

**UNITED STATES OF
AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934
Release No. 83626 / July 13, 2018**

**ADMINISTRATIVE PROCEEDING
File No. 3-18594**

In the Matter of

**FP RESOURCES USA INC.
and LOBSTER POINT
HOLDINGS LIMITED,**

Respondents.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease- and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against FP Resources USA Inc. (“FP Resources”) and Lobster Point Holdings Limited (“Lobster Point”) (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order and Civil Penalty (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds¹ that:

Summary

1. This matter concerns violations of the reporting provisions of Section 13(d) of the Exchange Act by Respondents. Section 13(d)(1) of the Exchange Act, together with Rule 13d-1(a), requires the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's Section 12-registered equity securities. Rule 13d-1(a) requires that a beneficial owner file a Schedule 13D within ten days after the underlying acquisition.

2. On December 31, 2015, FP Resources and Lobster Point became beneficial owners of approximately 16.5% of the common stock of The First Marblehead Corporation ("First Marblehead" or the "Company"). Following the acquisition of shares, Respondents took a series of steps to effectuate a merger—an extraordinary corporate transaction—with First Marblehead, with the goal of taking the Company private. Although Respondents' disclosure regarding their beneficial ownership was due no later than January 11, 2016, and by no later than February 22, 2016, the Respondents had taken a series of significant steps to acquire the Company that they were required to disclose, they failed to make these disclosures in a Schedule 13D until March 25, 2016.

Respondents

3. FP Resources is a Delaware corporation that was wholly owned by Lobster Point between December 31, 2015, and June 2, 2016. On August 22, 2016, First Marblehead became a wholly owned subsidiary of FP Resources pursuant to a merger that was approved by First Marblehead's stockholders.

4. Lobster Point is a Nova Scotia limited company.² Between December 31, 2015, and June 2, 2016, Lobster Point wholly owned FP Resources. Because Lobster Point was the parent company of FP Resources during the relevant time frame, Lobster Point also became a beneficial owner of the First Marblehead shares held by FP Resources.³

¹ The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

² In its March 25, 2016 Schedule 13D filing, Lobster Point was incorrectly identified as "Lobster Point Properties Ltd." However, a subsequent Schedule 13D amendment clarified that the correct name of the entity is "Lobster Point Holdings Limited."

³ Whether a person is a "beneficial owner" is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship

Legal Framework

5. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten days after acquiring beneficial ownership of more than five percent of the class of equity security.

6. Exchange Act Rule 13d-101 codifies Schedule 13D, which sets forth mandatory disclosure items in response to which beneficial owners must report, *inter alia*, the identity of the acquirer, including beneficial owners and the interest of all persons making the filing, including those acting together as a group. Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including those which relate to or would result in “[a]n extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer or any of its subsidiaries.” The duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 requires that the reporting person file truthfully and completely. *SEC v. Savoy Industries*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979).

7. There is no state of mind requirement for violations of Section 13(d) and the rules thereunder. *See SEC v. Levy*, 706 F. Supp. 61, 63-69 (D.D.C. 1989). The failure to timely file a Schedule 13D or an amendment to an existing Schedule 13D, even if inadvertent, constitutes a violation. *Herbert Moskowitz*, 77 SEC 446, 2002 WL 434524, at *7 (Mar. 21, 2002) (Commission opinion).

or otherwise” has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989).

Failure to Timely Disclose Beneficial Ownership and Plan to Acquire First Marblehead

8. As early as November 2015, Respondents contemplated a transaction to acquire First Marblehead. By early December 2015, Respondents had already begun discussing a potential acquisition with First Marblehead's management. By mid-December, Respondents were informed that a going-private transaction would likely have to take place without assistance from First Marblehead's management. In this regard, on December 17, 2015, the treasurer of FP Resources ("Treasurer") informed Respondents that due to restrictions on the stock of First Marblehead's CEO, "a management lead [sic] go private may not be possible and we may have to consider a bid which [First Marblehead's board of directors] could support." Accordingly, the next day, on December 18, 2015, Treasurer, on behalf of Respondents, contacted a large investment bank to request assistance "with a takeover bid for [First Marblehead], with the objective of taking it private."

9. On December 31, 2015, the president of FP Resources and Lobster Point ("President"), following consultation with legal counsel, transferred all of his First Marblehead shares to FP Resources. As a result, FP Resources and Lobster Point (as the parent company of FP Resources) both acquired a 16.5% beneficial ownership interest in First Marblehead, which ultimately contributed to their acquiring the Company through a merger transaction. Accordingly, by no later than January 11, 2016,⁴ Respondents had a legal obligation to file a Schedule 13D reporting their beneficial ownership in First Marblehead.

10. On January 14, 2016, Respondents, through President, notified First Marblehead through a letter to its CEO and directors that they were interested in exploring confidential discussions regarding a potential strategic transaction with the Company. Following the letter, Respondents, in consultation with legal counsel, continued taking significant steps toward effectuating a going-private transaction.

11. Shortly thereafter, on January 21, 2016, Treasurer contacted an investment bank, stating that Respondents had "accumulated a 16.5% interest in [First Marblehead] and it is our intention to enter into an agreement to buy out existing shareholders in a merger type transaction with the goal of taking the company private."

12. On January 28, 2016, Treasurer emailed an associate to discuss First Marblehead's finances. In this email, Treasurer stated, "We will be making a bid to take the company private. Likley [sic] in the \$5 to \$6 a share range. About 40% of the shareholders will role [sic] over."

13. Throughout February, Respondents continued to communicate closely with First Marblehead about the potential acquisition. On February 7, 2016, Treasurer informed Respondents that he was in the process of negotiating terms of a nondisclosure and standstill

⁴ Because January 10, 2016, which fell ten days after Respondents' acquisition of the First Marblehead shares, was a Sunday, Respondents' Schedule 13D was due by the following business day.

agreement with the Independent Committee of First Marblehead's Board of Directors ("Independent Committee") in connection with the going-private transaction. In response, Respondents, through their representative, cautioned Treasurer against committing to terms that would prevent Respondents from making a tender offer or soliciting proxies directly from shareholders, advising him against an agreement that "would preclude us [from] going direct to shareholders if for some reason the Board goes stupid on us."

14. Shortly thereafter, on February 9, 2016, Treasurer sought Respondents' approval of terms he negotiated with the Independent Committee. Among the terms was a one-year standstill period that would prohibit Respondents from "going hostile, acquiring shares, or proposing directors."

15. On February 16, 2016, Treasurer explained to the Independent Committee that Respondents were reluctant to execute the agreement because he believed the standstill provisions "could be used to [First Marblehead's] advantage in negotiation." Treasurer then stated that Respondents would soon present the Independent Committee with a price range for the acquisition, based only upon publicly available information, and that negotiations toward a board-approved merger could move forward if the Independent Committee found that range to be acceptable.

16. Thereafter, as reflected in contemporaneous email discussions, FP Resources reduced its ownership of First Marblehead in the belief that it would obtain "more rights under Delaware takeover rules" that require heightened shareholder approval on merger transactions involving shareholders whose ownership exceeds 15% or more of a company's voting stock. Beginning on February 22, 2016, and continuing until March 7, 2016, FP Resources sold 191,697 First Marblehead shares, bringing its ownership of the Company's stock down from approximately 16.5% to 14.9%.

17. On March 8, 2016, FP Resources sent an indication of interest to First Marblehead's CEO, lead director, and the chairman of the Independent Committee, to purchase the outstanding shares of First Marblehead, contemplating an offer price between \$4.50 and \$6.00 per share. In connection with the transaction to take the Company private, which was ultimately successful, Respondents purchased First Marblehead shares at a price, \$5.05 per share, within this range.

18. Respondents had an obligation to file a Schedule 13D disclosing their ownership of First Marblehead shares by no later than January 11, 2016, but failed to file their initial Schedule 13D until two and a half months later. By no later than February 22, 2016, Respondents had an obligation to disclose their plan to engage in an extraordinary transaction with the Company. Despite these obligations, Respondents did not file their Schedule 13D until March 25, 2016.

Violations

19. As a result of the conduct described above, Respondents violated Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder.

Respondents' Cooperation

20. In determining to accept the Offer, the Commission considered the cooperation Respondents provided to Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, FP Resources and Lobster Point cease and desist from committing or causing any violations and any future violations of Section 13(d)(1) of the Exchange Act and Rule 13d-1 thereunder.

B. FP Resources shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$92,383.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

C. Lobster Point shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$92,383.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

Payment must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:
Enterprise Services Center

Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying the payor as a respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Anita B. Bandy, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, FP Resources and Lobster Point agree that in any related investor action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of their payment of a civil penalty in this action (“Penalty Offset”). If the court in any related investor action grants such a Penalty Offset, Respondents agree that they shall, within thirty days after entry of a final order granting the Penalty Offset, notify the Commission’s counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a “related investor action” means a private action for damages brought against FP Resources and/or Lobster Point by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary