



- c. *Share Tracing Issues.* The Common Stock trades publicly and the clearly valid shares cannot be traced and segregated from the questionably valid shares.
- d. *Timing Exigencies.* The Company is obligated to file its Annual Report on Form 10-K for the period ended December 31, 2022 by March 31, 2023, and its outside auditor has raised concerns regarding the validity of its capital structure and may be unwilling to certify its financial results and deliver the requisite audit opinions absent a validation of the Charter before then.

### **BACKGROUND**

3. The Company was initially incorporated as a special purpose acquisition company under the name Falcon Capital Acquisition Corp (“FCAC”). It adopted the Charter in connection with a business combination (“Business Combination”) with a leading digital healthcare platform company (“Legacy Sharecare”).

4. The Charter amended the Old Charter, including by increasing the total number of shares of common stock of the Company (“Common Stock”) authorized for issuance.

5. As a condition to consummating the Business Combination, the Company asked its stockholders to approve adoption of the Charter (“Charter Proposal”).<sup>1</sup> The Proxy Statement soliciting stockholder approval of the Charter

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<sup>1</sup> The Company also submitted to stockholders a non-binding advisory proposal to approve the increase in the authorized Common Stock reflected in the Charter (“Advisory Proposal”). The Advisory Proposal was submitted to

Proposal (Ex. C, “Proxy Statement”) disclosed that “[a]pproval of the Charter Proposal requires the affirmative vote of at least a majority of the outstanding FCAC Shares entitled to vote thereon, voting as a single class.” (Ex. C at 10.) “FCAC Shares” was defined to mean the Class A Common Stock and Class B Common Stock of FCAC, collectively. (Ex. C at 3.) Viewing its Class A Common Stock and Class B Common Stock as two series of the same class of stock, the Company believed no class votes were required to adopt the Charter.

6. That belief has been called into question by the opinion in *Garfield v. Boxed, Inc.*<sup>2</sup> where the Court read a certificate of incorporation as creating two classes, rather than series, of common stock, and therefore determined that increases in the authorized shares of each class had to be approved by separate class votes under Section 242(b)(2) of the DGCL. The certificate of incorporation at issue in *Boxed* and the Old Charter are substantially similar, as reflected on **Exhibit D**. Applying *Boxed* to the Old Charter, it is possible that the Charter Proposal had to be approved by a separate class vote of the Class A Common Stock. A majority of the outstanding Class A Common Stock vote was in fact obtained on the Charter Proposal; however, given that the Proxy Statement did not disclose that

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stockholders pursuant to SEC guidance; however, stockholder approval of the Charter was dependent solely on the singular Charter Proposal.

<sup>2</sup> 2022 WL 17959766 (Del. Ch. Dec. 27, 2022). Hereafter, “*Boxed*”.

such a separate class vote was required, the Company wishes to resolve any doubts about the validity of the Charter.<sup>3</sup>

7. In addition, given the way Section 161 of the DGCL calculates the number of shares available for issuance (which requires sufficient shares be available to cover both issued shares and shares reserved for issuance to satisfy the exercise or conversion, as applicable, of stock options, warrants or other convertible securities), a number of shares of Common Stock and other securities that are or may be convertible into or exercisable for shares of Common Stock and were issued in

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<sup>3</sup> A class vote of the Class A Common Stock may have been required if the Charter is viewed as having renamed the Class A Common Stock as Common Stock, and increasing the authorized number of shares of that class. Alternatively, a class vote may have been required by Section 242(b)(2) because the Charter reclassified the Class A Common Stock into Common Stock. A reclassification might be viewed as adversely affecting the rights, powers or preferences of the Class A Common Stock, and, if so, would require a separate class vote of the Class A Common Stock for purposes of Section 242(b)(2).

The Charter also effected other amendments, including to “eliminate certain provisions specific to FCAC’s status as a blank check company.” (Ex. C at 126.) To the extent such other amendments might be deemed to have adversely affected the rights, powers or preferences of the Class A Common Stock, a separate class vote of the Class A Common Stock would have been required to adopt those amendments as well. Given the limited number of cases interpreting what constitutes an adverse effect for purposes of Section 242(b)(2) of the DGCL, and because the amendments were submitted to stockholders in a singular Charter Proposal, the Company is seeking validation of the entire Charter.

connection with or after the Business Combination may be placed under a cloud of uncertainty. The Company seeks to clarify the validity of these securities as well.

8. The Company respectfully submits that relief under Section 205 is warranted. The Charter was adopted more than a year-and-a-half ago, with the advice of reputable counsel. The stockholders of both FCAC and Legacy Sharecare (then an unrelated entity) relied on the Charter's provisions when they approved the Business Combination. They knew, as disclosed in the Proxy Statement, that "the greater number of authorized shares of capital stock is desirable for New Sharecare to have sufficient shares to complete the Business Combination and have additional authorized shares for financing its business, for acquiring other businesses, for forming strategic partnerships and alliances and for stock dividends and stock splits." (Ex. C at 126.). Moreover, since the Business Combination, the Company has issued Common Stock, or securities convertible into or exercisable for Common Stock, in connection with acquisitions of unrelated entities and as compensation for executives and other employees. The recipients of these securities also relied on the validity of the Charter.

9. The Company respectfully requests a prompt final hearing regarding this Petition. Aside from the cloud hanging over the publicly traded stock of a Company with a current market capitalization of approximately \$900 million, uncertainty over the Company's capital structure could prevent the Company from

effecting further SEC filings, conducting stockholder votes, utilizing its equity as acquisition or financing currency, compensating its officers and employees, or honoring the contractual commitments to issue Common Stock upon conversion or exercise of its convertible securities. Indeed, the Company's auditor has already contacted the Company to inquire regarding "the validity of the corporate actions taken in connection with last year's de-SPAC transaction in contemplation of this year's audit." Absent a prompt remedy, the Company's interests, as well as those of its equityholders and employees, would be irreparably harmed.

### **FACTUAL BACKGROUND**

10. The Company was incorporated on June 5, 2020 as a special purpose acquisition company. The Old Charter, filed with the Secretary of State on July 1, 2021, was in effect at the time the Company sought stockholder approval of the Charter.

11. The Company entered into the Business Combination agreement with Legacy Sharecare on February 12, 2021. In the Business Combination, a wholly-owned subsidiary of the Company merged with and into Legacy Sharecare, with Legacy Sharecare surviving as a wholly-owned subsidiary of the Company.

12. The consideration provided to Legacy Sharecare stockholders in the Business Combination was a mix of Common Stock and cash and, with respect to Legacy Sharecare's Series D Preferred Stock, shares of newly-designated Series

A Preferred Stock of the Company. In addition, in connection with the Business Combination: (i) certain options of Legacy Sharecare (“Legacy Sharecare Options”) were assumed by New Sharecare and converted into options to acquire shares of Common Stock; (ii) New Sharecare issued to former holders of Legacy Sharecare Options additional options to acquire shares of Common Stock, whose vesting is dependent upon achievement of certain earnout conditions; (iii) certain warrants of Legacy Sharecare (“Legacy Sharecare Warrants”) were converted into the right to receive Common Stock; (iv) certain other Legacy Sharecare Warrants, including those held by certain Sharecare customers, were assumed by New Sharecare; (v) the sponsor of FCAC and New Sharecare entered into arrangements by which certain shares of Class B Common Stock that otherwise would have become shares of Common Stock would instead be placed in escrow, and the sponsor would be entitled to receive shares of Common Stock upon achievement of certain earnout conditions; and (vi) FCAC transferred certain shares of Common Stock to a charitable foundation designated by Legacy Sharecare to support well-being initiatives. Also in connection with the Business Combination, FCAC entered into subscription agreements with certain investors pursuant to which the investors would purchase, immediately prior to closing of the Business Combination, Class A Common Stock (“PIPE Common Stock”). All securities described in this paragraph are referred to as the “Business Combination Securities”.

13. The Company stockholders voted on the Charter Proposal at a special meeting held on June 29, 2021 (“Special Meeting”). 43,125,000 shares of common stock of the Company were issued and outstanding and entitled to vote at the Special Meeting, comprised of 34,500,000 shares of Class A Common Stock and 8,625,000 shares of Class B Common Stock. (Ex. C at 224.) Thus: (i) 21,562,501 votes would be required for a majority vote of the Class A Common Stock and Class B Common Stock, voting together as a single class and (ii) 17,250,001 votes of the Class A Common Stock would be required for a majority vote of the Class A Common Stock, voting separately as a class.

14. As reflected in the Final Report of the Inspector of Election for the Special Meeting, 32,078,346 shares voted in favor of the Charter Proposal. Assuming all 8,625,000 shares of Class B Common Stock voted in favor of the Charter Proposal, 23,453,346 shares of Class A Common Stock (or nearly 68% of the Class A Common Stock outstanding and entitled to vote at the Special Meeting) voted in favor of the Charter Proposal.<sup>4</sup>

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<sup>4</sup> Utilizing the same arithmetic and based on the Inspector Report, 22,800,105 shares of Class A Common Stock (or over 66% of the Class A Common Stock outstanding and entitled to vote at the Special Meeting) voted in favor of the Advisory Charter Proposal.



15. Because the Charter Proposal obtained enough votes to satisfy the voting standard described in the Proxy Statement, the Company caused the Charter to be filed with the Secretary of State on July 1, 2021.

16. Immediately following the Business Combination, the Company had either outstanding or reserved for issuance 474,296,786 shares of Common Stock, including: (i) previously-issued FCAC shares that were not redeemed in connection with the Business Combination; (ii) Common Stock comprising, or reserved for issuance under, the Business Combination Securities; and (iii) shares of Common Stock reserved for issuance upon exercise of warrants of FCAC issued prior to the Business Combination.

17. Since the Business Combination, the Company has issued, or reserved for issuance, an additional 76,358,705 shares of Common Stock, including in connection with the acquisition of third-party entities, and grants of options to executives pursuant to employment contracts and other officers under the Company's 2021 Omnibus Incentive Plan (the Common Stock, and securities exercisable for or convertible into Common Stock, issued since the Business Combination, "Post-Business Combination Securities" and with the Business Combination Securities, the "Relevant Securities").

18. Over a year after the closing of the Business Combination, the Court issued its opinion in *Boxed*. The provisions of the Old Charter are similar in

all material respects to the certificate of incorporation provisions at issue in *Boxed*. (**Ex. D.**) Applying the *Boxed* decision, the Old Charter could be read to have designated the Class A Common Stock and Class B Common Stock as two separate classes. If that is the case, then the Charter Proposal required approval by the holders of Class A Common Stock, voting as a separate class, a different voting standard than disclosed in the Proxy Statement. For this reason and for the additional reasons noted above, the Company is seeking validation of the Charter to remedy any defect that might have resulted from the failure to disclose the separate class vote requirement.

19. If the Charter did not validly increase the number of shares of Common Stock authorized for issuance, then (absent validation by this Court) the Company is limited to validly issuing only 400 million shares of Common Stock (the maximum number fixed in the Old Charter, assuming the Common Stock is simply renamed FCAC Class A Common Stock). (**Ex. B** § 4.1.). To determine the number of shares that a corporation may issue on a given date, Section 161 of the DGCL requires the corporation to deduct from its total number of authorized shares the number of shares that have already been issued and the number of shares that have been subscribed for or are otherwise committed to be issued. 8 *Del. C.* § 161.

20. Taking into account Section 161, the transactions effected on the closing date of the Business Combination caused the Company to exceed the Old

Charter's 380 million share limit for Class A Common Stock by 94,296,786 shares. Because these transactions all occurred on the closing date of the Business Combination, the Company cannot with certainty segregate valid shares and share commitments from putative shares and share commitments.

### **CONSIDERATIONS WARRANTING RELIEF UNDER SECTION 205**

21. **Belief in Charter's and Relevant Securities' Validity** (8 *Del. C.* § 205(d)(1)). Based upon information provided by the Company's counsel, many SPACs read their charters as creating two series, rather than two classes, of common stock. The Company was no different, as reflected in the Form S-1 it filed describing the securities to be issued in the IPO. In a Form 8-K filed with the SEC on June 29, 2021, the Company disclosed that the Charter Proposal had been approved by the stockholders. The Charter, as filed with the Secretary of State, certifies that it was "duly adopted in accordance with" the DGCL. Because the Company believed the Charter was valid, it had no reason to believe the Relevant Securities were invalid when issued.

22. **Treatment of Charter and Relevant Securities as Valid, and Reliance on Validity** (8 *Del. C.* § 205(d)(2)). The Charter was filed with the Secretary of State, the Business Combination closed, and the Business Combination Securities issued, all based on the belief that the Charter was validly approved. Since the Business Combination, the Company issued the Post-Business Combination

Securities, including to employees and as acquisition currency. In numerous public filings since the closing of the Business Combination, the Company's disclosures with respect to its capitalization have all assumed that the Charter and the Relevant Securities are valid. Until the *Boxed* decision, the Company had no reason to believe there was any uncertainty about the Company's capital structure.

23. **Harm Arising from Validation** (8 *Del. C.* § 205(d)(3)). The Company does not believe that any person would be harmed by the validation of the Charter and the Company's capital structure. To the contrary, validation will place the Company and its security holders in the place they always thought they would be.

24. **Harm Arising from Failure to Validate** (8 *Del. C.* § 205(d)(4)). All holders of the Relevant Securities would be harmed if the Charter and the Relevant Securities are not validated. Many of those holders – including former Legacy Sharecare stockholders, investors in the PIPE Common Stock, and other persons who purchased the Relevant Securities on the open market or received Relevant Securities in post-Business Combination acquisitions by the Company – were not affiliated with the Company when they received their Relevant Securities.

25. **Other Factors** (8 *Del. C.* § 205(d)(5)). Expedited relief is required and can only be provided by the Court. Continued uncertainty as to the validity of the Relevant Securities will potentially cause market disruption, disturb the Company's corporate relationships, result in claims from holders of such

securities, and could lead to consequent loss of value for the Company's stockholders and loss of eligibility to remain listed on the NASDAQ. Additionally, the Company is required to file its Annual Report on Form 10-K by March 31, 2023. Because there now exists uncertainty regarding the validity of the Common Stock, there is likewise uncertainty as to the statements and representations the Company is required to make in its Form 10-K. Only the Court can provide the required relief because, given the Company's inability to trace which of its shares are valid, it would be impossible to determine precisely which shares are entitled to vote. And even if such a vote were obtainable, it could not be obtained in the prompt manner required here. Obtaining stockholder approval through a meeting process could take at least three months. Further, a Section 204 ratification would require filing a certificate of validation with the Secretary of State and there is no guarantee as to when the Secretary of State will issue a certified copy of the certificate of validation, which can in practice take months in some cases. Thus, only the Court can provide the prompt relief the Company requires.

26. For all of these reasons, the Company respectfully requests the relief it seeks here pursuant to Section 205.

**COUNT ONE**  
**(Validation of the Charter Under 8 Del. C. § 205)**

27. The Company repeats and reiterates the allegations above as if set forth fully herein.

28. Because of the potential defects described above, there is uncertainty as to the validity of the Charter, which is a potentially defective corporate act.

29. The Court has the authority under Section 205 to determine the validity of any corporate act or defective corporate act, including the filing and effectiveness of the Charter, and to declare that a defective corporate act validated by the Court shall be effective as of the time of such act.

30. The Company and its stockholders and other equityholders will be irreparably harmed absent relief from this Court.

31. The Company has no adequate remedy at law.

**COUNT TWO**  
**(Validation of Issuances of Securities Under 8 Del. C. § 205)**

32. The Company repeats and reiterates the allegations above as if set forth fully herein.

33. Because of the potential defects described above, there is uncertainty as to the validity of the Relevant Securities.

34. The Court has the authority under Section 205 to determine the validity of any “stock, rights or options to acquire stock” and to declare that shares of putative stock are shares of valid stock and that putative stock validated by the Court shall be deemed to be an identical share of valid stock as of the time originally issued or purportedly issued.

35. The Company and its stockholders and other equityholders will be irreparably harmed absent relief from this Court.

36. The Company has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, the Company respectfully requests that the Court enter a proposed Final Order Granting Relief Under 8 *Del. C.* § 205 in the form attached hereto:

- A. Validating and declaring effective the Charter, retroactive to the date of its filing with the Secretary of State on July 1, 2021, and all amendments effected thereby;
- B. Validating and declaring effective the Relevant Securities (and the issuance of the Relevant Securities) described herein and the issuance of any other securities issued in reliance on the validity of the Charter, each as of their original issuance dates; and
- C. Granting such other and further relief as this Court deems proper.

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