon, Moe's Southwest Grill, McAlister's Deli, and Auntie Anne's brands.

23. On August 2, 2018, Jamba and Focus issued a joint press release announcing the Proposed Transaction. The press release stated in relevant part:

#### **Focus Brands and Jamba Juice Announce Definitive Merger Agreement**

ATLANTA, Georgia and FRISCO, Texas, (August 2, 2018) — Focus Brands Inc. ("FBI") and Jamba, Inc. (Nasdaq: JMBA) ("Jamba") today announced that the companies have entered into a definitive merger agreement under which FBI will acquire Jamba

for \$13.00 per share in cash, in a transaction valued at approximately \$200 million.

**Statement by Steve DeSutter, Chief Executive Officer of Focus Brands Inc.**

“Benefiting from an extremely loyal customer base and strong franchise operators, Jamba Juice is one of the category leaders in the fast growing smoothie and juice category,” said Steve DeSutter, CEO of Focus Brands Inc. “We are excited to welcome Jamba Juice with such an iconic heritage into our family of well-known and highly loved ‘fan favorite’ brands.”

**Statement by Dave Pace, Chief Executive Officer of Jamba, Inc.**

“We are delighted to have reached this agreement with Focus Brands and are confident that it will result in a positive outcome for our guests, our franchisees and our employees”, said Dave Pace, CEO of Jamba, Inc. “Over the last few years, we have worked hard to strengthen our foundation and reposition this iconic brand for the future. Partnering with Focus Brands will allow us to build on this work and further accelerate the Company’s growth.”

**Transaction Details**

Under the terms of the agreement, a subsidiary of FBI will commence a tender offer to purchase all of the outstanding shares of Jamba common stock for \$13.00 per share in cash. The tender offer is subject to customary conditions, including antitrust clearance and the tender of a majority of the outstanding shares of Jamba common stock. Following successful completion of the tender offer, FBI would acquire all remaining shares not tendered in the offer through a merger at the same price as in the tender offer. The transaction is expected to close during the third quarter of 2018 and will be funded by FBI using cash on hand and available borrowing capacity under its existing credit facilities.

Following the close of the transaction, Jamba will be a privately-held subsidiary of FBI and will continue to be operated as an independent brand.

Focus Brands is majority owned by affiliates of Roark, an Atlanta based private equity firm that focuses on investing in franchised and multi-unit businesses in the restaurant, retail and other consumer sectors.

Certain funds advised by Engaged Capital, LLC and Indus Capital Partners, LLC, which collectively own approximately 27% of the outstanding shares of Jamba, have entered into agreements to tender their shares in the tender offer.

### **Advisors**

North Point Advisors LLC is serving as financial advisor and DLA Piper LLP is serving as legal counsel to Jamba. Paul, Weiss, Rifkind, Wharton & Garrison LLP is serving as legal counsel to FBI.

### **About Focus Brands Inc.**

Atlanta-based Focus Brands Inc. is a leading developer of global multi-channel foodservice brands. FBI, through its affiliate brands, is the franchisor and operator of more than 5,000 restaurants, cafes, ice.

## **II. The Recommendation Statement Is Materially Incomplete and Misleading**

24. On August 15, 2018, Jamba filed the Recommendation Statement with the SEC in connection with the Proposed Transaction. The Recommendation Statement solicits the Company's shareholders to tender their shares in favor of the Proposed Transaction. The Individual Defendants were obligated to carefully review the Recommendation Statement before it was filed with the SEC and disseminated to the Company's shareholders to ensure that it did not contain any material misrepresentations or omissions. However, the Recommendation Statement misrepresents or omits material information that is necessary for the Company's shareholders to make an informed decision whether to tender their shares in connection with the Tender Offer, in violation of Sections 14(d)(4), 14(e), and 20(a) of the Exchange Act.

25. First, the Recommendation Statement states that two sets of financial projections for Jamba existed: the *Management Case*, which were developed by Jamba's management and depict a more successful outlook for the Company, and *Base Case*, which were prepared by North



Point and depict a more pessimistic outlook for the Company. *See* Recommendation Statement at 40-43.

26. However, while the Recommendation Statement provides several different metrics for both sets of projections, including Total Revenue, EBITDA, and Adjusted EBTIDA, it fails to disclose the most important one: Jamba's expected unlevered free cash flows.<sup>1</sup> Indeed, Jamba's unlevered free cash flows were utilized by North Point in their valuation analyses, including both discounted cash flow ("DCF") analyses that were performed for Jamba using the *Management Case* and *Base Case* projections, and are material to the Company's shareholders.

27. Indeed, investors are concerned, perhaps above all else, with the unlevered free cash flows of the companies in which they invest. Under sound corporate finance theory, the market value of a company should be premised on the expected unlevered free cash flows of the corporation. Accordingly, the question that the Company's shareholders need to assess in determining whether to tender in favor of the Proposed Transaction is clear—is the Offer Price fair compensation given the Company's expected unlevered free cash flows? Without Jamba's unlevered free cash flow projections for both the *Management Case* and *Base Case* sets of projections, the Company's shareholders will not be able to answer this question and assess the fairness of the Offer Price.

28. Furthermore, EBITDA is not a sufficient alternative to unlevered free cash flows—as Warren Buffet and other financial experts have stated: "References to EBITDA make us

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<sup>1</sup> Unlevered free cash flows are used to determine a company's enterprise value. The unlevered free cash flow allows investors to ascertain the operating value of a company independent of its capital structure. This provides a greater degree of analytical flexibility and allows for a clearer picture of the value of the company overall. For this reason, unlevered free cash flows are routinely used to value a company, especially in merger contexts.

shudder. Too many investors focus on earnings before interest, taxes, depreciation, and amortization. That makes sense, only if you think capital expenditures are funded by the tooth fairy.”<sup>2</sup> Relying solely on EBITDA to provide a fair summary of a company’s financial prospects has numerous pitfalls. EBITDA does not take into account any capital expenditures, working capital requirements, current debt payments, taxes, or other fixed costs that are critical to understand a company’s value. As a result of these material differences between EBITDA and unlevered free cash flows, many experts recognize unlevered free cash flows as a much more accurate measure when it comes to analyzing the expected performance of a company. Simply put, Jamba’s unlevered free cash flow projections are material and their omission renders the projections included in the Recommendation Statement misleading.

29. Numerous courts have championed the importance of management based financial projections because a company’s management has unique insight into their firm’s future that the market does not. Shareholders cannot hope to replicate management’s inside view of the Company’s prospects. The established case law shows the importance (and, hence, materiality) of financial projections to shareholders' decision-making.

30. Additionally, complete disclosure of Jamba’s unlevered free cash flow projections is particularly important for Company shareholders in light of the fact that shareholders are being asked to accept a one-time cash payment and forsake any future interest in the Company. Accordingly, a reasonable shareholder would find it material to know what the best estimate of the Company’s expected future cash flows.

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<sup>2</sup> Elizabeth MacDonald, *the Ebitda folly*, Forbes (March 17, 2003), <http://www.forbes.com/global/2003/0317/024.html>.

31. By electing to disclose *some* of Jamba's projections, Defendants' obligated themselves to speak the *whole truth* regarding Jamba's projections by providing *complete and accurate* projections because if a recommendation statement discloses financial projections and valuation information, such *projections must be complete and accurate*, rather than cherry-picking favorable financial metrics to disclose. The question here is not the duty to speak, but liability for not having spoken enough. With regard to future events, uncertain figures, and other so-called soft information, a company may choose silence or speech elaborated by the factual basis as then known—but it may not choose half-truths.

32. Second, the Proxy describes North Point's fairness opinion and the various valuation analyses it performed in support of its opinion. However, the description of North Point's fairness opinion and analyses fails to include key inputs and assumptions underlying these analyses. Without this information, as described below, Jamba's shareholders are unable to fully understand these analyses and, thus, are unable to determine what weight, if any, to place on North Point's fairness opinion in determining whether to tender their shares in favor of the Proposed Transaction. This omitted information, if disclosed, would significantly alter the total mix of information available to Jamba's common shareholders

33. With respect to North Point's *Discounted Cash Flow Analysis*, the Recommendation Statement fails to disclose the following key components used in their analysis: (i) Jamba's projected unlevered free cash flows<sup>3</sup> for the years 2019 through 2023; (ii) Jamba's

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<sup>3</sup> The DCF is widely-regarded as the most important valuation methodology. A DCF analysis calculates the present value of the future free cash flows of the corporation by discounting the cash flows at a specific discount rate. In practice, a discounted cash flow of a corporate entity consists of three principal components: (1) a corporation's future free cash flows; (2) its terminal value; and (3) the discount rate. See Steven M. Davidoff, *Fairness Opinions*, 55 Am. U.L. Rev. 1557,

illustrative terminal values in the year 2023; and (iii) the inputs and assumptions underlying the calculation of the discount rates ranging from 9.4% to 14.4%. *See* Recommendation Statement at 36-37.

34. These key inputs are material to Jamba's shareholders, and their omission renders the summary of North Point's *Discounted Cash Flow Analysis* incomplete and misleading. As a highly-respected professor explained in one of the most thorough law review articles regarding the fundamental flaws with the valuation analyses bankers perform in support of fairness opinions, in a DCF analysis a banker takes management's forecasts, and then makes several key choices "each of which can significantly affect the final valuation." Davidoff, *Fairness Opinions* at 1576. Such choices include "the appropriate discount rate, and the terminal value..." *Id.* As Professor Davidoff explains:

There is substantial leeway to determine each of these, and any change can markedly affect the discounted cash flow value. For example, a change in the discount rate by one percent on a stream of cash flows in the billions of dollars can change the discounted cash flow value by tens if not hundreds of millions of dollars... This issue arises not only with a discounted cash flow analysis, but with each of the other valuation techniques. This dazzling variability makes it difficult to rely, compare, or analyze the valuations underlying a fairness opinion ***unless full disclosure is made of the various inputs in the valuation process, the weight assigned for each, and the rationale underlying these choices.*** The substantial discretion and lack of guidelines and standards also makes the process vulnerable to manipulation to arrive at the "right" answer for fairness. This raises a further dilemma in light of the conflicted nature of the investment banks who often provide these opinions.

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1574 n.73 (2006) (collecting sources and outlining the methodology for conducting a DCF analysis of a corporation).

*Id.* at 1577-78 (emphasis added). Without the above-mentioned information, Jamba shareholders cannot evaluate for themselves the reliability of North Point's DCF analysis, make a meaningful determination of whether the implied equity value per share ranges reflect the true value of the Company or was the result of North Point's unreasonable judgment, and make an informed decision regarding whether to tender their shares in the Proposed Transaction.

35. Furthermore, the Recommendation Statement fails to disclose the DCF analysis North Point prepared using the *Management Case* projections. Indeed, the Recommendation Statement explicitly states that "North Point then performed discounted cash flow analyses using both the management case and the base case." Recommendation Statement at 37. However, the Board decided to withhold the analysis simply because they believed presenting shareholders with two DCF analyses "may lead to confusion." *Id.*

36. The failure to disclose an entire analysis renders the Recommendation Statement materially incomplete and misleading, as Jamba shareholders are unable to evaluate an entire analysis that the Board considered when deciding to enter into the Merger Agreement and unanimously recommend the Company's shareholders tender their shares in the Tender Offer. Moreover, without the *Management Case* DCF analysis, Jamba shareholders are unable to assess the fairness of the Offer Price and make an informed decision regarding whether to tender their shares in the Proposed Transaction.

37. With respect to North Point's *Illustrative Leveraged Buyout Scenario Analysis*, the Recommendation Statement fails to disclose the following key components used in their analysis: (i) Jamba's existing debt; and (ii) the inputs and assumptions underlying the calculation of the internal rates of return ranging from 17.5% to 25.0%. *See* Recommendation Statement at 37. For the same reasons mentioned above, the Jamba shareholders cannot evaluate for themselves the

reliability of North Point's *Illustrative Leveraged Buyout Scenario Analysis*, make a meaningful determination of whether the implied equity value per share ranges reflect the true value of the Company or was the result of North Point's unreasonable judgment, and make an informed decision regarding whether to tender their shares in the Proposed Transaction.

38. With respect to North Point's *Comparable Precedent Transactions Analysis*, the Recommendation Statement fails to disclose the individual multiples North Point calculated for each transaction utilized. *See* Recommendation Statement at 35-36. The omission of these multiples renders the summary of the analysis and the implied equity value per share ranges materially misleading. A fair summary of a transactions analysis requires the disclosure of the individual multiples for each transaction; merely providing the range that a banker applied is insufficient, as shareholders are unable to assess whether the banker applied appropriate multiples, or, instead, applied unreasonably low multiples in order to drive down the implied equity value per share ranges. Accordingly, North Point's *Comparable Precedent Transactions Analysis* is materially incomplete and misleading, and the individual multiples for each transaction observed must be disclosed so Jamba shareholders can determine whether the implied equity value per share ranges set forth in the Recommendation Statement actually reflect the true value of their interest in the Company.

39. Finally, the Recommendation Statement fails to disclose or misstate material information that materially misleads shareholders as to the potential conflicts of interest faced by North Point.

40. In particular, the Recommendation Statement discloses information concerning the past dealings between North Point and Focus. Specifically, the Recommendation Statement simply states:

In addition, *North Point and/or its affiliates have provided investment banking services to Roark and other entities affiliates with Parent.* Such services have included various advisory services for several entities, including Pet Valu Canada Holding Corporation, FASTSIGNS Holding Corp., and Mississippi Restaurant Holdings Inc. (dba McAlister's Deli), in each case for which North Point has received customary fees. All of these engagements were in 2016 or earlier years.

Recommendation Statement at 40 (emphasis added). However, the Recommendation Statement fails to disclose sufficient information concerning the past dealings between North Point and Focus, including the compensation received in connection therefrom.

41. Such information is material to Jamba shareholders. Indeed, it is imperative for shareholders to be able to understand what factors might influence the financial advisor's analytical efforts. A financial advisor's own proprietary financial interest in a proposed merger must be carefully considered in assessing how much credence to give its analysis. A reasonable shareholder would want to know what important economic motivations that the advisor, employed by a board to assess the fairness of the proposed transaction to the shareholders, might have, especially when that motivation could rationally lead the advisor to favor a deal at a less than optimal price because the procession of a deal was more important to him, given his overall economic interest, than only approving a deal at truly fair price to shareholders. The failure to quantify the compensation North Point has received in connection with the prior work is has performed for Focus and its affiliates renders the Recommendation Statement materially incomplete and misleading.

42. In sum, the omission of the above-referenced information renders the Proxy materially incomplete and misleading, in contravention of the Exchange Act. Absent disclosure of the foregoing material information prior to the Expiration Date, Plaintiff and the other members of the Class will be unable to make an informed decision regarding whether to tender their shares

in favor of the Proposed Transaction, and they are thus threatened with irreparable harm, warranting the injunctive relief sought herein.

**COUNT I**

**(Against All Defendants for Violation of Section 14(e) of the Exchange Act  
and 17 C.F.R. § 244.100 Promulgated Thereunder)**

43. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

44. Section 14(e) of the Exchange Act provides that it is unlawful “for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading...” 15 U.S.C. §78n(e).

45. Defendants violated § 14(e) of the Exchange Act by issuing the Recommendation Statement in which they made untrue statements of material facts or failed to state all material facts necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, in connection with the tender offer commenced in conjunction with the Proposed Transaction. Defendants knew or recklessly disregarded that the Recommendation Statement failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

46. The Recommendation Statement was prepared, reviewed, and/or disseminated by Defendants. It misrepresented and/or omitted material facts, including material information about the consideration offered to shareholders via the Tender Offer and the intrinsic value of the Company.

47. In so doing, Defendants made untrue statements of fact and/or omitted material facts necessary to make the statements made not misleading. Each of the Individual Defendants,



by virtue of their roles as officers and/or directors, were aware of the omitted information but failed to disclose such information, in violation of Section 14(e). The Individual Defendants were therefore reckless, as they had reasonable grounds to believe material facts existed that were misstated or omitted from the Recommendation Statement, but nonetheless failed to obtain and disclose such information to shareholders although they could have done so without extraordinary effort.

48. The omissions and incomplete and misleading statements in the Recommendation Statement are material in that a reasonable shareholder would consider them important in deciding whether to tender their shares or seek appraisal. In addition, a reasonable investor would view the information identified above which has been omitted from the Recommendation Statement as altering the “total mix” of information made available to shareholders.

49. Defendants knowingly or with deliberate recklessness omitted the material information identified above from the Recommendation Statement, causing certain statements therein to be materially incomplete and therefore misleading. Indeed, while Defendants undoubtedly had access to and/or reviewed the omitted material information in connection with approving the Proposed Transaction, they allowed it to be omitted from the Recommendation Statement, rendering certain portions of the Recommendation Statement materially incomplete and therefore misleading.

50. The misrepresentations and omissions in the Recommendation Statement are material to Plaintiff, and Plaintiff will be deprived of their entitlement to make a fully informed decision if such misrepresentations and omissions are not corrected prior to the expiration of the tender offer.

**COUNT II**

**(Against all Defendants for Violations of Section 14(d)(4) of the Exchange Act  
and SEC Rule 14d-9, 17 C.F.R. § 240.14d-9)**

51. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

52. Defendants have caused the Recommendation Statement to be issued with the intention of soliciting shareholder support of the Proposed Transaction.

53. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated thereunder require full and complete disclosure in connection with tender offers. Specifically, Section 14(d)(4) provides that:

Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

54. SEC Rule 14d-9(d), which was adopted to implement Section 14(d)(4) of the Exchange Act, provides that:

Information required in solicitation or recommendation. Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1 through 8 of Schedule 14D-9 (§ 240.14d-101) or a fair and adequate summary thereof.

55. In accordance with Rule 14d-9, Item 8 of a Schedule 14D-9 requires a Company's directors to:

Furnish such additional information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

56. The Recommendation Statement violates Section 14(d)(4) and Rule 14d-9 because it omits material facts, including those set forth above, which omissions render the

Recommendation Statement false and/or misleading. Defendants knowingly or with deliberate recklessness omitted the material information identified above from the Recommendation Statement, causing certain statements therein to be materially incomplete and therefore misleading. Indeed, while Defendants undoubtedly had access to and/or reviewed the omitted material information in connection with approving the Proposed Transaction, they allowed it to be omitted from the Recommendation Statement, rendering certain portions of the Recommendation Statement materially incomplete and therefore misleading.

57. The misrepresentations and omissions in the Recommendation Statement are material to Plaintiff, and Plaintiff will be deprived of their entitlement to make a fully informed decision if such misrepresentations and omissions are not corrected prior to the Expiration Date.

### **COUNT III**

#### **(Against the Individual Defendants for Violations of Section 20(a) of the Exchange Act)**

58. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

59. The Individual Defendants acted as controlling persons of Jamba within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers and/or directors of Jamba and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false and misleading statements contained in the Recommendation Statement, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements that Plaintiff contends are false and misleading.

60. Each of the Individual Defendants was provided with or had unlimited access to copies of the Recommendation Statement alleged by Plaintiff to be misleading prior to and/or

shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause them to be corrected.

61. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control and influence the particular transactions giving rise to the violations as alleged herein, and exercised the same. The Recommendation Statement contains the unanimous recommendation of the Individual Defendants to approve the Transaction. They were thus directly involved in the making of the Recommendation Statement.

62. By virtue of the foregoing, the Individual Defendants violated Section 20(a) of the Exchange Act.

63. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(e) and 14(d)(4) of the Exchange Act and Rule 14d-9, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of the Individual Defendants' conduct, Plaintiff and the Class have suffered damage and actual economic losses (*i.e.*, the difference between the Offer Price and the true value of Jamba shares) in an amount to be determined at trial.

64. Plaintiff and the Class have no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment and relief as follows:

A. Declaring that this action is properly maintainable as a Class Action and certifying

Plaintiff as Class Representative and his counsel as Class Counsel;

B. Preliminarily and permanently enjoining Defendants and their counsel, agents, employees, and all persons acting under, in concert with, or for them, from proceeding with, consummating, or closing the Proposed Transaction, unless and until Defendants disclose the material information identified above which has been omitted from the Recommendation Statement;

C. Rescinding, to the extent already implemented, the Merger Agreement or any of the terms thereof, or granting Plaintiff and the Class rescissory damages;

D. Directing the Defendants to account to Plaintiff and the Class for all damages suffered as a result of their wrongdoing;

E. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and expert fees and expenses; and

F. Granting such other and further equitable relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury on all issues so triable.

Dated: August 28, 2018

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*Attorneys for Plaintiff*

### CERTIFICATION OF PROPOSED LEAD PLAINTIFF

I, Wei-Hsin Fu (“Plaintiff”), declare, as to the claims asserted under the federal securities laws, that:

1. Plaintiff has reviewed a draft of the complaint and has authorized the filing of a complaint substantially similar to the one reviewed.
2. Plaintiff selects Monteverde & Associates PC and any firm with which it affiliates for the purpose of prosecuting this action as my counsel for purposes of prosecuting my claim against defendants.
3. Plaintiff did not purchase the security that is the subject of the complaint at the direction of Plaintiff’s counsel or in order to participate in any private action arising under the federal securities laws.
4. Plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary.
5. Plaintiff sets forth in the attached chart all the transactions in the security that is the subject of the complaint during the class period specified in the complaint.
6. In the past three years, Plaintiff has not sought to serve nor has served as a representative party on behalf of a class in an action filed under the federal securities laws, unless otherwise specified below.
7. Plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond Plaintiff’s pro rata share of any recovery, except such reasonable costs and expenses (including lost wages) directly relating to the representation of the Class as ordered or approved by the Court.

I declare under penalty of perjury under the laws of the United States that the foregoing information is correct to the best of my knowledge.

Signed this 28 day of August, 2018.

DocuSigned by:  
Wei-Hsin Fu  
D795B35BE3AC426...  
Signature



CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE



## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
  
- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
  
- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
  
- IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
  
- V. **Origin.** Place an "X" in one of the seven boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.  
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.  
**PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
  
- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
  
- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
  
- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.