M&A UPDATE

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THE TEXAS STATE SECURITIES BOARD, AND
THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS

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By

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I. Introduction.

Acquisitions of publicly-held companies have some fundamental parallels to acquisitions of private companies. There are, however, some substantial differences, including:

- It is not practical to negotiate the terms of the acquisition with public stockholders because of their number. The acquisition agreement will, of necessity, be negotiated and entered into by the target company.

- The acquisition of a public company is subject to substantial regulation under the federal securities laws, including (depending on the form of the transaction) the tender offer rules under Section 14(d) and 14(e) of the Securities Exchange Act of 1934 (the "*Exchange Act*"), the proxy rules under Section 14(a) of the Exchange Act and the registration requirements of the Securities Act of 1933 (the "*Securities Act*"). This outline assumes that the target company is a domestic issuer with equity securities registered under Section 12(b) or 12(g) of the Exchange Act.

- It is customary for the stockholders of the target company not to have any surviving liability to the purchaser with respect to the business of the target company, whether for representations and warranties or indemnification.

- The transaction will to some degree be subject to competing offers for a period of time after the acquisition agreement is signed. Deal protection provisions are important.

- Challenges to decisions of directors, particularly decisions of the board of the target to sell the company or resist a raider's bid, are frequent. Directors are fiduciaries who owe duties to act with due care and loyalty to the corporation.

This outline will focus on public companies organized under the Texas Business Corporation Act ("*TBCA*") and the Delaware General Corporation Law ("*DGCL*").

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II. Types of Transactions.

As in the case of acquisitions of private companies, acquisitions of public companies can be made for cash, securities of the acquiring company (stock or debt) or a combination of cash and securities. Earn-outs and other payments that are contingent on performance of the target company after the closing are rare.

Private company acquisitions can be in the form of stock purchases, asset purchases and mergers. Asset purchases of an entire public company are unusual. Since it is normally impractical to purchase *all* of the stock of a public company through consensual sales by stockholders, the acquisition of a public company will typically involve a mandatory transaction, usually a merger, in which the actions of a majority of stockholders can result in the acquisition of all of the target company's stock.

The most common forms of acquisitions of public companies for cash are:

- *Two step acquisition*. A cash tender offer in which the acquiring company will offer to purchase the outstanding stock of the target company for cash, followed by a merger in which the shares that were not tendered are converted into cash and the target company becomes a wholly-owned subsidiary of the acquiring company.

- *One step acquisition*. A cash merger in which all of the shares of the target company are converted into cash and the target company becomes a wholly-owned subsidiary of the acquiring company.

The principal advantage of a two step acquisition is that the acquiring company can obtain control of the target company more quickly than in a one step acquisition, principally as a result of differences between the tender offer rules and the proxy rules under the Exchange Act. Once control is obtained, the transaction will cease to be vulnerable to competing offers. However, a two step transaction is generally more expensive, requiring two sets of securities disclosure documents and, if the acquisition is being financed, interim financing at the conclusion of the tender offer when the lenders will not have access to the target company's assets. It also presents a risk that the transaction could be interrupted between the steps, with the acquiring company having paid most of the purchase price and acquiring control of the target company, but remaining subject to the rights of non-tendering stockholders of the target company. If competing offers are not a concern, or if the transaction cannot be completed quickly for regulatory or other reasons, there is often no reason to incur the additional expense of a two step transaction.

Although the acquisition of a public company for securities can be structured as either a two step (an exchange offer followed by a merger) or one step (a merger) transaction, two step acquisitions for securities were not common prior to 2000. This is because the issuance of securities in the exchange offer will normally require registration under the Securities Act, which in the past reduced, if not eliminated, the timing advantage of a two-step transaction. The Securities and Exchange Commission ("SEC") adopted rules in late 1999 (effective January 24, 2000), which permit an exchange offer to commence upon the filing of the related registration statement. Regulation of Takeovers and Security Holder Communications, Release No. 33-7760, 34-42055; 1C-24107. These rules extend some of the timing advantages of cash tender offers to exchange offers and are expected to increase the frequency of exchange offers.

The merger in any of these transactions can be a direct merger between two public companies, a reverse subsidiary merger of an acquisition subsidiary of the acquiring company into the target company with the target company surviving or a forward subsidiary merger of the target company into an acquisition subsidiary of the acquiring company with the acquisition subsidiary surviving. Occasionally, the transaction may be structured as a "merger of equals" in form; the parties cause the creation of a new parent with two newly formed subsidiaries. Each of the constituent corporations then merges with one of the subsidiaries with the effect that each of the constituent corporations becomes a subsidiary of the new parent and the outstanding stock of each of the constituent corporations is converted into stock of the new parent.

III. Documentation.

The documentation for the acquisition of a public company consists of the same basic components as the documentation for the acquisition of a private company. The parties may start with a confidentiality agreement to permit initial diligence. A public company confidentiality agreement is similar to that used in the acquisition of a private company, except for inclusion of an acknowledgment by the information recipient of its obligations under the Exchange Act not to engage in trading while in possession of material, non-public information. The target company may also (particularly in the context of an auction) seek to include standstill provisions that prohibit the acquiring company from buying target company stock, participating in a proxy contest or making an uninvited acquisition proposal. A form of standstill provision is attached as Exhibit A. The parties will often elect not to negotiate a letter of intent in order to avoid public disclosure of the transaction (which a letter of intent would normally require) before the execution of a definitive agreement.

The definitive agreement for the acquisition of a public company has many of the same components as a private company acquisition agreement. However, the same component of the agreement may look very different in public and private transactions. For example, the representations and warranties of the target company in a public acquisition are typically less extensive than in the acquisition of a private company for the following reasons:

- The acquiring company has the benefit of the target company's filings under the Exchange Act and the Securities Act

- There will be no post-closing liability based on a breach of the target company's representations and warranties, so that provisions intended for risk allocation purposes are generally not appropriate

- The need to move quickly to a definitive agreement and to preserve confidentiality of the negotiations will limit the level of detail that the target company is able to provide

In contrast, the transaction mechanics provisions of a public company acquisition agreement will typically be more extensive than the private company counterpart. Public company acquisition agreements also need to address the extent to which the target company may seek or facilitate competing offers and the financial consequences of termination of the agreement or failure of the transaction in favor of a competing transaction. It is also common for public company acquisition agreements to address issues that are of little interest to the target company's stockholders, but of great interest to the target company directors and management who are negotiating the transaction, such as continued indemnification and insurance, maintenance of employee benefits and the composition of the acquiring company's board of directors after the merger.

It is also important for the public company acquisition agreement to commit the target company to take whatever steps are needed to exempt the transaction from existing defensive measures, including target company rights plans (otherwise knows as "poison pills"), and applicable statutory business combination provisions (*e.g.*, Section 203 of the DGCL and Part Thirteen of the TBCA) and control share provisions (*e.g.*, Section 2561 through 2568 of the Pennsylvania Business Corporation Law).

IV. Regulation.

Acquisitions of public companies are subject to extensive regulation, principally under the federal securities laws, to a far greater degree than are acquisitions of private companies.

Cash tender offers. The principal sources of regulation are Section 14(d) and 14(e) of the Exchange Act and the rules thereunder. The more significant rules include the following:

- Upon commencement of the offer, the acquiring company must file with the SEC, deliver to the target company and certain other persons and publicly disseminate the disclosures specified in the tender offer rules (Exchange Act Rules 14d-3, 14d-4 and 14d-6 and Schedule TO)

- Pre-commencement public communications relating to the tender offer must be filed with the SEC (Exchange Act Rule 14d-2(b)(2))

- There is no requirement for SEC staff review of the offering materials prior to commencement of the offer

- The target company must file with the SEC and disseminate its position with respect to the offer within ten business days after it is made (Exchange Act Rules 14d-9 and 14e-2). In a negotiated transaction, the content of the target company's position is usually negotiated in advance and filed and disseminated at the time the offer commences

- The offer must remain open for at least 20 business days (Exchange Act Rule 14e-1(a)). Extension of the offer is required if certain changes are made (Exchange Act Rule 14e-1(b))

- Tendered securities may be withdrawn while the offer remains open, but not during a subsequent offering period permitted by Exchange Act Rule 14d-11. (Exchange Act Rule 14d-7(a))

- The offer must be made to all of the target company's stockholders (Exchange Act Rule 14d-10(a)(1)). If less than all of the tendered shares are to be acquired they must be acquired *pro rata* from all tendering holders (Section 14(d)(6) of the Exchange Act, Exchange Act Rule 14d-8). The per share consideration paid to each tendering holder must be the same (Exchange Act Rule 14d-10(a)(2))

- The acquiring company may not, directly or indirectly, during the period from the first public announcement of the offer until the expiration of the offer purchase or make any arrangement to purchase securities of the type subject to the offer (or securities convertible into securities of the type subject to the offer). However, this prohibition does not apply to purchases made during a subsequent offering period permitted by Exchange Act Rule 14d-11 if the consideration paid is in the same form and amount as in the tender offer (Exchange Act Rule 14e-5)

- The second step merger may be subject to the heightened disclosure requirements of Exchange Act 13e-3 unless it occurs within one year after expiration of the tender offer at a price at least equal to the highest price paid in the tender offer, the intention to engage in the second step merger was disclosed in the tender offer and, if the tender offer was made for less than all of the target company's shares, the tender offer was made pursuant to a definitive agreement disclosed in the tender offer (Exchange Act Rule 13e-3(g)(1))

- A cash tender offer is afforded expedited treatment under the pre-merger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Sections 7A(b)(1)(B) and 7A(e)(2) of the Clayton Act)

- The acquiring company cannot take control of the target company's board of directors upon completion of the offer unless it has complied with Section 14(f) of the Exchange Act, which requires that the target company file with the SEC and disseminate to its stockholders substantially the same information that would be required in a proxy statement if the new directors were candidates for election at a stockholders meeting (Exchange Act Rule 14f-1). In a negotiated transaction, this disclosure is often combined with the target company's filings and disclosures pursuant to Exchange Act Rules 14d-9 and 14e-2.

The second step merger will be subject to the proxy rules under Section 14(a) of the Exchange Act (or the analogous consent rules under Section 14(c) of the Exchange Act) unless, as is often the case, the acquiring company acquires a sufficient number of shares of the target company's stock in the tender offer to enable it to accomplish a short-form merger under applicable state law (*e.g.*, DGCL Section 253 and TBCA art. 5.16 – at least 90%). Even if a short-form merger can be accomplished, applicable state law may require that the notice of effectiveness of the merger be accompanied by some disclosure concerning the target company.

One step cash mergers. The principal sources of regulation are the proxy rules under Section 14(a) of the Exchange Act. The more significant rules include the following:

- The solicitation of proxies must be accompanied by a proxy statement containing the information specified in Schedule 14A (Exchange Act Rule 14a-3)

- The proxy statement must be filed with the SEC in preliminary form no less than ten calendar days before it is first sent to stockholders (Exchange Act Rule 141-6(a)). As a practical matter, the SEC staff takes more than ten days to comment on such a proxy statement and most practitioners will not send the proxy statement to stockholders until those comments are received. This filing requirement is the principal reason that the tender offer in a two step transaction can result in the acquisition of control of the target company more quickly than a one step cash merger

- Pre-solicitation public communications relating to the transaction must be filed with the SEC (Exchange Act Rule 14a-12)

- The transaction is not subject to the expedited treatment afforded to cash tender offers under the Hart-Scott-Rodino Antitrust Improvements Act of 1976

- Stockholders who do not vote in favor of the merger may be entitled to appraisal rights under applicable state law

Two step stock or securities exchange offers. These transactions are subject to both the rules relating to two step cash tender offers and the registration requirements of the Securities Act. Significantly, the exchange offer may commence upon the filing of the related registration statement (Securities Act Rule 162(a) and Exchange Act Rule 14d-4(b)) and the requirement to deliver a final prospectus has been eliminated in some circumstance (Securities Act Rule 162(b)).

One step stock or securities mergers. These transactions are subject to both the rules relating to cash mergers and the registration requirements of the Securities Act. The more significant additional requirements include:

- A registration statement (usually on Form S-4) including the prospectus/proxy statement to be sent to the target company's stockholders must be filed with the SEC and declared effective. The form of combined prospectus/proxy statement contained in the effective registration statement must be sent to the target company's stockholders before they vote on the transaction (Securities Act Rule 153a). This makes the timing of the transaction dependent on the timing of the SEC staff's review of the registration statement.

- Other public communications relating to the transaction must bear legends and be filed with the SEC (Securities Act Rules 165 and 425)

- Affiliates of the target company may be subject to restrictions on resale of the securities they receive in the transaction (Securities Act Rule 145(c) and (d))

- In some cases stockholders will not have appraisal rights (*See, e.g.*, DGCL Section 262(b) and TBCA art. 5.11B.)

V. Protecting The Deal.

As noted above, unless a majority stockholder is party to the acquisition agreement, the transaction will to some degree be subject to competing offers for a period of time after the acquisition agreement is signed. There are, however, a variety of techniques that the parties to a negotiated acquisition of a public company can use to protect the transaction from competing bids and to provide compensation if the transaction is abandoned in favor of a competing bid.

Arrangements with stockholders of the target company. The acquiring company can enter into arrangements with stockholders of the target company to support the transaction, including the following:

- Option to acquire the stockholder's target company shares, which may or may not terminate upon termination of the underlying merger agreement

- Agreement to tender shares in the acquiring company's tender offer

- Agreement to vote in favor of the proposed merger with the acquiring company

If the basic transaction involves a tender offer, the acquiring company must structure these arrangements to comply with Exchange Act Rule 14e-5.

Arrangements with the target company. The target company's ability to facilitate the transaction and protect it against competing offers is limited by fiduciary duties relating to the board's duties to maximize price. Arrangements with target companies include:

- Limitation of the ability of the target company to seek or facilitate competing offers

- Agreement to submit the transaction to stockholders notwithstanding the existence of a more favorable competing transaction, as is expressly permitted by the 1998 amendment to DGCL Section 251(c)

- Compensation for termination of the agreement or failure of the transaction in favor of a competing transaction

- Option to purchase target company stock (or to receive in cash the value of that option) in the event of a competing transaction

Examples of these deal protection provisions are attached as Exhibits B through E.

VI. Fiduciary Duties Generally.

A. General Principles.

The concepts that underlie the fiduciary duties of corporate directors have their origins in English common law of both trusts and agency from over two hundred years ago. The current concepts of those duties in both Texas and Delaware are still largely matters of evolving common law.

Both the Texas Business Corporation Act ("*TBCA*") and the Delaware General Corporation Law ("*DGCL*") provide that the business and affairs of a corporation are to be managed under the direction of its board of directors. TBCA art. 2.31 and DGCL Section 141(a). While the TBCA and the DGCL provide statutory guidance as to matters such as the issuance of securities, the payment of dividends, the conduct of meetings of directors and shareholders, and the ability of directors to rely on specified persons and information, the nature of a director's "fiduciary" duty to the corporation and the shareholders has been largely defined by the courts through damage and injunctive actions. In Texas, the fiduciary duty of a director has been characterized as including duties of loyalty, care and obedience. *Gearhart Industries, Inc. v. Smith International, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984). In Delaware, the fiduciary duties include those of loyalty, care and candor. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). Both Texas and Delaware have adopted a judicial rule of review of business decisions, known as the "business judgment rule," that is intended to protect disinterested directors from liability for decisions made by them when exercising their business judgment, but there are substantial differences in the Delaware and Texas judicial approaches to the business judgment rule. *See* Egan and Huff, *Choice of State of Incorporation - Texas versus Delaware: Is it Now Time to Rethink Traditional Notions?,* University of Texas 22nd Annual Conference on Securities Regulation and Business Law Problems, Dallas, TX, February 18, 2000, which can be found at www.texasbusinesslaw.org/members/reports.html and at www.jw.com/articles/articles.cfm. and is being republished in SMU L. Rev. (Winter 2001).

B. Applicable Law.

Under the internal affairs doctrine, courts in Texas apply the law of a corporation's state of incorporation in adjudications regarding director fiduciary duties. TBCA art. 8.02 and Texas Miscellaneous Corporations Act ("TMCLA") art. 1302-1.03; *Hollis v. Hill*, 232 F.3d 460 (5th Cir. 2000); *Gearhart*, 741 F.2d at 719; *A. Copeland Enterprises, Inc. v. Guste,* 706 F. Supp. 1283, 1288 (W.D. Tex. 1989); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Civ. App. — Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 944 (1988). Delaware also subscribes to the internal affairs doctrine. However, Delaware has a choice of law statute under which the parties can agree that internal matters ordinarily governed by the law of another state of incorporation will be resolved under the laws of Delaware in Delaware courts. Del. Code Ann. Tit. 6, §2708; *see* Ribstein, *Delaware, Lawyers, and Contractual Choice of Law,* 19 Del. J. Corp. L. 999 (1994).

C. Fiduciary Duties in Texas Cases.

The Fifth Circuit stated in *Gearhart* that under Texas law "[t]hree broad duties stem from the fiduciary status of corporate directors; namely the duties of obedience, loyalty, and due care," and commented that (i) the duty of obedience requires a director to avoid committing *ultra vires* acts, i.e., acts beyond the scope of the authority of the corporation as defined by its articles of incorporation or the laws of the state of incorporation, (ii) the duty of loyalty dictates that a director must act in good faith and must not allow his personal interests to prevail over the interests of the corporation, and (iii) the duty of due care requires that a director must handle his corporate duties with such care as an ordinarily prudent man would use under similar circumstances. *Gearhart*, 741 F.2d at 712-720; *McCollum v. Dollar*, 213 S.W. 259 (Tex. Comm'n App. 1919, holding approved). *Gearhart* remains the seminal case for defining the fiduciary duties of directors in Texas, although there are subsequent cases which amplify *Gearhart* as they apply it in particular situations, such as lawsuits by the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Company ("RTC") arising out of failed financial institutions. *See, e.g., FDIC v. Harrington*, 844 F. Supp. 300 (N.D. Tex. 1994).

1. Loyalty.

The duty of loyalty in Texas is a duty that dictates that the director act in good faith and not allow his personal interest to prevail over that of the corporation. *Gearhart*, 741 F.2d at 719. The good faith of a director will be determined on whether the director acted with an intent to confer a benefit to the corporation. *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1967). Whether there exists a personal interest by the director will be a question of fact. *Id.* at 578. In general, a director will not be permitted to derive a personal profit or advantage at the expense of the corporation and must act solely with an eye to the best interest of the corporation, unhampered by any pecuniary interest of his own. *Copeland Enterprises*, 706 F. Supp. at 1291; *Milam v. Cooper Co.*, 258 S.W.2d 953 (Tex. Civ. App. — Waco 1953, writ ref'd n.r.e.). *See* Kendrick, *The Interested Director in Texas*, 21 Sw. L.J. 794 (1967).

The court in *Gearhart* summarized Texas law with respect to the question of whether a director is "interested":

> A director is considered 'interested' if he or she (1) makes a personal profit from a transaction by dealing with the corporation or usurps a corporate opportunity . . .; (2) buys or sells assets of the corporation . . .; (3) transacts business in his director's capacity with a second corporation of which he is also a director or significantly financially associated . . .; or (4) transacts business in his director's capacity with a family member.

Gearhart, 741 F.2d at 719-20 (citations omitted).

2. Care (including business judgment rule).

The duty of care in Texas requires the director to handle his duties with such care as an ordinary prudent man would use under similar circumstances. In performing this obligation, the director must be diligent and informed and exercise honest and unbiased business judgment in pursuit of corporate interests. *Gearhart*, 741 F.2d at 719; *McCollum v. Dollar*, 213 S.W. 259 (Tex. Comm'n App. 1919, holding approved).

In general, the duty of care will be satisfied if the directors' actions are covered by the business judgment rule. The Fifth Circuit stated in *Gearhart* that, in spite of the requirement that a corporate director handle his duties with such care as an ordinarily prudent man would use under similar circumstances, Texas courts will not impose liability upon a *noninterested* corporate director unless the challenged action is *ultra vires* or is tainted by fraud. In a footnote in the *Gearhart* decision, the Fifth Circuit stated:

> The business judgment rule is a defense to the duty of care. As such, the Texas business judgment rule precludes judicial interference with the business judgment of directors absent a showing of fraud or an ultra vires act. If such a showing is not made, then the good or bad faith of the directors is irrelevant. *Gearhart*, 741 F.2d at 723 n.9.

In applying the business judgment rule in Texas, the courts in *Gearhart* and other recent cases have quoted from the early Texas decision of *Cates v. Sparkman*, 11 S.W. 846 (1889), as setting the standard for judicial intervention in cases involving duty of care issues:

> [I]f the acts or things are or may be that which the majority of the company have a right to do, or if they have been done irregularly, negligently, or imprudently, or are within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved, these would not constitute such a breach of duty, however unwise or inexpedient such acts might be, as would authorize interference by the courts at the suit of a shareholder.

Id. at 849.

In *Gearhart* the Court commented that "[e]ven though *Cates* was decided in 1889, and despite the ordinary care standard announced in *McCollum v. Dollar*, *supra*, Texas courts to this day will not impose liability upon a noninterested corporate director unless the challenged action is ultra vires or is tainted by fraud." *Gearhart*, 741 F.2d at 721.

Neither *Gearhart* nor the earlier Texas cases on which it relied referenced "gross negligence" as a standard for director liability. If read literally, the business judgment rule articulated in the case would protect even grossly negligent conduct. Recent Federal district court decisions in FDIC and RTC initiated cases, however, have declined to interpret Texas law this broadly and have held that the Texas business judgment rule does not protect "any breach of the duty of care that amounts to gross negligence" or "directors who abdicate their responsibilities and fail to exercise any judgment." *FDIC v. Harrington*, 844 F. Supp. 300, 306 (N.D. Tex. 1994); *see also RTC v. Acton*, 844 F. Supp, 307, 314 (N.D. Tex. 1994); *RTC v. Norris*, 830 F. Supp. 351, 357-58 (S.D. Tex. 1993); *FDIC v. Brown*, 812 F. Supp. 722, 726 (S.D. Tex. 1992); *cf. RTC v. Miramon*, 22 F.3d 1357 (5th Cir. 1994) (followed *Harrington* analysis of Section 1821(K) of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") which held that federal common law of director liability did not survive FIRREA and applied Texas' gross negligence standard for financial institution director liability cases under FIRREA).

In response to RTC and FDIC claims that ordinary negligence was the standard for duty of care cases against failed Texas financial institutions, the Texas legislature in 1993 passed House Bill 1076 which, purporting not to change existing law, provided that a disinterested director of a failed institution may not be held personally liable unless the director was grossly negligent or committed willful or negligent misconduct. While House Bill 1076 is inapplicable beyond FDIC and RTC cases, its legislative imprimatur "gave added weight to the *Gearhart* standard of liability" since the "statute explicitly provides that officers and directors may be held liable only for acts of gross negligence" and "was not intended to change, but merely clarify, existing law regarding the proper standard of care for directors and officers of insured financial institutions." *Harrington*, 844 F. Supp. at 307, n.8. The RTC challenged the constitutionality of House Bill 1076 in *Harrington*, but the court resolved the issues before it without reaching the constitutional question.

Gross negligence in Texas is defined as "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981) (citing *Missouri Pacific Ry. v. Shuford*, 72 Tex. 165, 10 S.W. 408, 411 (1888)). In *Harrington*, 844 F. Supp. at 306 n.7, the Court concluded "that a director's total abdication of duties falls within this definition of gross negligence."

The business judgment rule does not necessarily protect a director with respect to transactions in which he is "interested." It simply means that the action will have to be challenged on duty of loyalty rather than duty of care grounds. *Gearhart*, 741 F.2d at 723, n.9.

Directors may "in good faith and with ordinary care, rely on information, opinions, reports or statements, including financial statements and other financial data," prepared by officers or employees of the corporation, counsel, accountants, investment bankers or "other persons as to matters the director reasonably believes are within the person's professional or expert competence." TBCA art. 2.41D.

3. Other (obedience).

The duty of obedience in Texas requires a director to avoid committing *ultra vires* acts, i.e., acts beyond the scope of the powers of the corporation as defined by its articles of incorporation and Texas law. *Gearhart*, 741 F.2d at 719. An *ultra vires* act may be voidable under Texas law, but the director will not be held personally liable for such act unless the act is in violation of a specific statute or against public policy.

The RTC's complaint in *RTC v. Norris*, 830 F. Supp. 351 (S.D. Tex. 1993), asserted that the directors of a failed financial institution breached their fiduciary duty of obedience by failing to cause the institution to adequately respond to regulatory warnings: "The defendants committed *ultra vires* acts by ignoring warnings from [regulators], by failing to put into place proper review and lending procedures, and by ratifying loans that did not comply with state and federal regulations and Commonwealth's Bylaws." *Norris*, 830 F. Supp. at 355. In rejecting this RTC argument, the court wrote:

> The RTC does not cite, and the court has not found, any case in which a disinterested director has been found liable under Texas law for alleged *ultra vires* acts of employees, absent pleadings and proof that the director knew of or took part in the act, even where the act is illegal.
>
> . . . .
>
> Under the business judgment rule, Texas courts have refused to impose personal liability on corporate directors for illegal or *ultra vires* acts of corporate agents unless the directors either participated in the act or had actual knowledge of the act . . . .

Id.

D. Fiduciary Duties in Delaware Cases.

1. Loyalty.

The duty of loyalty in Delaware imposes on the director an obligation to refrain from doing anything that would effect an injury to the corporation, or deprive it of profits or advantages which the director's skill and ability might properly bring to the corporation, or enable the corporation to make in the reasonable and lawful exercise of its powers. The duty of loyalty requires an undivided and unselfish loyalty by the director to the corporation and demands that there not be any conflict between the director's duty to the corporation and the self-interest of the director. *See Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939) ("[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests . . . an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."). The standard which must be followed by a director in complying with the duty of loyalty will not be subject to any fixed schedule and will be dependent upon the facts and circumstances. *Id.* at 514-515.

2. Care.

(a) *Duty of Care.* The duty of care under Delaware law is a duty that requires the director exercise his business judgment in the management of the corporation with due care and good faith. In 1962, the Delaware Supreme Court stated:

> [D]irectors of a corporation in managing the corporate affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances. Their duties are those of control, and whether or not by neglect they have made themselves liable for failure to exercise proper control depends upon the circumstances of and facts of the particular case.

Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1962).

This duty requires the director to inform himself of all material information reasonably available to him prior to making a decision. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). *See Brehm v. Eisner*, 746 A.2d 244, 259 (Del. Supr. 2000) ("[T]he standard for judging the informational component of the directors' decision does not mean that the Board must be informed of every fact. The Board is responsible for considering only material facts that are reasonably available, not those that are immaterial or out of the board's reasonable reach." The "term 'material' is used in this context to mean relevant and of a magnitude to directors in carrying out their fiduciary care in decisionmaking," which is "distinct from the use of the term 'material' in disclosure to stockholders in which [a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.")

(b) *Business Judgment Rule.* The business judgment rule is premised on the fact that courts are ill equipped to engage in substantive reviews of business decisions taken by directors in the management of their corporations and a public policy that encourages entrepreneurial risk taking by corporate managers without the specter of personal liability for decisions that in hindsight prove to be wrong or imprudent. In Delaware the business judgment rule provides that an independent corporate director who makes a business decision on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation will not be held personally liable for mistakes of business judgment that damage corporate interests. *In re J.P. Stevens & Co. Shareholders Litig.,* Del. Ch., 542 A.2d 770, 780 (1988) ("a decision made by an independent board will not give rise to liability . . . if it is made in good faith and in the exercise of due care"); *see Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) (directors approved lucrative consulting contract with founder/controlling shareholder in his seventies that gave him a percentage of the corporation's profits above a threshold without any requirement that he be able to work plus interest-free loans; court found directors "independent" because they had no financial interest in the transactions, although they were dependent upon the founder for their positions, and applied business judgment rule).

The business judgment rule in Delaware is both a presumption (i.e., a burden-allocating mechanism used in litigation) and a substantive rule of law. As a presumption, the rule provides that acts by independent directors will be presumed to have been taken with due care and good faith and in a belief that the act was in the best interest of the corporation. *Aronson*, 473 A.2d at 812; *AC Acquisitions Corp. v. Anderson, Clayton & Co.,* Del. Supr., 519 A.2d 103, 111 (1986) (business judgment rule is "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company"). The standard for liability under the Delaware business judgment rule is gross negligence. *Van Gorkom*, 488 A.2d at 873. Thus, a challenge to an action by an independent director requires the complaining party to prove that the action by the director was grossly negligent or was not taken in an honest attempt to foster the corporation's interests. As a substantive rule of law, the business judgment rule provides that there is no liability to a director for authorizing a corporate action if the director acted in good faith and with appropriate care in informing himself of all material information reasonably available to him under the circumstances. *Aronson*, 473 A.2d at 812.

"A conscious decision to refrain from acting may none the less be a valid exercise of business judgment and enjoy the protections of the [business judgment] rule." *Aronson*, 473

A.2d at 813. Because deliberate inaction is protected by the business judgment rule and other inaction is not so protected, the focus in a director inaction case must be on the process by which the decision not to act was made. *See In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996); Stephen F. Funk, *Note: In re Caremark International Inc. Derivative Litigation: Director Behavior, Shareholder Protection, and Corporate Legal Compliance*, 22 Del. J. Corp. L. 311 (1997).

3. Other (candor).

Delaware has also imposed a duty of candor. *Mills Acquisition Co. v. Macmillan, Inc.*, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,071 (Del. Ch. 1988), *rev'd*, 559 A.2d 1261 (Del. 1988). This duty requires disclosure to shareholders of "all germane or material information" and information that "would have been viewed by the reasonable investor as having significantly altered the "total mix of information made available." *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 480 (Del. 1989); *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 846 (Del. 1989); *Day v. Quotron Systems, Inc.*, 16 Del. J. Corp. Law 297, 307 (Del. Ch. 1989); *see also Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265, at *6 (Del. Ch. 1999). This duty imposes, at a minimum, that a director not use superior information or knowledge to mislead others in the performance of their fiduciary obligations to the corporation, and the breach thereof can be established without any showing that the directors acted with *scienter*. The judicial focus in the reported cases to date has been on information related to the process followed by the directors leading up to its decision to recommend that the shareholders approve a transaction and to the relative value to be received by the shareholders, rather than on compliance with Securities and Exchange Commission disclosure rules. *See generally*, Pease, *Delaware's Disclosure Rule: The "Complete Candor" Standard, its Application, and Why Sue in Delaware*, 14 Del. J. Corp. L. 446 (1989).

VII. Standards of Review in Change of Control Context.

A. Texas Standard of Review.

Possibly because the Texas business judgment rule, as articulated in *Gearhart*, protects so much director action, the parties and the courts in the two leading cases in the takeover context have concentrated on the duty of loyalty in analyzing the propriety of the director conduct. This focus should be contrasted with the approach of the Delaware courts which often concentrates on the duty of care.

To prove a breach of the duty of loyalty, it must be shown that the director was "interested" in a particular transaction. *Gearhart*, 741 F.2d. at 719; *Copeland*, 706 F. Supp. at 1290. In *Copeland*, the court interpreted *Gearhart* as indicating that "[a]nother means of showing interest, when a threat of takeover is pending, is to demonstrate that actions were taken with the goal of director entrenchment." *Copeland*, 706 F. Supp. at 1290-91.

Both the *Gearhart* and *Copeland* courts assumed that the defendant directors were interested, thus shifting the burden to the directors to prove the fairness of their actions to the corporation. *Gearhart*, 741 F.2d at 722; *Copeland*, 706 F. Supp. at 1291-92. Once it is shown that a transaction involves an interested director, the transaction is "subject to strict judicial scrutiny but [is] not voidable unless [it is] shown to be unfair to the corporation." *Gearhart*, 741 F.2d at 720; *see also Copeland*, 706 F. Supp. at 1291. "[T]he burden of proof is on the interested director to show that the action under fire is fair to the corporation." *Gearhart*, 741 F.2d at 720; *see also Copeland*, 706 F. Supp. at 1291.

In analyzing the fairness of the transaction at issue, the Fifth Circuit in *Gearhart* relied on the following criteria set forth by Justice Douglas in *Pepper v. Litton,* 308 U.S. 295, 306-07 (1939):

> A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders. Their powers are powers in trust. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.

Gearhart, 741 F.2d at 723 (citations omitted). In *Gearhart*, the court also stated that a "challenged transaction found to be unfair to the corporate enterprise may nonetheless be upheld if ratified by a majority of disinterested directors or the majority of stockholders." *Id*. at 720 (citation omitted).

In setting forth the test for fairness, the *Copeland* court also referred to the criteria discussed in *Pepper v. Litton* and cited *Gearhart* as controlling precedent. *Copeland*, 706 F. Supp. at 1290-91. In analyzing the shareholder rights plan (also known as a "poison pill") at issue, however, the court specifically cited Delaware cases in its after-the-fact analysis of the fairness of the director action. *Id*. at 1291-93. Whether a Texas court following *Gearhart* would follow Delaware case law in its fairness analysis remains to be seen, especially in light of the Fifth Circuit's complaint in *Gearhart* that the lawyers focused on Delaware cases and failed to deal with Texas law:

> We are both surprised and inconvenienced by the circumstance that, despite their multitudinous and voluminous briefs and exhibits, neither plaintiffs nor defendants seriously attempt to analyze officers' and directors' fiduciary duties or the business judgment rule under Texas law. This is particularly so in view of the authorities cited in their discussions of the business judgment rule: Smith and Gearhart argue back and forth over the applicability of the plethora of out-of-state cases they cite, yet they ignore the fact that we are obligated to decide these aspects of this case under Texas law. We note that two cases cited to us as purported Texas authority were both decided under Delaware law. . . .

Gearhart, 741 F.2d. at 719 n.4. Given the extent of Delaware law in the takeover context, it is certain, however, that Delaware cases will be cited and argued by the corporate lawyers negotiating the transaction and by any subsequent litigants. The following analysis, therefore, focuses on the pertinent Delaware cases.

B. Delaware Standard of Review.

Under Delaware law, there are generally three standards against which the courts will measure director conduct in a takeover context. As articulated by the Delaware courts, these standards provide important guidelines for directors and their counsel as to the process to be followed for director action to be sustained. These standards are:

(i) the business judgment rule -- for a decision to remain independent or to approve a transaction not involving a sale of control;

(ii) enhanced scrutiny -- for a decision to adopt or employ defensive measures[1] or to approve a transaction involving a sale of control; and

(iii) entire fairness -- for a decision to approve a transaction involving management or a principal shareholder.

The business judgment rule provides a presumption in favor of directors, and places the burden on those challenging director action, where the directors have acted with care, loyalty and independence. Before the Delaware Supreme Court's decision in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), it was generally believed that in the takeover context director action would be accorded the protection of the business judgment rule in the absence of a traditional conflict of interest. As applied in the takeover context in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), this protection of the business judgment rule was premised upon directors adequately informing themselves of all material information reasonably available to provide bases for their decisions.

Beginning with *Unocal*, however, the conduct of directors was subjected to “enhanced scrutiny” in circumstances where a traditional conflict of interest was absent. The enhanced scrutiny standard places a burden on directors not only to be adequately informed but also to have “acted reasonably.” *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994); *see also Quickturn Design Sys., Inc. v. Mentor Graphics Corp.*, 721 A.2d 1281, 1290 (Del. 1998). The range of reasonableness addressed by enhanced scrutiny may be a middle ground between the “any rational purpose” to which the business judgment rule defers and the “entire fairness” sought for transactions in which directors or other affiliates have an interest. *See QVC*, 637 A.2d at 42, 45.

Enhanced scrutiny was initially the product of court review of defensive techniques used to respond to an unwanted suitor. *See Unocal*, 493 A.2d 946; *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985). The burden of enhanced scrutiny was extended to director responses to competing bids when a decision is made to sell a company. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). In *QVC*, the Delaware Supreme Court

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[1] In *Williams v. Geier*, 671 A.2d 1368 (Del. 1996), the Delaware Supreme Court held that an antitakeover defensive measure will not be reviewed under the enhanced scrutiny standard when the defensive measure is approved by stockholders. The court stated that this standard “should be used only when a board unilaterally (i.e. without stockholder approval) adopts defensive measures in reaction to a perceived threat.” *Id*. at 1377.

confirmed that the application of enhanced scrutiny is to sales of control generally. *QVC*, 637 A.2d at 46.

Whether the burden of proof is ultimately found to be with the directors or their challengers, in all cases, directors and their counsel are well advised to establish a record supporting the reasonableness of their actions from the very beginning of the decision-making process.

1. Business Judgment Rule.

The Delaware business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citation omitted); *see also Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 49 (Del. 1997). "A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose'." *Unocal*, 493 A.2d at 954 (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

The availability of the business judgment rule does not mean, however, that directors can act on an uninformed basis. Directors must satisfy their duty of care even when they act in the good faith belief that they are acting only in the interests of the corporation and its stockholders. Their decision must be an informed one. "The determination of whether a business judgment is an informed one turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'" *Van Gorkom*, 488 A.2d at 872 (citation omitted). In *Van Gorkom*, notwithstanding a transaction price substantially above the current market, directors were held to have been grossly negligent in, among other things, acting in haste without adequately informing themselves as to the value of the corporation. *Id*. at 874.

2. Enhanced Scrutiny.

When applicable, enhanced scrutiny places on the directors the burden of proving that they have acted reasonably. The key features of enhanced scrutiny are:

(i) a judicial determination regarding the adequacy of the decision-making process employed by the directors, including the information on which the directors based their decision; and

(ii) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing.

The directors have the burden of proving that they were adequately informed and acted reasonably. *QVC*, 637 A.2d at 45; *see also Quickturn*, 721 A.2d at 1290.

The reasonableness required under enhanced scrutiny falls within a range of acceptable alternatives, which echoes the deference found under the business judgment rule.

> [A] court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.

QVC, 637 A.2d at 45.

a. **Defensive Measures.**

When directors authorize defensive measures, there arises "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Unocal*, 493 A.2d at 954. Courts review such actions with enhanced scrutiny even though a traditional conflict of interest is absent. In refusing to enjoin a selective exchange offer adopted by the board to respond to a hostile takeover attempt, the *Unocal* court held that the directors must prove that (i) they had reasonable grounds for believing there was a danger to corporate policy and effectiveness (satisfied by showing good faith and reasonable investigation) and (ii) the responsive action taken was reasonable in relation to the threat posed. *Id*. at 954-55.

b. **Sale of Control.**

In *QVC*, the issues were whether a poison pill could be used selectively to favor one of two competing bidders, effectively precluding shareholders from accepting a tender offer, and whether provisions of the merger agreement (a "no-shop" clause, a "lock-up" stock option, and a break-up fee) were appropriate measures in the face of competing bids for the corporation. Although the decision can be viewed as a variation on *Unocal and Revlon*, the Delaware Supreme Court's language is sweeping as to the possible extent of enhanced scrutiny.

> The consequences of a sale of control impose special obligations on the directors of a corporation. In particular, they have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders. The courts will apply enhanced scrutiny to ensure that the directors have acted reasonably.

QVC, 637 A.2d at 43 (footnote omitted).

The rule announced in *QVC* places a burden on the directors to obtain the *best value* reasonably available once the board determines to sell the corporation in a change of control transaction. This burden entails more than obtaining a fair price for the shareholders, one within the range of fairness that is commonly opined upon by investment banking firms. In *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993), the Delaware Supreme Court found a breach of duty even though the transaction price exceeded the value of the corporation determined under the Delaware appraisal statute: "[I]n the review of a transaction involving a sale of a company, the directors have the burden of establishing that the price offered was the highest value reasonably available under the circumstances." *Id*. at 361.

Although *QVC* mandates that enhanced scrutiny for board action involving a sale of control, certain stock transactions are considered not to involve a change in control for such purpose. In *Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270 (Del. 1994), the Delaware Supreme Court considered a merger between Bancorp and Bank of Boston in which Bancorp stock was exchanged for Bank of Boston stock. *Id*. at 1273. The shareholder plaintiff argued, among other things, that the board's actions should be reviewed with enhanced scrutiny because (i) Bancorp was seeking to sell itself and (ii) the merger constituted a change in control because the Bancorp shareholders were converted to minority status in Bank of Boston, losing the opportunity to enjoy a control premium. Id. at 1289. The Court held that the corporation was not for sale because no active bidding process was initiated and the merger was not a change in control and, therefore, that enhanced scrutiny of the board's approval of the merger was not appropriate. *Id*. at 1289-90. Citing *QVC*, the Court stated that "there is no 'sale or change in control' when '[c]ontrol of both [corporations] remain[s] in a large, fluid, changeable and changing market.'" *Id*. at 1290. As continuing shareholders in Bank of Boston, the former Bancorp shareholders retained the opportunity to receive a control premium. *Id*. The Court noted that in *QVC* a single person would have control of the resulting corporation, effectively eliminating the opportunity for shareholders to realize a control premium. *Id*.; *see also Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989).

3. Entire Fairness.

Both the business judgment rule and the enhanced scrutiny standard should be contrasted with the standard applied in transactions with affiliates. In reviewing board action in transactions involving management, board members or a principal shareholder, the Delaware Supreme Court has imposed an "entire fairness" standard. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1988). Under this standard the burden is on directors to show both (i) fair dealing and (ii) a fair price:

> The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.

Weinberger, 457 A.2d at 711. The burden shifts to the challenger to show the transaction was unfair where (i) the transaction is approved by the majority of the minority shareholders, though the burden remains on the directors to show that they completely disclosed all material facts relevant to the transaction, *id* at 703, or (ii) the transaction is negotiated by a special committee of independent directors that is truly independent, not coerced and has real bargaining power. *See Kahn v. Lynch Communications Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994).

C. Action Without Bright Lines.

Whether the burden will be on the party challenging board action, under the business judgment rule, or on the directors, under enhanced scrutiny, clearly the care with which the directors acted in a change of control transaction will be subjected to close review. For this review there will be no "bright line" tests, and it may be assumed that the board may be called upon to show care commensurate with the importance of the decisions made, whatever they may have been in the circumstances. Thus directors, and counsel advising them, should heed the Delaware Supreme Court in *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989): "[T]here is no single blueprint that a board must follow to fulfill its duties. A stereotypical approach to the sale and acquisition of corporate control is not to be expected in the face of the evolving techniques and financing devices employed in today's corporate environment." In the absence of bright lines and blueprints that fit all cases, the process to be followed by the directors will be paramount. The elements of the process should be clearly understood at the beginning, and the process should be guided and well documented by counsel throughout.

VIII. Application of Delaware Standards in a Friendly Merger.

How do the Delaware fiduciary duties outlined above play out in the context of a friendly merger involving a sale of control? The typical friendly merger begins when an unaffiliated suitor contacts a corporation's CEO to propose a merger, generally for a cash price or a combination of cash and stock. If the consideration is for cash, the proposed transaction would likely include an "any and all" tender offer for the corporation's shares. Management would not have any special interest in the transaction, nor would management wish to pursue its own buyout or implement another competing transaction intended to enhance shareholder value. In these circumstances, how should the directors respond? Are they required to evaluate the proposed transaction and, if so, to what extent? If after an evaluation, they do not wish to pursue the combination, what is required to protect them and their decision from challenge? Or if they wish to pursue the combination, how should they proceed? If a merger agreement is signed, can the suitor protect its deal? If a competing suitor emerges, how should the directors respond?

A. Management's Immediate Response.

Serious offers require serious consideration. The CEO and management will usually be called upon to make an initial judgment as to seriousness. A written, well developed proposal from a credible prospective acquiror should be studied. In contrast, an oral proposal, or a written one that is incomplete in material respects, should not require management efforts to develop the proposal further. In no event need management's response indicate any willingness to be acquired. In *Citron v. Fairchild Camera and Instrument Corp.*, 569 A.2d 53 (Del. 1989), for example, the Delaware Supreme Court sanctioned behavior that included the CEO's informing an interested party that the corporation was not for sale, but that a written proposal, if made, would be submitted to the board for review. Additionally, in *Matador Capital Management Corp. v. BRC Holdings, Inc.*, 729 A.2d 280 (Del. Ch. 1998), the Delaware Chancery Court found unpersuasive the plaintiff's claims that the board failed to consider a potential bidder because the board's decision to terminate discussion was "justified by the embryonic state of [the potential bidder's] proposal." *Id*. at 292. In particular, the court stated that the potential bidder did not provide evidence of any real financing capability and conditioned its offer of its ability to arrange the participation of certain members of the target company's management in the transaction. *Id*.

B. The Board's Consideration.

"When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders." *Unoca*l, 493 A.2d at 954. Just as all proposals are not alike, board responses to proposals may differ. A proposal that is incomplete in material respects should not require serious board consideration. On the other hand, because more developed proposals may present more of an opportunity for shareholders, they ought to require more consideration by the board. *See Desert Partners, L.P. v. USG Corp.*, 686 F. Supp. 1289, 1300 (N.D. Ill. 1988) (applying Delaware law) ("The Board did not breach its fiduciary duty by refusing to negotiate with Desert Partners to remove the coercive and inadequate aspects of the offer. USG decided not to bargain over the terms of the offer because doing so would convey the image to the market place 'that (1) USG was for sale -- when, in fact, it was not; and (2) $42/share was an 'in the ballpark' price -- when, in fact, it was not.'"); and *Citron*, 569 A.2d at 63, 66-67 (validating a board's action in approving one bid over another that, although higher on its face, lacked in specifics of its proposed back-end which made the bid impossible to value). *Compare Golden Cycle, LLC v. Allan*, 1998 WL 892631 (board not required to contact competing bidder for a higher bid before executing a merger agreement where bidder had taken itself out of the board process, refused to sign a confidentiality agreement and appealed directly to the stockholders with a consent solicitation).

1. Matters Considered.

Where an offer is perceived as serious and substantial, an appropriate place for the board to begin its consideration may be an informed understanding of the corporation's value. This may be advisable whether the board's ultimate response is to "say no," to refuse to remove pre-existing defensive measures, to adopt new or different defensive measures or to pursue another strategic course to maximize shareholder value. Such a point of departure is consistent with *Van Gorkom* and *Unocal*. In *Van Gorkom*, the board was found grossly negligent, among other things, for not having an understanding of the intrinsic value of the corporation. In Unocal, the inadequacy of price was recognized as a threat for which a proportionate response is permitted. Unocal, 493 A.2d at 955; *see also Unitrin Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1384 (Del. 1995), noting as a threat "substantive coercion . . . the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management's representations of intrinsic value."

That is not to say, however, that a board must "price" the corporation whenever a suitor appears. Moreover, it may be ill advised even to document a range of values for the corporation before the conclusion of negotiations. However, should the decision be made to sell or should a defensive reaction be challenged, the board will be well served to have been adequately informed of intrinsic value during its deliberations from the beginning. *See Technicolor*, 634 A.2d at 368. In doing so, the board may also establish, should it need to do so under enhanced scrutiny, that it acted at all times to maintain or seek "the best value reasonably available to the stockholders." *QVC*, 637 A.2d at 45. This may also be advisable even if that value derives from remaining independent.

There are, of course, factors other than value to be considered by the board in evaluating an offer. The Delaware judicial guidance here comes from the sale context and the evaluation of competing bids, but may be instructive:

> In assessing the bid and the bidder's responsibility, a board may consider, among various proper factors, the adequacy and terms of the offer; its fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests; the risk of nonconsummation; the basic stockholder interests at stake; the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.

Macmillan, 559 A.2d at 1282 n.29 (citations omitted).

2. Being Adequately Informed.

Although there is no one blueprint for being adequately informed, *see Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265, at *21 (Del. Ch. 1999) (citing *Barkan*, 567 A.2d at 1286), the Delaware courts do value expert advice, the judgment of directors who are independent and sophisticated, and an active and orderly deliberation.

a. **Investment Banking Advice.**

The fact that the board of directors relies on expert advice to reach a decision provides strong support that the board acted reasonably. *See Goodwin*, 1999 WL 64265, at *22 ("The fact that the Board relied on expert advice in reaching its decision not to look for other purchasers also supports the reasonableness of its efforts."); *In re Vitalink Communications Corp. Shareholders Litig.*, 1991 WL 238816, at *12 (Del. Ch. 1991) (citations omitted) (board's reliance on the advice of investment bankers supported a finding that the board had a "reasonable basis" to conclude that it obtained the best offer).

Addressing the value of a corporation generally entails obtaining investment banking advice. *See, e.g., In re Talley Indus., Inc. Shareholders Litig.*, 1998 WL 191939, at *11-12 (Del. Ch. 1998). The analysis of value requires the "techniques or methods which are generally considered acceptable in the financial community. . . ." *Weinberger*, 457 A.2d at 713. Clearly, in *Van Gorkom*, the absence of expert advice prior to the first board consideration of a merger proposal contributed to the determination that the board "lacked valuation information adequate to reach an informed business judgment as to the fairness [of the price]" and the finding that the directors were grossly negligent. *Van Gorkom*, 488 A.2d at 878. Although the Delaware Supreme Court noted that "fairness opinions by independent investment bankers are [not] required as a matter of law," *id*. at 876, in practice, investment banking advice is obtained for any decision to sell and for many decisions not to sell. In the non-sale context, such advice is particularly helpful where there may be subsequent pressure to sell or disclosure concerning the board's decision not to sell is likely.

The advice of investment bankers is not, however, a substitute for the judgment of the directors. As the court pointed out in *Citron*, “in change of control situations, sole reliance on hired experts and management can 'taint[] the design and execution of the transaction'.” *Citron*, 569 A.2d at 66 (citation omitted). In addition, the timing, scope and diligence of the investment bankers may affect the outcome of subsequent judicial scrutiny. The cases in this latter respect involve decisions to sell, but may nevertheless be instructive for board deliberations which do not result in a sale decision:

(1) *Weinberger*, 457 A.2d 701 - In *Weinberger*, the Delaware Supreme Court held that the board's approval of an interested merger transaction did not meet the test of fairness. *Id*. at 715. The fairness analysis prepared by the investment bankers was criticized as “hurried” where due diligence was conducted over a weekend and the price was slipped into the opinion by the banking partner (who was also a director of the corporation) after a quick review of the assembled diligence on a plane flight. *Id*. at 712.

(2) *Macmillan*, 559 A.2d 1261 - In *Macmillan*, the court enjoined defensive measures adopted by the board, including a lock-up and no-shop granted to an acquiror, to hinder competing bids from Mills. The court questioned an investment bank's conclusion that an $80 per share cash offer was inadequate when it had earlier opined that the value of the company was between $72 and $80 per share and faulted the lack of independence of the investment bankers who were retained by and consulted with financially interested management. *Id*. at 1271.

(3) *Technicolor*, 634 A.2d 345 - In *Technicolor*, the court faulted the valuation package prepared by the investment bankers because they were given limited access to senior officers and directors of Technicolor.

b. **Value of Independent Directors, Special Committees.**

One of the first tasks of counsel in a takeover context is to assess the independence of the board. In responding to a suitor, a corporation that has significant independent directors may have an advantage over companies without such independent directors. *See, e.g., Kahn v. MSB Bancorp, Inc.*, 1998 WL 409355, at *3 (Del. Ch. 1998), *Aff'd* 734 A.2d 158 (Del. 1999) (“[T]he fact that nine of the ten directors are not employed by MSB, but are outside directors, strengthens the presumption of good faith.”) In a sale of control transaction, “the role of outside, independent directors becomes particularly important because of the magnitude of a sale of control transaction and the possibility, in certain cases, that management may not necessarily be impartial.” *QVC*, 637 A.2d at 44; *see also Macmillan*, 599 A.2d 1261. As pointed out by the Delaware Supreme Court in *Unocal*, when enhanced scrutiny is applied by the court, “proof is materially enhanced . . . by the approval of a board comprised of a majority of outside independent directors who have acted [in good faith and after a reasonable investigation].” *Unocal*, 493 A.2d at 955.

(1) *Characteristics of an Independent Director*. An independent director has been defined as a non-employee and non-management director. *Unitrin*, 651 A.2d at 1375. In addition, a court may consider the sophistication of the individual board members in evaluating

their independence and informed judgments. In *Van Gorkom*, the fact that no directors were investment bankers or financial analysts contributed to the evidence indicating that the board was uninformed. *Van Gorkom*, 488 A.2d at 877-78. Moreover, to be effective, outside directors cannot be dominated by financially interested members of management. *See Macmillan*, 559 A.2d at 1266. Care should also be taken to restrict the influence of other interested directors, which may include recusal of interested directors from participation in certain board deliberations. *See Technicolor*, 634 A.2d at 366 n.35. *See also Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (in evaluating charge that directors breached fiduciary duties in approving employment and subsequent severance of a corporation's president, the Delaware Supreme Court held that the “issues of disinterestedness and independence” turn on whether the directors were “incapable, due to personal interest or domination and control, of objectively evaluating” an action), following in this respect and overruling the standards for appellate review set forth in *Aronson*.

(2) *Need for Active Participation*. Active participation of the independent members of the board is important in demonstrating that the board did not simply follow management. In *Time*, 571 A.2d 1140, the Delaware Supreme Court considered Time's actions in recasting its previously negotiated merger with Warner into an outright cash and securities acquisition of Warner financed with significant debt to ward off Paramount's surprise all-cash offer to acquire Time. Beginning immediately after Paramount announced its bid, the Time board met repeatedly to discuss the bid, determined the merger with Warner to be a better course of action, and declined to open negotiations with Paramount. The outside directors met independently, and the board sought advice from corporate counsel and financial advisors. Through this process the board reached its decision to restructure the combination with Warner. The court viewed favorably the participation of certain of the board's 12 independent directors in the analysis of Paramount's bid. The Time board's process contrasts with *Van Gorkom*, where although one-half of Trans Union's board was independent, an absence of any inquiry by those directors as to the basis of management's analysis and no review of the transaction documents contributed to the court's finding that the board was grossly negligent in its decision to approve a merger. *See also Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997), where the Delaware Supreme Court found that the three member special committee of outside directors was not fully informed, not active, and did not appropriately simulate an arm's-length transaction, given that two of the three members permitted the other member to perform the committee's essential functions and one of the committee members did not attend a single meeting of the committee.

(3) *Use of Special Committee*. Where the board does not have a majority of independent directors, a special committee may be chartered to analyze the adequacy of a proposal. Although the cases addressing the use of special committees relate principally to management buyouts or other interested-director transactions, they provide useful guidance to a board considering any takeover proposal. They leave unresolved, however, the question of how much power a special committee must have in order to withstand judicial review. A special committee's charter should be broad enough to permit the special committee to establish that a rejected bid is inadequate or that an approved bid is the “best value reasonably available.” But a judgment will be required as to whether this requires the committee to have the ability to negotiate the offer or shop for other bidders.

(i) *Barkan,* 567 A.2d 1279 - The special committee used in *Barkan* to evaluate the fairness of any acquisition proposal was instructed not to search for alternatives to the management buy-out proposal under consideration. The court upheld the committee's decision to approve the management buy-out, but:

> [D]id not condone in all instances the imposition of the sort of 'no-shop' restriction that bound [the] Special Committee. Where a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids. *Id*. at 1288.

(ii) *Macmillan*, 559 A.2d 1261 - In *Macmillan*, the limited power conferred upon the special committee utilized contributed to the court's adverse ruling. The committee was not given any negotiating authority regarding the restructuring that involved a management equity position. *Id*. at 1268.

(iii) *Tremont,* 694 A.2d 422 - In *Tremont,* the Delaware Supreme Court found the selection and operation of a special committee to be lacking, finding that it did not "function in a manner which indicates that the controlling shareholders did not dictate the terms of the transaction and that the committee exercised real bargaining power 'at arm's-length'." *Id*. at 429. All three committee members had previous affiliations with the controlling shareholder or companies he controlled and, as a consequence, received significant financial compensation or influential positions on the board of such shareholder's controlled companies. *Id*. at 423. Both legal counsel and the investment bankers for the committee were retained at the suggestion of the general counsel for the corporation, rather than the committee. *Id*. at 429. And the committee functioned effectively as a "single member committee," with one member even absent from all meetings with advisors and other committee members. *Id*. at 429-30. The court noted that two of the members had "abdicated their responsibility . . . by permitting . . . [the committee chairman], the member whose independence was most suspect, to perform the Special Committee's essential functions." *Id*. at 429.

(iv) *Rand v. Western Air Lines, Inc.*, 1994 WL 89006 (Del. Ch. 1994), *aff'd* 659 A.2d 228 (Del. 1995) - In *Rand*, the Delaware Chancery Court acknowledged that delegation of decision-making to a special committee is useful in a variety of situations, but is not required by statute or case law. *Id*. at *4.

C. Value of Thorough Deliberation.

The Delaware cases repeatedly emphasize the importance of the process followed by directors in addressing a takeover proposal. The Delaware courts have frowned upon board decision-making that is done hastily or without prior preparation. Counsel should be careful to formulate and document a decision-making process that will withstand judicial review from this perspective.

Early in the process the board should be advised by counsel as to the applicable legal standards and the concerns expressed by the courts that are presented in similar circumstances. Distribution of a memorandum from counsel can be particularly helpful in this regard. Management should provide the latest financial and strategic information available concerning the corporation and its prospects. If a sale is contemplated or the corporation may be put "in play," investment bankers should be retained to advise concerning comparable transactions and market conditions, provide an evaluation of the proposal in accordance with current industry standards, and, if requested, render a fairness opinion concerning the transaction before it is finally approved by the board. The board should meet several times, preferably in person, to review reports from management and outside advisors, learn the progress of the transaction and provide guidance. Directors should receive reports and briefing information sufficiently before meetings so that they can be studied and evaluated. Directors should be active in questioning and analyzing the information and advice received from management and outside advisors. A summary of the material provisions of the merger agreement should be prepared for the directors and explained by counsel.

See, e.g., *Moore Corp. Ltd. v. Wallace Computer Servs.*, 907 F. Supp. 1545 (D. Del. 1995) for an in depth description of a decision-making process that withstood review under enhanced scrutiny.

(1) In *Van Gorkom*, 488 A.2d 858, the Trans Union board approved the proposed merger at a meeting without receiving notice of the purpose of the meeting, no investment banker was invited to advise the board, and the proposed agreement was not available before the meeting and was not reviewed by directors. This action contributed to the court's conclusion that the board was grossly negligent.

(2) In *Technicolor*, 634 A.2d 345, notice of a special board meeting to discuss and approve an acquisition proposal involving interested management was given to members of the board only one day prior to the meeting, and it did not disclose the purpose of the meeting. Board members were not informed of the potential sale of the corporation prior to the meeting, and it was questioned whether the documents were available for the directors' review at the meeting.

(3) In contrast is *Time*, 571 A.2d 1140, where the board met often to discuss the adequacy of Paramount's offer and the outside directors met frequently without management, officers or directors. *See also Moran*, 500 A.2d 1346, where (i) before considering a rights plan as a preventative mechanism to ward off future advance, the board received material on the potential takeover problem and the proposed plan, (ii) independent investment bankers and counsel attended the board meeting to advise the directors, and (iii) ten of the board's sixteen members were outside directors; and *MSB Bancorp*, 1998 WL 409355, where during the period in question, the board met weekly, considered the offers, consulted with its legal and financial advisors, and then made its conclusion as to which offer to pursue.

For a summary of guidelines for counsel to develop a suitable process for the board's deliberations, *see* Diane H. Frankle, *Counseling the Board of Directors in Exploring Alternatives*, 1101 PLI/Corp. 261 (1998).

D. The Decision to Remain Independent.

A board may determine to reject an unsolicited proposal. It is not required to exchange the benefits of its long-term corporate strategy for short-term gain. However, like other decisions in the takeover context, the decisions to "say no" must be adequately informed. The information to be gathered and the process to be followed in reaching a decision to remain independent will vary with the facts and circumstances, but in the final analysis the board should seek to develop reasonable support for its decision.

A common ground for rejection is that the proposal is inadequate. Moreover, the proposal may not reflect the value of recent or anticipated corporate strategy. Another ground is that continued independence is thought to maximize shareholder value. Each of these reasons seems founded on information about the value of the corporation and points to the gathering of information concerning value.

A decision based on the inadequacy of the proposal or the desirability of continuing a pre-existing business strategy is subject to the business judgment rule, in the absence of the contemporaneous adoption of defensive measures or another response that proposes an alternative means to realize shareholder value.[2] Defensive measures are subject to enhanced scrutiny, with its burden on the directors to demonstrate reasonableness. An alternative transaction can raise an issue as to whether the action should be reviewed as essentially a defensive measure. Moreover, the decision not to waive the operation of a poison pill or the protection of a state business combination statute such as DGCL Section 203 can be viewed as defensive. *See e.g., Moore*, 907 F. Supp. at 1556 (failure to redeem poison pill defensive). A merger agreement that requires the merger to be submitted to shareholders, even if the board has withdrawn its recommendation of the merger, as permitted by the 1998 amendment to DGCL Section 251(c), may also be analyzed as defensive. In any case, and especially where it is likely that the suitor or a shareholder will turn unfriendly, the authorized response should be based on a developed record that demonstrates its reasonableness.

1. Judicial Respect for Independence.

Delaware cases have acknowledged that directors may reject an offer that is inadequate or reach an informed decision to remain independent. Even in striking down a board's decision in *Lynch Communication*, 638 A.2d 1110, the Delaware Supreme Court acknowledged that:

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[2] Whether the standards of review for a decision to remain independent are the same in the face of a cash bid that potentially involves "Revlon" duties or a stock transaction that does not is unsettled. *Compare, e.g.*, Wachtell, Lipton, Rosen & Katz, *Takeover Law and Practice*, 1212 PLI/Corp. 801, 888, citing no authority: "If the proposal calls for a transaction that does not involve a change in control within the meaning of *QVC*, it would appear that the traditional business judgment rule would apply to the directors' decision. If the acquisition proposal calls for a transaction that would involve a change within the meaning of *QVC*, the enhanced-scrutiny *Unocal* test would apply." Such a conclusion would subject all director decisions to a reasonableness standard merely because of what transaction has been proposed. In theory, at least, a well-informed, fully independent board ought to be accorded more deference than this where it has not initiated a sale, even though the consideration for the sale presents advantages that are reasonable. On the other hand, in practice, it may be difficult to avoid the defensive responses to a proposal, which would involve a reasonableness review, where the bidder is persistent.

> The power to say no is a significant power. It is the duty of directors serving on [an independent] committee to approve only a transaction that is in the best interests of the public shareholders, to say no to any transaction that is not fair to those shareholders and is not the best transaction available.

Id. at 1119 (citation omitted).

In a number of prominent cases, the Delaware courts have endorsed the board's decision to remain independent:

a. In *Time*, 571 A.2d 1140, the Delaware Supreme Court validated the actions of Time's board in the face of an all-shares cash offer from Paramount. The board had concluded that the corporation's purchase of Warner "offered a greater long-term value for the stockholders and, unlike Paramount's offer, did not pose a threat to Time's survival and its 'culture.'" *Id*. at 1149. In approving these actions, the court determined that the board, which "was adequately informed of the potential benefits of a transaction with Paramount," did not have to abandon its plans for corporate development in order to provide the shareholders with the option to realize an immediate control premium. *Id*. at 1154. "Time's board was under no obligation to negotiate with Paramount." *Id*. According to the court, this conclusion was consistent with long-standing Delaware law: "We have repeatedly stated that the refusal to entertain an offer may comport with a valid exercise of a board's business judgment." *Id*. at 1152 (citing *Macmillan*, 552 A.2d at 1285 n.35; *Van Gorkom*, 448 A.2d at 881; and *Pogostin v. Rice*, 480 A.2d 619, 627 (Del. 1984).

b. In *Unitrin*, 651 A.2d 1361, the Delaware Supreme Court considered defensive actions taken by Unitrin's board in response to American General's overtures. The board rejected the offer as financially inadequate and presenting antitrust complications, but did not adopt defensive measures to protect against a hostile bid until American General issued a press release announcing the offer. *Id*. at 1370. Unitrin's board viewed the resulting increase in Unitrin's stock price as a suggestion that speculative traders or arbitrageurs were buying up Unitrin stock and concluded that the announcement constituted a "hostile act designed to coerce the sale of Unitrin at an inadequate price." *Id*. In response, the board adopted a poison pill and an advance notice bylaw provision for shareholder proposals. *Id*. The directors then adopted a repurchase program for Unitrin's stock. *Id*. at 1370-71. The directors owned 23% of the stock and did not participate in the repurchase program. *Id*. at 1370. This increased their percentage ownership and made approval of a business combination with a shareholder without director participation more difficult. *Id*. at 1371-72. The Delaware Court of Chancery ruled that the poison pill was a proportionate defensive response to American General's offer, but that the repurchase plan exceeded what was necessary to protect shareholders from a low bid. The poison pill was not directly at issue when the Delaware Supreme Court reviewed the case. The court determined that the Court of Chancery used an incorrect legal standard and substituted its own business judgment for that of the board. *Id*. at 1389. The court remanded to the Court of Chancery to reconsider the repurchase plan and determine whether it, along with the other defensive measures, was preclusive or coercive and, if not, "within the range of reasonable defensive measures available to the Board." *Id*. at 1390.

c. In *Revlon*, 506 A.2d 173, the Delaware Supreme Court looked favorably on the board's initial rejection of Pantry Pride's offer and its adoption of a rights plan in the face of a hostile takeover at a price it deemed inadequate. *Id*. at 180-81. The court did not suggest that Revlon's board had a duty to negotiate or shop the company before it "became apparent to all that the break-up of the company was inevitable" and the board authorized negotiation of a deal, thus recognizing that the company was for sale. *Id*. at 182.

d. In *Desert Partners*, 686 F. Supp. 1289 (applying Delaware law), the court approved the USG board's refusal to redeem a poison pill to hinder an inadequate hostile offer and noted that the board had no duty to negotiate where it had neither put the company up for sale nor entertained a bidding contest. *Id*. at 1300. "Once a Board decides to maintain a company's independence, Delaware law does not require a board of directors to put their company on the auction block or assist a potential acquiror to formulate an adequate takeover bid." *Id*. at 1300.

e. In *MSB Bancorp*, 1998 WL 409355, the Delaware Chancery Court upheld the board's decision to purchase branches of another bank in furtherance of its long-held business strategy rather than to negotiate an unsolicited merger offer that would result in short-term gain to the shareholders. *Id*. at *4. In reaching its conclusion, the court applied the business judgment rule because it determined that there was no defensive action taken by the board in merely voting not to negotiate the unsolicited merger offer which did not fit within its established long-term business plan. *Id*. at *3.

2. Defensive Measures.

When a board makes a decision to reject an offer considered inadequate, the board may adopt defensive measures in case the suitor becomes unfriendly. Such a response will be subjected to the proportionality test of *Unocal*, that the responsive action taken is reasonable in relation to the threat posed. *See, e.g., Quickturn*, 721 A.2d at 1290. This test was developed in *Unitrin* to make clear that defensive techniques that are "*coercive*" or "*preclusive*" will not be considered to satisfy the proportionality test:

> An examination of the cases applying Unocal reveals a direct correlation between findings of proportionality or disproportionality and the judicial determination of whether a defensive response was draconian because it was either coercive or preclusive in character. In *Time*, for example, [the Delaware Supreme Court] concluded that the Time board's defensive response was reasonable and proportionate since it was not aimed at 'cramming down' on its shareholders a management-sponsored alternative, *i.e.*, was not coercive, and because it did not preclude Paramount from making an offer for the combined Time-Warner Company, *i.e.*, was not preclusive.

Unitrin, 651 A.2d at 1387 (citations omitted).

In *Moran*, 500 A.2d 1346, the Delaware Supreme Court considered a shareholder rights plan adopted by Household International not during a takeover contest, "but as a preventive mechanism to ward off future advances." *Id*. at 1349. The court upheld the pre-planned poison pill but noted that the approval was not absolute. *Id*. at 1354. When the board "is faced with a tender offer and a request to redeem the [rights plan], they will not be able to arbitrarily reject the offer. They will be held to the same fiduciary standards any other board of directors would be held to in deciding to adopt a defensive mechanism." *Id*. *See also Moore*, 907 F. Supp. 1545; *Desert Partners*, 686 F. Supp. 1289; *Unitrin*, 651 A.2d 1361; *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987); and *Revlon*, 506 A.2d 173, where the court considered favorably a board's defensive measures to protect its decision to remain independent.

E. The Pursuit of a Sale.

The board which decides to pursue a sale of the corporation (involving a sale of control within the meaning of *QVC)*, whether on its own initiative or in response to a friendly suitor, has undertaken "to seek the best value reasonably available to the stockholders." *QVC*, 637 A.2d at 48; *see also Matador*, 729 A.2d at 290. As the Delaware Supreme Court stated in *Technicolor*: "[I]n the review of a transaction involving a sale of a company, the directors have the burden of establishing that the price offered was the highest value reasonably available under the circumstances." *Technicolor*, 634 A.2d at 361.

1. Value to Stockholders.

In *Revlon*, the Delaware Supreme Court imposed an affirmative duty on the board to seek the highest value reasonably available to the shareholders when a sale became inevitable. *See Revlon*, 506 A.2d 173. The duty established in *Revlon* has been considered by the Delaware courts on numerous occasions, and was restated in *QVC*. According to the Delaware Supreme Court in *QVC*, the duty to seek the highest value reasonably available is imposed on a board in the following situations:

> Under Delaware law there are, generally speaking and without excluding other possibilities, two circumstances which may implicate *Revlon* duties. The first, and clearer one, is when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company.

QVC, 637 A.2d at 47 (citation omitted).

> [W]hen a corporation undertakes a transaction which will cause: (a) a change in corporate control; or (b) a break-up of the corporate entity, the directors' obligation is to seek the best value reasonably available to the stockholders.

Id. at 48.

2. Ascertaining Value.

When the *Revlon* decision was first announced by the Delaware Supreme Court, many practitioners read the decision to mandate an auction by a target company in order to satisfy the board's fiduciary duties (the so-called "Revlon duties"). *See* McBride, *Revisiting Delaware Law and Mergers and Acquisitions: The Impact of QVC v. Paramount*, 2 PLI Course Handbook, 26th Ann. Inst. on Sec. Reg. 86 (1994). After interpreting *Revlon* in *Barkan, Macmillan, Time, Technicolor*, and *QVC*, however, the Delaware Supreme Court has clearly indicated that an auction is not the only way to satisfy the board's fiduciary duties. As the court in *Barkan* stated:

> Revlon does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest. Revlon is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders.

Barkan, 567 A.2d at 1286.

One court has noted that when the board is negotiating with a single suitor and has no reliable grounds upon which to judge the fairness of the offer, a canvas of the market is necessary to determine if the board can elicit higher bids. *In re Fort Howard Corp. Shareholders Litig.*, 1988 WL 83147 (Del. Ch. 1988). However, the Delaware Supreme Court held in *Barkan* that when the directors "possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market." *Barkan*, 567 A.2d at 1287.

The following cases indicate situations in which a board was not required to engage in an active survey of the market. Most involve one-on-one friendly negotiations without other bidders, although in some the target had earlier discussions with other potential bidders.

a. In *Barkan*, 567 A.2d 1279 (Del. 1989), the corporation had been put "in play" by the actions of an earlier bidder. *Id*. at 1287. Instead of taking an earlier offer, the corporation instituted a management buyout (the "MBO") through an employee stock ownership program. *Id*. at 1282-83. In holding that the board did not have to engage in a market survey to meet its burden of informed decision-making in good faith, the court listed the following factors: (i) potential suitors had ten months to make some sort of offer (due to early announcements), (ii) the MBO offered unique tax advantages to the corporation that led the board to believe that no outside offer would be as advantageous to the shareholders, (iii) the board had the benefit of the advice of investment bankers, and (iv) the trouble the corporation had financing the MBO, indicating that the corporation would be unattractive to potential suitors. *Id*. at 1287-88. In holding that an active market check was not necessary, however, the court sounded a note of caution:

> The evidence that will support a finding of good faith in the absence of some sort of market test is by nature circumstantial; therefore, its evaluation by a court must be open-textured. However, the crucial element supporting a finding of good faith is knowledge. It must be clear

> that the board had sufficient knowledge of relevant markets to form the basis for its belief that it acted in the best interests of the shareholders. *The situations in which a completely passive approach to acquiring such knowledge is appropriate are limited.*

Id. at 1288 (emphasis added).

b. In *In re Vitalink*, 1991 WL 238816, Vitalink entered a merger agreement with Network Systems Corporation. *Id*. at *3-4. While Vitalink had also conducted earlier discussions with two other companies, the court found that Vitalink had not discussed valuation with those two companies, and thus did not effectively canvas the market. *Id*. at *7. In holding that the Vitalink board nevertheless met its burden of showing that it acted in an informed manner in good faith, the court looked at the following factors: (i) no bidder came forward in the 45 days that passed between the public announcement of the merger and its closing; (ii) the parties negotiated for a number of months; (iii) the board had the benefit of a fairness opinion from its investment banker; and (iv) the investment banker's fee was structured to provide it an incentive to find a buyer who would pay a higher price. *Id*. at *11-12.

As the Delaware Supreme Court noted in *Van Gorkom*, failure to take appropriate action to be adequately informed as to a transaction violates the board's duty of due care. Without a firm blueprint to build adequate information, however, the passive market check entails a risk of being judged as "doing nothing" to check the market or assess value. *See Barkan*, 567 A.2d at 1287 (there is no single method that a board must employ to become informed).

3. Protecting the Merger.

During the course of acquisition negotiations, it may be neither practicable nor possible to auction or actively shop the corporation. Moreover, even when there has been active bidding by two or more suitors, it may be difficult to determine whether the bidding is complete. In addition, there can remain the possibility that new bidders may emerge that have not been foreseen. In these circumstances, it is generally wise for the board to make some provision for further bidders in the merger agreement. Such a provision can also provide the board with additional support for its decision to sell to a particular bidder if the agreement does not forestall competing bidders, permits the fact gathering and discussion sufficient to make an informed decision and provides meaningful flexibility to respond to them. In this sense, the agreement is an extension of, and has implications for, the process of becoming adequately informed.

In considering a change of control transaction, a board should consider:

> [W]hether the circumstances afford a disinterested and well motivated director a basis reasonably to conclude that if the transactions contemplated by the merger agreement close, they will represent the best available alternative for the corporation and its shareholders. This inquiry involves consideration inter alia of the nature of any provisions in the merger agreement tending to impede other offers, the extent of the board's information about market alternatives, the content of announcements accompanying the execution of the merger agreement, the extent of the

> company's contractual freedom to supply necessary information to competing bidders, and the time made available for better offers to emerge.

Roberts v. General Instrument Corp., 1990 WL 118356, at *8 (Del. Ch. 1990).

Management will, however, have to balance the requirements of the buyer against these interests in negotiating the merger agreement. The buyer will seek assurance of the benefit of its bargain through the agreement, especially the agreed upon price, and the corporation may run the risk of losing the transaction if it does not accede to the buyer's requirements in this regard. The relevant cases provide the corporation and its directors with the ability, and the concomitant obligation in certain circumstances, to resist.

The assurances a buyer seeks often take the form of a “no-shop” clause, a “lock-up” agreement for stock or assets, or a break-up fee. In many cases, a court will consider the effect of these provisions together. Whether or not the provisions are upheld may depend, in large measure, on whether a court finds that the board has adequate information about the market and alternatives to the offer being considered. The classic examples of no-shops, lock-ups and break-up fees occur, however, not in friendly situations, where a court is likely to find that such arrangements provide the benefit of keeping the suitor at the bargaining table, but rather in a bidding war between two suitors, where the court may find that such provisions in favor of one suitor prematurely stop an auction and thus do not allow the board to obtain the highest value reasonably attainable.

The fact that a buyer has provided consideration for the assurances requested in a merger agreement does not end the analysis. In *QVC*, the Delaware Supreme Court took the position that provisions of agreements that would force a board to violate its fiduciary duty of care are unenforceable. As the court stated:

> Such provisions, whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the . . . directors from carrying out their fiduciary duties under Delaware law. To the extent such provisions are inconsistent with those duties, they are invalid and unenforceable.

QVC, 637 A.2d at 48. Although this language provides a basis for directors to resist unduly restrictive provisions, it may be of little comfort to a board that is trying to abide by negotiated restrictive provisions in an agreement and their obligations under Delaware law, especially where the interplay of the two may not be entirely clear.

a. **No-Shops**

The term “no-shop” is used generically to describe provisions that limit a corporation's ability to actively canvas the market or to respond to overtures from the market. No-shop clauses can take different forms. A strict no-shop allows no solicitation and also prohibits a target from facilitating other offers, all without exception. Such a strict no-shop clause would probably not be upheld. *See QVC*, 637 A.2d at 48. A customary, and limited, no-shop clause contains some type of “fiduciary out,” which allows a board to take certain actions to the extent necessary for the board to comply with its fiduciary duties to shareholders. *See, e.g., Matador*, 729 A.2d at 288-89; and William T. Allen, "*Understanding Fiduciary Outs: The What and Why of an Anomalous Concept*," 55 Bus. Law. 653 (2000). Board actions permitted can range from supplying confidential information about the corporation to unsolicited suitors, to negotiating with unsolicited suitors and terminating the existing merger agreement upon payment of a break-up fee, to actively soliciting other offers. *See id*. Each action is tied to a determination, by the board after advice of counsel, that it is required in the exercise of the board's fiduciary duties. Such "fiduciary outs," even when restrictively drafted, will likely be interpreted by the courts to permit the board to become informed about an unsolicited competing bid. "[E]ven the decision not to negotiate ... must be an informed one. A target can refuse to negotiate [in a transaction not involving a sale of control] but it should be informed when making such refusal." *Phelps Dodge Corp. v. Cypress Amax Minerals Co.*, 1999 WL 1054255, (Del. Ch. 1999).

See Ace Ltd. v. Capital Re Corp., 747 A.2d. 95 (Del. Ch. 1999) for a discussion of restrictive "no shop" provisions. In *Ace*, which did not involve a change in control merger, the court interpreted a "no-talk" provision of a "no-shop" to permit the board to engage in continued discussions with a continuing bidder, notwithstanding the signing of a merger agreement, when not to do so was tantamount to precluding the stockholders from accepting a higher offer. The court wrote:

> *QVC* does not say that directors have no fiduciary duties when they are not in "Revlon-land." ...Put somewhat differently, *QVC* does not say that a board can, in all circumstances, continue to support a merger agreement not involving a change of control when: (1) the board negotiated a merger agreement that was tied to voting agreements ensuring consummation if the board does not terminate the agreement; (2) the board no longer believes that the merger is a good transaction for the stockholders; and (3) the board believes that another available transaction is more favorable to the stockholders. The fact that the board has no *Revlon* duties does not mean that it can contractually bind itself to set idly by and allow an unfavorable and preclusive transaction to occur that its own actions have brought about. The logic of *QVC* itself casts doubts on the validity of such a contract.

Id. at 107-108.

Although determinations concerning fiduciary outs are usually made when a serious competing suitor emerges, it may be difficult for a board or its counsel to determine just how much of the potentially permitted response is required by the board's fiduciary duties. *See* John F. Johnston, *Recent Amendments to the Merger Sections of the DGCL Will Eliminate Some - But Not All - Fiduciary Out Negotiation and Drafting Issues*, 1 BNA Mergers & Acquisitions L. Rep. 777 (1998):

> [I]n freedom-of-contract jurisdictions like Delaware, the target board will be held to its bargain (and the bidder will have the benefit of its bargain) only if the initial agreement to limit the target board's discretion can withstand scrutiny under applicable fiduciary duty principles. The exercise of fiduciary duties is scrutinized up front -- at the negotiation

> stage. If that exercise withstands scrutiny, fiduciary duties will be irrelevant in determining what the target board's obligations are when a better offer, in fact, emerges; at that point its obligations will be determined solely by the contract.

Id. at 779. As a consequence, the board may find it advisable to state the "fiduciary out" in terms that do not only address fiduciary duties but also permit action when an offer reasonably believed to be "superior" is made.

As the cases that follow indicate, while in some more well-known situations no-shops have been invalidated, the Delaware courts have on numerous occasions upheld different no-shop clauses as not impeding a board's ability to make an informed decision that a particular agreement provided the highest value reasonably obtainable for the shareholders.

b. **Lock-ups**

Lock-ups can take the form of an option to buy additional shares of the corporation to be acquired, which benefits the suitor if the price for the corporation increases after another bidder emerges and discourages another bidder by making the corporation more expensive.[3] Lock-ups can also take the form of an option to acquire important assets (a company's "crown jewels") at a price that may or may not be a bargain for the suitor, which may so change the attractiveness of the corporation as to discourage or preclude other suitors. "[L]ock-ups and related agreements are permitted under Delaware law where their adoption is untainted by director interest or other breaches of fiduciary duty." *Revlon*, 506 A.2d at 176. The Delaware Supreme Court has tended to look askance at lock-up provisions when such provisions, however, impede other bidders or do not result in enhanced bids. As the Delaware Supreme Court stated in *Revlon*,

> Such [lock-up] options can entice other bidders to enter a contest for control of the corporation, creating an auction for the company and maximizing shareholder profit. . . . However, while those lock-ups which draw bidders into the battle benefit shareholders, similar measures which end an active auction and foreclose further bidding operate to the shareholders detriment.

Revlon, 506 A.2d at 183.

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[3] Such an option is issued by the corporation, generally to purchase newly issued shares for up to 19.9% of the corporation's outstanding shares at the deal price. The amount is intended to give the bidder maximum benefit without crossing limits established by the New York Stock Exchange (see Rule 312.03, NYSE Listed Company Manual) or NASD (see Rule 4310(c)(25)(H)(i), NASD Manual -- The Nasdaq Stock Market) that require shareholder approval for certain large stock issuances. Such an option should be distinguished from options granted by significant shareholders or others in support of the deal. Shareholders may generally grant such options as their self-interest requires. See *Mendel v. Carroll*, 651 A.2d 297, 306 (Del. Ch. 1994). However, an option involving 15% of the outstanding shares makes applicable Section 203 of the DGCL that restricts certain transactions with shareholders who acquire such amount of shares without board approval. Any decision to exempt such an option from the operation of Section 203 involves the board's fiduciary duties.

As the cases that follow indicate, the Delaware courts have used several different types of analyses in reviewing lock-ups. In active bidding situations, the courts have examined whether the lock-up resulted in an enhanced bid (in addition to the fact that the lock-up ended an active auction). *See Revlon*, 506 A.2d 173; *Macmillan*, 559 A.2d 1261. In situations not involving an auction, the courts have examined whether the lock-up impeded other potential suitors, and if an active or passive market check took place prior to the grant of the lock-up. *See Matador*, 729 A.2d at 291; Rand, 1994 WL 89006; *Roberts*, 1990 WL 118356. For a further discussion of the analytical approaches taken by the Delaware courts, *see* Fraidin and Hanson, *Toward Unlocking Lock-ups*, 103 Yale L. J. 1739, 1748-66 (1994).

c. **Break-Up Fees.**

Break-up fees generally require the corporation to pay consideration to its merger partner should the corporation be acquired by a competing bidder that emerges after the merger agreement is signed. As with no-shops and lock-ups, break-up fees are not invalid unless they are preclusive or an impediment to the bidding process.[4] As the cases that follow indicate, however, break-up fees are not as disliked by the Delaware courts, and such fees that bear a reasonable relation to the value of a transaction so as not to be preclusive have been upheld. *See Goodwin*, 1999 WL 64265, at * 23; *Matador*, 729 A.2d at 291 n.15 (discussing authorities). In practice, counsel are generally comfortable with break-up fees that range from 1% to 3% of the transaction value (including the amount of any debt assumed in the deal). For this purpose, the value of any lock-up given by the corporation to the bidder should be included.

4. Specific Cases Where No-Shops, Lock-ups, and Break-Up Fees Have Been Invalidated.

a. *Revlon*, 506 A.2d 173 - In *Revlon*, the court held that the no-shop along with a lock-up agreement and a break-up fee effectively stopped an active bidding process and thus was invalid. *Id*. at 182. The court noted that the no-shop is "impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder." *Id*. at 184. *Revlon* had also granted to Forstmann a "crown jewel" asset lock-up representing approximately 24% of the deal value (and apparently the

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[4] Alternatively, if parties to a merger agreement expressly state that the termination fee will constitute liquidated damages, Delaware courts will evaluate the termination fee under the standard for analyzing liquidated damages. For example, in *Brazen*, 695 A.2d 43, Bell Atlantic and NYNEX entered into a merger agreement which included a two-tiered termination fee of $550 million, which represented about 2% of Bell Atlantic's market capitalization and would serve as a reasonable measure for the opportunity cost and other losses associated with the termination of the merger. *Id.* at 45. The merger agreement stated that the termination fee would "constitute liquidated damages and not a penalty." *Id.* at 46. Consequently, the court found "no compelling justification for treating the termination fee in this agreement as anything but a liquidated damages provision, in light of the express intent of the parties to have it so treated." *Id.* at 48. Rather than apply the business judgment rule, the court followed "the two-prong test for analyzing the validity of the amount of liquidated damages: 'Where the damages are uncertain and the amount agreed upon is reasonable, such an agreement will not be disturbed.'" *Id.* at 48 (citation omitted). Ultimately, the court upheld the liquidated damages provision. *Id.* at 50. The court reasoned in part that the provision was within the range of reasonableness "given the undisputed record showing the size of the transaction, the analysis of the parties concerning lost opportunity costs, other expenses, and the arms-length negotiations." *Id.* at 49.

crown jewel was undervalued), and a break-up fee worth approximately 1.2% of the deal. The court invalidated the lock-up and the break-up fee, noting that Forstmann "had already been drawn into the contest on a preferred basis, so the result of the lock-up was not to foster bidding, but to destroy it." *Id*. at 183.

b. *Macmillan*, 559 A.2d 1261 - In *Macmillan*, the directors of the corporation granted one of the bidders a lock-up agreement for one of its "crown-jewel" assets. *Id*. at 1286. As in *Revlon*, the court held that the lock-up had the effect of ending the auction, and held that the lock-up was invalid. The court also noted that if the intended effect is to end an auction, "at the very least the independent members of the board must attempt to negotiate alternative bids before granting such a significant concession." *Id*.

> In this case, a lock-up agreement was not necessary to draw any of the bidders into the contest. Macmillan cannot seriously contend that they received a final bid from KKR that materially enhanced general stockholder interests. . . . When one compares what KKR received for the lock-up, in contrast to its inconsiderable offer, the invalidity of the [lock-up] becomes patent.

Id. at 1286. The court was particularly critical of the "crown jewel" lock-up. "Even if the lock-up is permissible, when it involves 'crown jewel' assets careful board scrutiny attends the decision. . . . Thus, when directors in a *Revlon* bidding contest grant a crown jewel lock-up, serious questions are raised, particularly where, as here, there is little or no improvement in the final bid." *Id*.

c. *QVC*, 637 A.2d 34 - In *QVC*, which like *Revlon* involved an active auction, the no-shop provision provided that Paramount would not:

> [S]olicit, encourage, discuss, negotiate, or endorse any competing transaction unless: (a) a third party "makes an unsolicited written, bona fide proposal, which is not subject to any material contingencies relating to financing"; and (b) the Paramount board determines that discussions or negotiations with the third party are necessary for the Paramount Board to comply with its fiduciary duties.

Id. at 39 (citations omitted). The break-up fee arrangement provided that Viacom would receive $100 million (between 1% and 2% of the front-end consideration) if (i) Paramount terminated the merger agreement because of a competing transaction, (ii) Paramount's stockholders did not approve the merger, or (iii) Paramount's board recommended a competing transaction. *Id*. In examining the lock-up agreement between Paramount and Viacom (for 19.9% of the stock of Paramount), the court emphasized two provisions of the lock-up as being both "unusual and highly beneficial" to Viacom: (a) Viacom was permitted to pay for the shares with a senior subordinated note of questionable marketability instead of cash, thereby avoiding the need to raise the $1.6 billion purchase price" and "(b) Viacom could elect to require Paramount to pay Viacom in cash a sum equal to the difference between the purchase price and the market price of Paramount's stock." *Id*. The court held that the lock-up, no-shop and break-up fee were "impeding the realization of the best value reasonably available to the Paramount shareholders." *Id*. at 50.

d. *In re Holly Farms Corp. Shareholders Litig.*, 564 A. 2d 342 (Del. Ch. 1989) - In *Holly Farms*, the board of Holly Farms entered into an agreement to sell the corporation to ConAgra which included a lock-up option on Holly Farms' prime poultry operations and a $15 million break-up fee plus expense reimbursement. *Id*. at *2. Tyson Foods was at the same time also negotiating to purchase Holly Farms. In invalidating the lock-up and the break-up fee, the court noted that "[w]hile the granting of a lock up may be rational where it is reasonably necessary to encourage a prospective bidder to submit an offer, lock-ups 'which end an active auction and foreclose further bidding operate to the shareholders' detriment' are extremely suspect." *Id*. at *6 (citations omitted). The court further stated that "the lock up was nothing but a 'show stopper' that effectively precluded the opening act." *Id*. The court also invalidated the break-up fee, holding that it appeared likely "to have been part of the effort to preclude a genuine auction." *Id*.

5. Specific Cases Where No-Shops, Lock-ups and Break-Up Fees Have Been Upheld.

a. *Goodwin*, 1999 WL 64265 - In *Goodwin*, the plaintiff shareholder argued that the board of Live Entertainment violated its fiduciary duties by entering into a merger agreement with Pioneer Electronics. *Id*. at *21. The merger agreement contained a 3.125% break-up fee. *Id*. at *23. While the plaintiff did not seek to enjoin the transaction on the basis of the fee and did not attack any other aspect of the merger agreement as being unreasonable, the court noted "this type of fee is commonplace and within the range of reasonableness approved by this court in similar contexts." *Id*. Ultimately, the Chancery Court upheld the merger agreement.

b. *Matador*, 729 A.2d 280 - In *Matador*, Business Records Corporation entered into a merger agreement with Affiliated Computer Services which contained four "defensive" provisions, including a no-shop provision with a fiduciary out and termination fee. *Id*. at 289. Three BRC shareholders also entered into lock-up agreements with ACS to tender their shares to ACS within five days of the tender offer of ACS. *Id*. The Chancery Court upheld these provisions reasoning that "these measures do not foreclose other offers, but operate merely to afford some protection to prevent disruption of the Agreement by proposals from third parties that are neither bona fide nor likely to result in a higher transaction." *Id*. at 291. The court also noted that because the termination fee is not "invoked by the board's receipt of another offer, nor is it invoked solely because the board decides to provide information, or even negotiates with another bidder," it can hardly be said that it prevents the corporation from negotiating with other bidders. *Id*. at 291 n.15.

c. *Rand*, 1994 WL 89006 - In *Rand*, Western had been considering opportunities for fundamental changes in its business structure since late 1985. *Id*. at *1. In the spring of 1986, Western had discussions with both American and Delta, as well as other airlines. *Id*. When Western entered into a merger agreement with Delta in September 1986, the agreement contained a no-shop clause providing that Western could not "initiate contact with, solicit, encourage or participate in any way in discussions or negotiations with, or provide an information or assistance to, or provide any information or assistance to, any third party . . . concerning any acquisition of . . . [Western].” *Id*. at *2. Western also granted Delta a lock-up agreement for approximately 30% of Western's stock. The court stated that the market had been canvassed by the time the merger agreement was signed, and that by having a lock-up and a no-shop clause Western “gained a substantial benefit for its stockholders by keeping the only party expressing any interest at the table while achieving its own assurances that the transaction would be consummated.” *Id*. at *7.

d. *In re Vitalink*, 1991 WL 238816 - In *Vitalink*, the court held that the break-up fee, which represented approximately 1.9% of the transaction, did not prevent a canvass of the market. *Id*. at *7. The merger agreement in Vitalink also contained a no-shop which prohibited the target from soliciting offers, and a lock-up for NSC to purchase 19.9% of the shares of Vitalink. *Id*. at *3. In upholding the no-shop clause, the court noted that the no-shop clause “was subject to a fiduciary out clause whereby the Board could shop the company so as to comply with, among other things, their *Revlon* duties (i.e., duty to get the highest price reasonably attainable for shareholders).” *Id*. at *7. The court also held that the lock-up at issue did not constitute a “real impediment to an offer by a third party.” *Id*.

e. *Roberts*, 1990 WL 118356 - In *Roberts*, General Instrument entered into a merger agreement with a subsidiary of Forstmann Little & Co. *Id*. at *6. The merger agreement contained a no-shop clause providing that the corporation would not “solicit alternative buyers and that its directors and officers will not participate in discussions with or provide any information to alternative buyers except to the extent required by the exercise of fiduciary duties.” *Id*. General Instrument could terminate the merger agreement if it determined that a third party's offer was more advantageous to the shareholders than Forstmann's offer. *Id*. Forstmann also agreed to keep the tender offer open for 30 business days, longer than required by law, to allow time for alternative bidders to make proposals. General Instrument was contacted by two other potential acquirors, and provided them with confidential information pursuant to confidentiality agreements. *Id*. Neither made offers. The court held that the no-shop did not impede any offers, noting that the merger agreement contained a sufficient fiduciary out. *Id*. at *9. The transaction in *Roberts* also included a $33 million break-up fee in the event that the General Instrument board chose an unsolicited bid over that of the bidder in the exercise of the board's fiduciary duties. *Id*. at *6. The court held that the break-up fee was “limited”, approximately 2% of the value of the deal, and would not prevent the board from concluding that it had effected the best available transaction. *Id*. at *9.

f. *In re Fort Howard*, 1988 WL 83147 - The board of Fort Howard decided to enter into a merger agreement with a subsidiary of the Morgan Stanley Group. The agreement contained a no-shop clause that allowed Fort Howard to respond to unsolicited bids and provide potential bidders with information. Fort Howard received inquiries from eight potential bidders, all of whom were provided with information. *Id*. at *8. None of the eight made a bid. *Id*. at *8-9. The agreement also contained a break-up fee of approximately 1% of the consideration. The court believed that Fort Howard conducted an active market check, noting that the:

> [A]lternative “market check” that was achieved was not so hobbled by lock-ups, termination fees or topping fees, so constrained in time or so administered (with respect to access to pertinent information or manner of announcing “window shopping” rights) as to permit the inference that this

> alternative was a sham designed from the outset to be ineffective or minimally effective.

Id. at *13. The court noted that it was "particularly impressed with the [window shopping] announcement in the financial press and with the rapid and full-hearted response to the eight inquiries received." *Id*.

F. Dealing with a Competing Acquiror.

Even in the friendly acquisition, a board's obligations do not cease with the execution of the merger agreement. *See e.g., Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 WL 48306 (Del. Ch. 1996) (bidding and negotiations continued more than six months after merger agreement signed). If a competing acquiror emerges with a serious proposal offering greater value to shareholders (usually a higher price), the board should give it due consideration. *See Phelps Dodge*, 1999 WL 1054255 and *Ace*, 747 A.2d at 107-108. Generally the same principles that guided consideration of an initial proposal (being adequately informed and undertaking an active and orderly deliberation) will also guide consideration of the competing proposal. *See Macmillan*, 559 A.2d at 1282 n.29.

1. Flexibility in the Merger Agreement.

A board should seek to maximize its flexibility in responding to a competing bidder in the no-shop provision of the merger agreement. It will generally be advisable for the agreement to contain provisions permitting the corporation not only to provide information to a bidder with a superior proposal, but also to negotiate with the bidder, enter into a definitive agreement with the bidder and terminate the existing merger agreement upon the payment of a break-up fee. Without the ability to terminate the agreement, the board may find, at least under the language of the agreement, that its response will be more limited. *See Van Gorkom*, 488 A.2d at 888 ("Clearly the . . . Board was not 'free' to withdraw from its agreement . . . by simply relying on its self-induced failure to have [negotiated a suitable] original agreement. . . .") *But see also QVC*, 637 A.2d at 51 (a board cannot "contract away" its fiduciary duties) and *Ace*, 747 A.2d at 107-108. In such circumstances, there may be some doubt as to its ability to negotiate with the bidder or otherwise pursue the bid. This may in turn force the competing bidder to take its bid directly to the shareholders through a tender offer, with a concomitant loss of board control over the process.

Bidders may seek to reduce the board's flexibility by negotiating for an obligation in the merger agreement to submit the merger agreement to stockholders even through the board subsequently withdraws its recommendation to the stockholders. Such an obligation is now permitted by DGCL Section 251(c). The decision to undertake such submission, however, implicates the board's fiduciary duties. Because of the possibility of future competing bidders, this may be a difficult decision. *See* John F. Johnston, *Recent Amendments to the Merger Sections of the DGCL Will Eliminate Some - But Not All - Fiduciary Out Negotiation and Drafting Issues*, 1 BNA Mergers & Acquisitions L. Rep. 777 (1998).

2. Level Playing Field.

If a bidding contest ensues, a board cannot treat bidders differently unless such treatment enhances shareholder interests. As the court in *Barkan* stated, "[w]hen multiple bidders are competing for control, this concern for fairness [to shareholders] forbids directors from using defensive mechanisms to thwart an auction or to favor one bidder over another." Barkan, 567 A.2d at 1286-87; *see also QVC*, 637 A.2d at 45. In *Macmillan*, however, the court stated that the purpose of enhancing shareholder interests "does not preclude differing treatment of bidders when necessary to advance those interests. Variables may occur which necessitate such treatment." *Macmillan*, 559 A.2d at 1286-87. The *Macmillan* court cited a coercive two-tiered bust-up tender offer as one example of a situation that could justify disparate treatment of bidders. *Id*. at 1287 n.38.

In all-cash transactions disparate treatment will not likely be permitted. In the context of keeping bidders on a level playing field, the court in Revlon stated that:

> Favoritism for a white knight to the total exclusion of a hostile bidder might be justifiable when the latter's offer adversely affects shareholder interests, but when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced Unocal duties by playing favorites with the contending factions.

Revlon, 506 A.2d at 184. The court in *QVC* restated this concept and applied the *Unocal* test in stating that in the event a corporation treats bidders differently, "'the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.'" *QVC*, 637 A.2d at 45 (quoting *Macmillan*, 559 A.2d at 1288).

3. Best Value.

In seeking to obtain the "best value" reasonably available, the Delaware Supreme Court has stated that the "best value" does not necessarily mean the highest price.

In *Citron*, 569 A.2d 53, Fairchild was the subject of a bidding contest between two competing bidders, Schlumberger and Gould. *Id*. at 54. The Fairchild board had an all cash offer of $66 per share from Schlumberger, and a two-tier offer of $70 per share from Gould, with the terms of the valuation of the back-end of Gould's offer left undefined. *Id*. The board was also informed by its experts that a transaction with Schlumberger raised substantially less antitrust concern than a transaction with Gould. The board accepted Schlumberger's offer. In upholding the agreement between Fairchild and Schlumberger, the court stated that Gould's failure to present a firm unconditional offer precluded an auction. *Id*. at 68-69. The court also stated that Fairchild had a duty to consider "a host of factors," including "the nature and timing of the offer," and "its legality, feasibility and effect on the corporation and its stockholders," in deciding whether to accept or reject Gould's claim. *Id*. at 68. Nevertheless, the *Citron* court specifically found that Fairchild "studiously endeavored to avoid 'playing favorites'" between the two bidders. *Id*.

A decision not to pursue a higher price, however, necessarily involves uncertainty, the resolution of which depends on a court's view of the facts and circumstances specific to the case. In *In re Lukens Inc. Shareholders Litig.*, 757 A.2d 720 (Del. Ch. 1999), the court sustained a board decision to sell to one bidder, notwithstanding the known possibility that a "carve up" of the business between the two bidders involved incremental stockholder value. The court placed great weight on the approval of the transaction by the stockholders after disclosure of the carve-up possibility. *Lukens*, 757 A.2d at 738.

In the final analysis, in many cases, the board may not know that it has obtained the best value reasonably available until after the merger agreement is signed and competing bids are no longer proposed. In several cases, the Delaware courts have found as evidence that the directors obtained the best value reasonably available the fact that no other bidders came forward with a competing offer once the transaction was public knowledge. *See, e.g.*, *Barkan* 567 A.2d at 1287 ("when it is widely known that some change of control is in the offing and no rival bids are forthcoming over an extended period of time, that fact is supportive of the board's decision to proceed"); *Goodwin*, 1999 WL 64265, at *23 ("Given that no draconian defenses were in place and that the merger was consummated three months after its public announcement, the fact that no bidders came forward is important evidence supporting the reasonableness of the Board's decision."); *Matador*, 729 A.2d at 293 (failure of any other bidder to may a bid within one month after the transaction was announced "is evidence that the directors, in fact, obtained the highest and best transaction reasonably available").

IX. DEALING WITH EXISTING DEFENSES.

A. Certain Defenses.

Shareholder rights plans and state anti-takeover laws developed in response to abusive takeover tactics and inadequate bids and have become a central feature of most major corporations' takeover preparedness. For example, over 2,300 companies have adopted rights plans.

Rights plans and state anti-takeover laws do not interfere with negotiated transactions, nor do they preclude unsolicited takeovers. They are intended to cause bidders to deal with the target's board of directors and ultimately extract a higher acquisition premium than would otherwise have been the case. If a bidder takes action that triggers the rights or the anti-takeover laws, however, dramatic changes in the rights of the bidder can result.

In a negotiated transaction the board can let down the defensive screen afforded by a rights plan or state anti-takeover law to allow the transaction to proceed. Doing so, however, requires strict compliance with the terms of the rights plan and applicable statutes, as well as compliance with the directors fiduciary duties of care and loyalty.

B. Rights Plans.

The Basic Design. The key features of a rights plan are the "flip-in" and "flip-over" provisions of the rights, the effect of which, in specified circumstances, is to impose unacceptable levels of dilution on the acquiror. The risk of dilution, combined with the authority of a board of directors to redeem the rights prior to a triggering event (generally an acquisition of

15% or 20% of the corporation's stock), gives a potential acquiror a powerful incentive to negotiate with the board of directors rather than proceeding unilaterally.

Basic Case Law Regarding Rights Plans. There is now no doubt as to the legality of poison-pill rights plans. *See Leonard Loventhal Account v. Hilton Hotel Corp.*, C.A. No. 17803, 2000 WL 1528909 (Del. Ch. Oct. 10, 2000), in which the Chancery Court, citing *Moran*, 500 A.2d at 1346, wrote:

> The Delaware courts first examined and upheld the right of a board of directors to adopt a poison pill rights plan fifteen years ago in *Moran v. Household International, Inc*. Since that decision, others have followed which affirmed the validity of a board of directors' decision to adopt a poison pill rights plan. Today, rights plans have not only become commonplace in Delaware, but there is not a single state that does not permit their adoption.

Federal courts applying Texas law have upheld the concept of rights plans. See *Gearhart Industries v. Smith International*, 741 F.2d 707 (5th Cir. 1984); and *A. Copeland Enterprises, Inc. v. Guste*, 706 F. Supp. 1283 (W.D. Tex. 1989).

The litigation concerning rights plans now focuses on whether or not a board of directors should be required to redeem the rights in response to a particular bid. In this respect, courts applying Delaware law have upheld, or refused to enjoin, determinations by boards of directors not to redeem rights in response to two-tier offers (*Desert Partners, L.P. v. USG Corp.*, 686 F. Supp. 1289 (N.D. Ill. 1988)) or inadequate 100% cash offers (*BNS Inc. v. Koppers Co.*, 683 F. Supp. 458, 474-75 (D. Del. 1988); *Moore Corp. v. Wallace Computer Services, Inc.*, 907 F. Supp. 1545 (D. Del. 1995)) as well as to protect an auction or permit a target to explore alternatives (*CRTF Corp. v. Federated Dept. Stores, Inc.*, 683 F. Supp. 422, 438-42 (S.D.N.Y. 1988) (refusing to enjoin discriminatory application of poison pill during auction); *MAI Basic Four, Inc. v. Prime Computer, Inc.*, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,179 (Del. Ch. 1988); *In re Holly Farms Corp. Shareholders Litig.*, [1988-89 Transfer Binder] Fed. Sec. L. Rep. ¶ 94,181 (Del. Ch. 1988).

On the other hand, some decisions have held that the rights may not interfere with shareholder choice at the conclusion of an auction (*Mills Acquisition Co. v. Macmillan, Inc.*, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,071 (Del. Ch. 1988), *rev'd on other grounds*, 559 A.2d 1261 (Del. 1989)) or at the "end stage" of a target's attempt to develop alternatives (*City Capital Associates Ltd. Partnership v. Interco, Inc.*, 551 A.2d 787, 798-800 (Del. Ch.), *appeal dismissed*, 556 A.2d 1070 (Del. 1988); *Grand Metropolitan Public, Ltd. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988)). Both *Pillsbury* and *Interco* involved circumstances in which the board of directors, rather than "just saying no," had pursued a restructuring that was comparable to the pending all-cash tender offer. *See TW Services v. SWT Acquisition Corp.*, C.A. No. 10427, 1989 Del. Ch. LEXIS 19, at 24-25 (Mar. 2, 1989); *Paramount Communications Inc. v. Time Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,283 (Del. Ch.) (in *Pillsbury* and *Interco,* management sought to "'cram down' a transaction that was the functional equivalent of the very leveraged 'bust up' transaction that management was claiming presented a threat to the corporation"), *aff'd*, 571 A.2d 1140 (Del. 1989).

Many rights plans adopted shortly after creation of these protective measures in 1984 were scheduled to expire and have generally been renewed. Renewal of a rights plan involves essentially the same issues as the initial adoption of a plan.

"Dead Hand" Pills. In the face of a "Just Say No" defense, the takeover tactic of choice has become a combined tender offer and solicitation of proxies or consents to replace target's board with directors committed to redeeming the poison pill to permit the tender offer to proceed. Under DGCL Section 228, a raider can act by written consent of a majority of the shareholders without a meeting of stockholders, unless such action is prohibited in the certificate of incorporation (under TBCA art. 9.10A, unanimous consent is required for shareholder action by written consent unless the articles of incorporation otherwise provide). Under DGCL a raider can call a special meeting between annual meetings only if permitted under the target's bylaws, whereas under TBCA art. 2.24C any holder of at least 10% of the outstanding shares can call a special meeting unless the articles of incorporation specify a higher percentage (not to exceed 50%). If the target has a staggered board, a raider can generally only replace a majority of the target's board by waging a proxy fight at two consecutive annual meetings.

A target cannot rely on an ordinary poison pill to give much protection in the face of a combined tender offer/proxy fight. The predicament faced by such targets has spawned variants of the so-called "continuing director" or "dead hand" pill.

"Pure" dead hand pills permit only directors who were in place prior to a proxy fight or consent solicitation (or new directors recommended or approved by them) to redeem the rights plan. Once these "continuing directors" are removed, no other director can redeem the pill.

Modified dead hand provisions come in a variety of forms. So called "nonredemption" or "no hand" provisions typically provide that no director can redeem the rights plan once the continuing directors no longer constitute a majority of the board. This limitation on redemption may last for a limited period or for the remaining life of the pill. The rights plan at issue in the *Quickturn* case discussed below included such a provision.

Another variant is the "limited duration," or "delayed redemption," dead hand pill. This feature can be attached to either the pure dead hand or no hand rights plan. As the name indicates, these pills limit a dead hand or no hand restriction's effectiveness to a set period of time, typically starting after the continuing directors no longer constitute a majority of the board. These rights plans delay, but do not preclude, redemption by a newly elected board.

The validity of dead hand provisions depends in large part upon the state law that applies. Delaware recently has made clear that dead hand provisions – even of limited duration – are invalid. *See Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. Supr. 1998), which involved a "no hand" pill provision of limited duration that the target's board had adopted in the face of a combined proxy fight and tender offer by raider. The pill provision barred a newly elected board from redeeming the rights plan for six months after taking office if the purpose or effect would be to facilitate a transaction with a party that supported the new board's election.

The Delaware Supreme Court held that the dead hand feature of the rights plan ran afoul of DGCL Section 141(a), which empowers the board of directors to manage the corporation.

Relying on the requirement in Section 141(a) that any limitation on the board's power must be stated in the certificate of incorporation, the court found that dead hand provision would prevent a newly elected board "from completely discharging its fundamental management duties to the corporation and its stockholders for six months" by restricting the board's power to negotiate a sale of the corporation. The reasoning behind the *Quickturn* holding leaves little room for dead hand provisions of any type in Delaware. *See also Carmody v. Toll Brothers, Inc.*, C.A. No. 15983, 1998 Del. Ch. LEXIS 131 (July 24, 1998).

Not all states have come down against dead hand rights plans. *See Invacare Corporation v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997) (court rejected the offeror's contention that a dead hand pill impermissibly restricts the power of future boards of directors – including a board elected as part of a takeover bid – to redeem a rights plan, relying upon the "plain language" of a Georgia statute that expressly grants a corporation's board the "sole discretion" to determine the terms contained in a rights plan); *AMP Incorporated v. AlliedSignal Inc.*, C.A. Nos. 98-4405, 98-4058, and 98-4109, 1998 U.S. Dist. LEXIS 15617 (E.D. Penn. 1998). The rights plan upheld in *Copeland*, supra, involved dead hand features, although the opinion did not focus on the validity of the dead hand feature.

C. Business Combination Statutes.

Both Delaware and Texas provide protections to shareholders of public companies against interested shareholder transactions that occur after a shareholder has acquired a 15% to 20% ownership interest. The Delaware limitations are found in Section 203 of the DGCL and the Texas limitations are found in Part Thirteen of the TBCA.

Section 203 of the DGCL. Section 203 of the DGCL imposes restrictions on transactions between public corporations and certain stockholders defined as "interested stockholders" unless specific conditions have been met. In general, Section 203 provides that a publicly held Delaware corporation may not engage in a business combination with any interested stockholder for a period of three years following the date the stockholder first became an interested stockholder unless (i) prior to that date the board of directors of the corporation approved the business combination or the transaction that resulted in the stockholder becoming an interested stockholder, (ii) the interested stockholder became an interested stockholder as a result of acquiring at least 85% of the voting stock of the corporation, excluding shares held by directors and officers and employee benefit plans in which participants do not have the right to determine confidentially whether their shares will be tendered in a tender or exchange offer, or (iii) the transaction is approved by stockholders by an affirmative vote of at least two-thirds of the outstanding shares excluding the shares held by the interested stockholder. In the context of a corporation with more than one class of voting stock where one class has more votes per share than another class, there is an "interesting interpretative challenge" whether "85% of the voting stock" refers to the number of shares or the number of votes. *In Re: Digex, Inc. Shareholders Litigation*, C.A. No. 18336, 2000 WL 1847679 (Del Ch. Dec. 13, 2000).

An interested stockholder is generally defined under DGCL Section 203(c)(3) as any person that directly or indirectly owns or controls or has beneficial ownership or control of at least 15% of the outstanding shares of the corporation. A business combination is defined under DGCL Section 203 to include (i) mergers, (ii) consolidations, (iii) direct or indirect sales, leases, exchanges, mortgages, transfers and other dispositions of assets to the interested stockholder having an aggregate market value greater than 10% of the total aggregate market value of the assets of the corporation, (iv) various issuances of stock and securities to the interested stockholder that are not issued to other stockholders on a similar basis and (v) various other transactions in which the interested stockholder receives a benefit, directly or indirectly, from the corporation that is not proportionally received by other stockholders.

The provisions of DGCL Section 203 apply only to public corporations (*i.e.*, corporations the stock of which is listed on a national securities exchange, authorized for quotation on interdealer quotation system of a registered national securities association or held of record by more than 2,000 stockholders). DGCL Section 203(b) The provisions of Section 203 also will not apply to certain stockholders who held their shares prior to the adoption of Section 203 or to stockholders whose acquisition of shares is approved by the corporation prior to the stockholder becoming an interested stockholder. In addition, Section 203 will not apply if the certificate of incorporation of the corporation or the bylaws approved by stockholders provides that the statute will not apply; provided that if the corporation is subject to Section 203 at the time of adoption of an amendment eliminating the application of Section 203, the amendment will not become effective for 12 months after adoption and the section will continue to apply to any person who was an interested stockholder prior to the adoption of the amendment.

A vote to so waive the protection of Section 203 is sometimes referred to as a "Section 203 waiver" and requires that the directors act consistently with their fiduciary duties of care and loyalty. *See Digex*, 2000 WL 1847679.

Part Thirteen of the TBCA. Part Thirteen of the TBCA, like Section 203 of the DGCL, imposes a special voting requirement for the approval of certain business combinations and related party transactions between public corporations and affiliated shareholders unless the transaction or the acquisition of shares by the affiliated shareholder is approved by the board of directors prior to the affiliated shareholder becoming an affiliated shareholder. *See* TBCA arts. 13.01-13.08

In general, Part Thirteen prohibits certain mergers, sales of assets, reclassifications and other transactions (defined as business combinations) between shareholders beneficially owning 20% or more of the outstanding stock of a Texas public corporation (such shareholders being defined as affiliated shareholders) for a period of three years following the shareholder acquiring shares representing 20% or more of the corporation's voting power unless two-thirds of the unaffiliated shareholders approve the transaction at a meeting held no earlier than six months after the shareholder acquires that ownership. The provisions requiring the special vote of shareholders will not apply to any transaction with an affiliated shareholder if the transaction or the purchase of shares by the affiliated shareholder is approved by the board of directors before the affiliated shareholder acquires beneficial ownership of 20% of the shares or if the affiliated shareholder was an affiliated shareholder prior to December 31, 1996, and continued as such through the date of the transaction. Part Thirteen does not contain the Delaware 85% unaffiliated share tender offer exception, which was considered by the drafters to be a major loophole in the Delaware statute, and attempts to attempts to clarify various uncertainties and ambiguities contained in the Delaware statute.

Part Thirteen applies only to an "issuing public corporation", which is defined to be a corporation organized under the laws of Texas that has: (i) 100 or more shareholders, (ii) any class or series of its voting shares registered under the Securities Exchange Act of 1934, as amended, or similar or successor statute, or (iii) any class or series of its voting shares qualified for trading in a national market system. *Id.* at art. 13.02A(b) For the purposes of this definition, a shareholder is a shareholder of record as shown by the share transfer records of the corporation. *Id.* Part Thirteen also contains an opt-out provision that allows a corporation to elect out of the statute by adopting a by-law or charter amendment prior to December 31, 1997.

EXHIBIT A

Sample Form of Seller-Favorable Standstill Provision

During the three-year period commencing on the date of this letter agreement (the "Standstill Period"), neither the Prospective Acquiror nor any of the Prospective Acquiror's Representatives will, in any manner, directly or indirectly:

(a) make, effect, initiate, cause or participate in (i) any acquisition of beneficial ownership of any securities of the Target or any securities of any subsidiary or other affiliate of the Target, (ii) any acquisition of any assets of the Target or any assets of any subsidiary or other affiliate of the Target, (iii) any tender offer, exchange offer, merger, business combination, recapitalization, restructuring, liquidation, dissolution or extraordinary transaction involving the Target or any subsidiary or other affiliate of the Target, or involving any securities or assets of the Target or any securities or assets of any subsidiary or other affiliate of the Target, or (iv) any "solicitation" of "proxies" (as those terms are used in the proxy rules of the Securities and Exchange Commission) or consents with respect to any securities of the Target;

(b) form, join or participate in a "group" (as defined in the Securities Exchange Act of 1934 and the rules promulgated thereunder) with respect to the beneficial ownership of any securities of the Target;

(c) act, alone or in concert with others, to seek to control or influence the management, board of directors or policies of the Target;

(d) take any action that might require the Target to make a public announcement regarding any of the types of matters set forth in clause "(a)" of this sentence;

(e) agree or offer to take, or encourage or propose (publicly or otherwise) the taking of, any action referred to in clause "(a)", "(b)", "(c)" or "(d)" of this sentence;

(f) assist, induce or encourage any other Person to take any action of the type referred to in clause "(a)", "(b)", "(c)", "(d)" or "(e)" of this sentence;

(g) enter into any discussions, negotiations, arrangement or agreement with any other Person relating to any of the foregoing; or

(h) request or propose that the Target or any of the Target's Representatives amend, waive or consider the amendment or waiver of any provision set forth in this section.

The expiration of the Standstill Period will not terminate or otherwise affect any of the other provisions of this letter agreement."

<u>**EXHIBIT B**</u>

I. Sample Seller-Favorable "No Shop," Termination and Break-up Fee Provisions.

ARTICLE 5

<u>CONDUCT OF BUSINESS PENDING THE MERGER</u>

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5.2 <u>No Solicitation</u>.

(a) From and after the date hereof and prior to the Effective Date or the earlier termination of this Agreement pursuant to <u>**Section 8.1**</u>, the Company shall not, directly or indirectly, take (nor shall the Company authorize or permit any Company Subsidiary or its or their officers, directors, employees, representatives, investment bankers, financial advisors, attorneys, accountants or other agents, to take) any action to (i) solicit or initiate the submission of any Business Combination Proposal, (ii) enter into any agreement with respect to any Business Combination Proposal or (iii) participate in any negotiations with, or furnish any non-public written information to, any person in connection with any proposal that constitutes, or may reasonably be expected to lead to, any Business Combination Proposal; <u>provided</u>, <u>however</u>, that the Company may (A) participate in negotiations with or furnish information to any persons or group (other than Parent or an affiliate of Parent) (a "Third Party") that makes a Business Combination Proposal not so solicited that the Board determines may reasonably be expected to result in a Superior Proposal if the Board determines, in good faith and after consultation with independent counsel, that such action is required in order to discharge properly its fiduciary duties, and enter into any confidentiality agreement or standstill agreement with such Third Party in connection with such a Business Combination Proposal, (B) comply with Rule 14e-2 promulgated under the Exchange Act with regard to any Business Combination Proposal (assuming that such Business Combination Proposal includes a tender offer requiring the Company's response pursuant to such Rule), (C) withdraw or modify its recommendation referred to in <u>**Section 1.2.1**</u> if there exists a Business Combination Proposal that is a Superior Proposal and the Board determines, in good faith and after consultation with of independent counsel, that such action is required to discharge properly its fiduciary duties, and (D) recommend to its stockholders a Business Combination Proposal if it is a Superior Proposal and the Board determines, in good faith and after consultation with independent counsel, that such action is required to discharge properly its fiduciary duties. Any actions permitted under, and taken in compliance with this <u>**Section 5.2**</u> shall not be deemed a breach of any other covenant or agreement of the Company contained in this Agreement. For purposes of this Agreement, "Business Combination Proposal" shall mean, with respect to the Company, the commencement of any tender or exchange offer, any bona fide, written proposal for a merger, consolidation or other business combination involving the Company or any Company Subsidiary or any other bona fide, written proposal or offer to enter into a Business Combination or any public announcement of a proposal, plan or intention to do any of the foregoing. "Superior Proposal" shall mean any Business Combination Proposal for which any required financing is supported by reasonable commitments and which the Board determines in good faith will be more favorable to its stockholders than the Merger. The term "Business Combination" means the occurrence of any of the following events: (a) the Company or any Company Subsidiary is acquired by merger or otherwise by any Thirty Party; (b) the Company or any Company Subsidiary enters into an agreement with a Third Party that contemplates the acquisition of 35% or more of the total assets of the Company and the Company Subsidiaries taken as a whole; (c) the Company enters into a merger or other agreement with a Third Party that contemplates the acquisition of beneficial ownership of more than 35% of the outstanding shares of the Company's capital stock; or (d) a Third Party acquires more than 35% of the outstanding shares of the Company's capital stock.

(b) In addition to the obligations of the Company set forth in **Section 5.2(a)**, the Company shall promptly advise Acquiror of any request for non-public written information or of any Business Combination Proposal, the material terms and conditions of such request or Business Combination Proposal, and the identity of the person making any such request or Business Combination Proposal. The Company shall keep Acquiror reasonably informed of the status and details of any such request or Business Combination Proposal.

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ARTICLE 8

TERMINATION

8.1 Termination. This Agreement may be terminated at any time prior to the Effective Time, notwithstanding approval thereof by the stockholders of the Company:

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(d) by Acquiror or the Company, prior to the purchase of Shares pursuant to the Offer, if the Board shall withdraw, modify or change its approval or recommendation of the Offer, this Agreement or the Merger in a manner adverse to Acquiror.

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8.2 Effect of Termination. In the event of the termination of this Agreement pursuant to **Section 8.1**, this Agreement shall forthwith become void and there shall be no liability on the part of any party hereto or any of its affiliates, directors, officers or stockholders (i) except as set forth in **Section 9.1** hereof and (ii) except to the extent that such termination results from the willful and material breach by a party of any of its representations, warranties, covenants or other agreements set forth in this Agreement.

ARTICLE 9

GENERAL PROVISIONS

9.1 Fees and Expenses.

(a) Except as provided in this **Section 9.1**, all fees and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such expenses, whether or not the Merger is consummated.

(b) If this Agreement is terminated pursuant to **<u>Section 8.1 (d)</u>**, then Company shall (provided that Acquiror is not then in material breach of its obligations under this Agreement), promptly after the termination of this Agreement, reimburse Acquiror for all documented out-of-pocket expenses and fees (including, without limitation, fees payable to all banks, investment banking firms and other financial institutions, and their respective agents and counsel, and all fees of counsel, accountants, financial printers, experts and consultants to Acquiror and its Affiliates), whether incurred prior to, on or after the date hereof, in connection with the Offer, the Merger and the consummation of all transactions contemplated by this Agreement; provided that in no event shall Company be required to pay in excess of an aggregate of $**[Dollar Amount]** pursuant to this **<u>Section 9.1(b)</u>**.

(c) If this Agreement is terminated pursuant to **<u>Section 8.1(d)</u>** and within twelve months following the date of such termination the Company either (x) consummates with any Third Party a transaction the proposal of which would otherwise qualify as a Business Combination Proposal under **<u>Section 5.2</u>** or (y) enters into a definitive agreement with a Third Party with respect to a transaction the proposal of which would otherwise qualify as a Business Combination Proposal under **<u>Section 5.2</u>**, then Company shall promptly pay to Acquiror a fee of $**[Dollar Amount]**, less any amounts paid by Company pursuant to **<u>Section 9.1(b)</u>**.

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II. Acquiror-Favorable “No Shop,” Termination and Break-Up Fee Provisions.

ARTICLE 5

<u>CONDUCT OF BUSINESS PENDING THE MERGER</u>

****

5.2 <u>No Solicitation</u>.

(a) The Company shall, and shall cause the Company Subsidiaries and its and their respective officers, directors, employees, representatives and agents to, immediately cease any discussions or negotiations with any parties with respect to any Third Party Acquisition (as defined below). The Company shall not, nor shall the Company authorize or permit any Company Subsidiary or any of its or their respective officers, directors, employees, representatives or agents to, directly or indirectly, encourage, solicit, participate in or initiate discussions or negotiations with or provide any non-public information to any person or group (other than Acquiror or any designees of Acquiror) concerning any Third Party Acquisition; provided, however, that (i) nothing herein shall prevent the Company Board from taking and disclosing to the Company's stockholders a position contemplated by Rules 14d-9 and 14e-2 promulgated under the Exchange Act with regard to any tender offer; and (ii) the Company may make inquiry of and participate in discussions or negotiations with any person or group who has submitted after the date hereof an unsolicited and unencouraged Superior Proposal if, and to the extent, the Company Board by requisite vote determines in its good faith judgment, after consultation with and based upon the advice of outside legal counsel, that it is required to do so in order to comply with its fiduciary duties. The Company shall promptly notify Acquiror in the event it receives any proposal or inquiry concerning a Third Party Acquisition, including the terms and conditions thereof and the identity of the party submitting such proposal, and shall advise Acquiror from time to time of the status and any material developments concerning the same.

(b) Except as set forth in this **Section 5.2(b)** the Company Board shall not withdraw its recommendation of the transactions contemplated hereby or approve or recommend, or cause the Company to enter into any agreement with respect to, any Third Party Acquisition. Notwithstanding the foregoing, if the Company Board by requisite vote determines in its good faith judgment, after consultation with and based upon the advice of outside legal counsel, that it is required to do so in order to comply with its fiduciary duties, the Company Board may withdraw its recommendation of the transactions contemplated hereby or approve or recommend a Superior Proposal, but in each case only (i) after providing reasonable written notice to Acquiror (a "Notice of Superior Proposal") advising Acquiror that the Company Board has received a Superior Proposal, specifying the material terms and conditions of such Superior Proposal and identifying the person making such Superior Proposal and (ii) if Acquiror does not, within three business days of Acquiror's receipt of the Notice of Superior Proposal, make an offer which the Company Board by requisite vote determines in its good faith judgment (based on the advice of a financial adviser of nationally recognized reputation) to be as favorable to the Company's stockholders as such Superior Proposal; provided, however, that the Company shall not be entitled to enter into any agreement with respect to a Superior Proposal unless and until this Agreement is terminated by its terms pursuant to **Section 7.1.** Any disclosure that the Company Board may be compelled to make with respect to the receipt of a proposal for a Third Party Acquisition in order to comply with its fiduciary duties or Rule 14d-9 or 14e-2 will not constitute a violation of this **Section 5.2(b)** provided that such disclosure states that no action will be taken by the Company Board with respect to the withdrawal of its recommendation of the transactions contemplated hereby or the approval or recommendation of any Third Party Acquisition except in accordance with this **Section 5.2(b)**.

(c) For the purposes of this Agreement, "Third Party Acquisition" means the occurrence of any of the following events: (i) the acquisition of the Company by merger or otherwise by any person (which includes a "person" as such term is defined in Section 13(d)(3) of the Exchange Act) other than Acquiror or any affiliate thereof (a "Third Party"); (ii) the acquisition by a Third Party of more than 35% of the total assets of the Company and the Company Subsidiaries taken as a whole; (iii) the acquisition by a Third Party of 35% or more of the outstanding Shares; (iv) the adoption by the Company of a plan of liquidation or the declaration or payment of an extraordinary dividend; or (v) the repurchase by the Company or any Company Subsidiary of more than 35% of the outstanding Shares. For purposes of this Agreement, a "Superior Proposal" means any bona fide proposal to acquire directly or indirectly for consideration consisting of cash and/or securities more than 50% of the Company Shares then outstanding or all or substantially all the assets of the Company and otherwise on terms which the Company Board by requisite vote determines in its good faith judgment (based on the advice of a financial adviser of nationally recognized reputation) to be more favorable to the Company's stockholders than the Merger.

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ARTICLE 7

TERMINATION, AMENDMENT AND WAIVER

7.1. <u>Termination</u>. This Agreement may be terminated at any time prior to the Effective Time, whether before or after approval of matters presented in connection with the Merger by the holders of the Company Common Stock:

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(d) by the Company if the Company Board has received a Superior Proposal, the Company Board by requisite vote determines in its good faith judgment, after consultation with and based upon the advice of outside legal counsel, that it is required to do so in order to comply with its fiduciary duties, withdraws its recommendation of the transactions contemplated hereby or approves or recommends such Superior Proposal, and the Company Board complies with all other provisions of **<u>Section 5.2(b)</u>** and concurrently complies with the provisions of **<u>Section 9.1 (b)</u>**;

(e) by Acquiror if the Company Board shall have recommended to the Company's stockholders a Superior Proposal; or the Company Board shall have withdrawn its recommendation of this Agreement or the Merger, provided that any disclosure that the Company Board is compelled to make of the receipt of a proposal for a Third Party Acquisition in order to comply with its fiduciary duties or Rule 14d-9 or 14e-2 shall not in and of itself constitute the withdrawal of the Company Board's recommendation; provided, further, that such disclosure states that no action will be taken by the Company Board with respect to the withdrawal of its recommendation of the transactions contemplated hereby or the approval or recommendation of any Third Party Acquisition except in accordance with **<u>Section 5.2 (b)</u>**; or

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7.2 <u>Effect of Termination</u>. In the event of termination of this Agreement as provided in **<u>Section 7.1</u>**, this Agreement shall forthwith become void and have no effect, without any liability or obligation on the part of any party, its affiliates, directors, officers or stockholders other than the provisions of **<u>Section 9.1</u>**, unless such termination results from the willful and material breach by a party of any of its representations, warranties, covenants or other agreements set forth in this Agreement, in which event the terminating party shall retain its rights and remedies against such other party in respect of such other party's breach.

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ARTICLE 9

<u>GENERAL PROVISIONS</u>

9.1. <u>Expenses.</u>

(a) Except as otherwise provided in this **Section 9.1**, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such expense, whether or not the Merger is consummated.

(b) In the event that this Agreement shall be terminated:

(i) pursuant to **<u>Section 7.1(d)</u> or <u>Section 7.1(e)</u>**;

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the Company shall pay to Acquiror the amount of $**[Dollar Amount]** immediately upon the occurrence of the event described in this **Section 9.1(b).**

(c) In the event this Agreement shall be terminated by Acquiror or (when a proposal for a Third Party Acquisition is pending) the Company pursuant to **Section 7.1(b)(i)**, and at the time of termination Acquiror is not in breach of its material obligations hereunder, the Company shall, promptly after the termination of this Agreement, reimburse Acquiror for all documented out-of-pocket expenses and fees (including, without limitation, fees payable to all banks, investment banking firms and other financial institutions, and their respective agents and counsel, and all fees of counsel, accountants, financial printers, experts and consultants to Acquiror), whether incurred prior to, on or after the date hereof, in connection with the Merger and the consummation of all transactions contemplated by this Agreement; provided that in no event shall the Company be required to pay in excess of an aggregate of $**[Dollar Amount]** pursuant to this **Section 9.1(c)**.

EXHIBIT C

Sample Acquiror-Favorable Voting Agreement

VOTING AGREEMENT

VOTING AGREEMENT (this "Agreement") dated as of ●, by and between [MERGERSUB], a Delaware corporation ("Merger Sub") and [MAJORITY HOLDER] (the "Stockholder").

WHEREAS, [PARENT], a Delaware corporation ("Parent"), Merger Sub and [TARGET], a Delaware corporation (the "Company"), have entered into an Agreement and Plan of Merger dated as of the date hereof (the "Merger Agreement"; capitalized terms used but not defined herein shall have the meanings set forth in the Merger Agreement; provided that the terms Merger and Merger Agreement shall not include any amendments or modifications thereto unless such amendments and modifications have been approved in writing by the Stockholder) providing for the merger (the "Merger") of Merger Sub with and into the Company, upon the terms and subject to the conditions set forth in the Merger Agreement; and

WHEREAS, the Stockholder beneficially owns ● Class A Shares and ● Class B Shares (such Class A Shares and Class B Shares, together with any other Class A Shares and Class B Shares that the Stockholder acquires beneficial ownership of after the date hereof and during the term of this Agreement, whether upon the exercise of options, warrants or rights, the conversion or exchange of convertible or exchangeable securities, or by means of purchase, dividend, distribution or otherwise, being collectively referred to herein as the "Subject Shares"); and

WHEREAS, as a condition to its willingness to enter into the Merger Agreement, Parent and Merger Sub have requested and required that the Stockholder enter into this Agreement.

NOW, THEREFORE, to induce Parent and Merger Sub to enter into, and in consideration of its entering into, the Merger Agreement, and in consideration of the premises and the representations, warranties and agreements contained herein, the parties hereto agree as follows:

1. Representations and Warranties of the Stockholder. The Stockholder hereby represents and warrants to Merger Sub as of the date hereof as follows:

(a) *Authority; No Conflicts.* The Stockholder has the necessary legal capacity, power and authority to execute and deliver this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby. This Agreement has been duly authorized, executed and delivered by and on behalf of the Stockholder, and, assuming due authorization, execution and delivery by Merger Sub, constitutes a legal, valid and binding obligation of the Stockholder, enforceable in accordance with its terms. Except for the filings required under the HSR Act, (i) no filing with, and no permit, authorization, consent or approval of, any Governmental Entity or any other person is necessary for the execution and delivery of this Agreement by and on behalf of the Stockholder and the consummation by the Stockholder of the transactions contemplated hereby, and (ii) none of the execution and delivery of this Agreement by and on behalf of the Stockholder, the consummation of the transactions contemplated hereby and compliance with the terms hereof by the Stockholder will conflict with, or result in any violation of, or default (with or without notice or lapse of time or both) under any provision of, any trust agreement, loan or credit agreement, note, bond, mortgage, indenture, lease or other agreement, instrument, permit, concession, franchise, license, judgment, order, notice, decree, statute, law, ordinance, rule or regulation applicable to the Stockholder or to the Stockholder's property or assets.

(b) *The Subject Shares.* The Stockholder is the beneficial owner of the Subject Shares and has, and throughout the term of this Agreement will have, good and marketable title to the Subject Shares free and clear of all Liens and, upon delivery thereof to Merger Sub against delivery of the consideration therefor pursuant to this Agreement, good and marketable title thereto, free and clear of all Liens (other than any arising as a result of actions taken or omitted by Merger Sub), will pass to Merger Sub. The Stockholder does not beneficially own any shares of capital stock of the Company or securities convertible into or exchangeable for shares of capital stock of the Company, other than the Subject Shares. The Stockholder has the sole right and power to vote and dispose of the Subject Shares, and none of the Subject Shares is subject to any voting trust or other agreement, arrangement or restriction with respect to the voting or transfer (other than the provisions of the Securities Act) of any of the Subject Shares, except as contemplated by this Agreement.

2. Representations and Warranties of Merger Sub. Merger Sub hereby represents and warrants to the Stockholder that Merger Sub is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has the necessary corporate power and authority to execute and deliver this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby. This Agreement has been duly authorized, executed and delivered by and on behalf of Merger Sub and, assuming due authorization, execution and delivery by the Stockholder, constitutes a legal, valid and binding obligation of Merger Sub enforceable in accordance with its terms. Except for the filings required under the HSR Act, (i) no filing with, and no permit, authorization, consent or approval of, any Governmental Entity or any other person is necessary for the execution of this Agreement by and on behalf of Merger Sub and the consummation by Merger Sub of the transactions contemplated hereby, and (ii) none of the execution and delivery of this Agreement by Merger Sub, the consummation of the transactions contemplated hereby nor the compliance with the terms hereof by Merger Sub will conflict with, or result in any violation of, or default (with or without notice or lapse of time or both) under any provision of, the certificate of incorporation or by-laws of Merger Sub, any trust agreement, loan or credit agreement, note, bond, mortgage, indenture, lease or other agreement, instrument, permit, concession, franchise, license, judgment, order, notice, decree, statute, law, ordinance, rule or regulation applicable to Merger Sub or to Merger Sub's property or assets. If the Option (as defined herein) is exercised, the Subject Shares will be acquired for investment for Merger Sub's own account, not as a nominee or agent and not with a view to the distribution of any part thereof. Merger Sub has no present intention of selling,

granting any participation in or otherwise distributing the same nor does Merger Sub have any contract, undertaking, agreement or arrangement with any person with respect to any of the Subject Shares. Merger Sub further understands that the Subject Shares may not be sold, transferred or otherwise disposed of without registration under the Securities Act or pursuant to an exemption therefrom.

3. Covenants of the Stockholder. Until the termination of this Agreement in accordance with Section 8 hereof, the Stockholder agrees as follows:

(a) *Voting of Subject Shares.* At any meeting of stockholders of the Company called to vote upon the Merger and the Merger Agreement or at any adjournment thereof or in any other circumstances upon which a vote or other approval with respect to the Merger and the Merger Agreement is sought, the Stockholder shall vote the Subject Shares in favor of the Merger, the adoption by the Company of the Merger Agreement and the approval of the terms thereof and each of the other transactions contemplated by the Merger Agreement.

At any meeting of stockholders of the Company or at any adjournment thereof or in any other circumstances upon which the Stockholder's vote, consent or other approval is sought, the Stockholder shall vote the Subject Shares against (i) any action or agreement that would result in a breach in any material respect of any covenant, representation or warranty or any other obligation or agreement of the Company under the Merger Agreement or of the Stockholder hereunder, and (ii) any action or agreement that would impede, interfere with, delay, postpone or attempt to discourage the Merger, including, but not limited to: (A) the adoption by the Company of a proposal regarding (1) the acquisition of the Company by merger, tender offer or otherwise by any person other than Merger Sub or any designee thereof (a "Third Party"), or any other merger, combination or similar transaction with any Third Party; (2) the acquisition by a Third Party of 10% or more of the assets of the Company and its Subsidiaries, taken as a whole; (3) the acquisition by a Third Party of 10% or more of the outstanding Shares; or (4) the repurchase by the Company or any of its subsidiaries of 10% or more of the outstanding Shares; (B) any amendment of the Company's certificate of incorporation or by-laws or other proposal or transaction involving the Company or any of its Subsidiaries, which amendment or other proposal or transaction would in any manner impede, frustrate, prevent or nullify the Merger, the Merger Agreement or any of the other transactions contemplated by the Merger Agreement or change in any manner the voting rights of any class of the Company's capital stock; (C) any change in the management or board of directors of the Company; (D) any material change in the present capitalization or dividend policy of the Company; or (E) any other material change in the Company's corporate structure or business. The Stockholder further agrees not to commit or agree to take any action inconsistent with the foregoing.

(b) *Proxies.* As security for the agreements of the Stockholder provided for herein, the Stockholder hereby grants to Merger Sub a proxy to vote the Subject Shares as indicated in Section 3(a) above. The Stockholder agrees that this proxy shall be irrevocable during the term of this Agreement and coupled with an interest and each of the Stockholder and Merger Sub will take such further action or execute such other instruments as may be necessary to effectuate the intent of this proxy and hereby revokes any proxy previously granted by the Stockholder with respect to the Subject Shares.

(c) *Transfer Restrictions*. The Stockholder agrees not to (i) sell, transfer, pledge, encumber, assign or otherwise dispose of or hypothecate (including by gift or by contribution or distribution to any trust or similar instrument or to any beneficiaries of the Stockholder (collectively, "Transfer"), or enter into any contract, option or other arrangement or understanding (including any profit sharing arrangement) with respect to the Transfer of, any of the Subject Shares other than pursuant to the terms hereof and the Merger Agreement, (ii) enter into any voting arrangement or understanding with respect to the Subject Shares, whether by proxy, voting agreement or otherwise, or (iii) take any action that could make any of its representations or warranties contained herein untrue or incorrect or could have the effect of preventing or disabling the Stockholder from performing any of its obligations hereunder.

(d) *Appraisal Rights.* The Stockholder hereby irrevocably waives any and all rights which it may have as to appraisal, dissent or any similar or related matter with respect to the Merger.

(e) *No Solicitation.* Neither the Stockholder nor any of its affiliates shall (whether directly or indirectly through any officer, director, member, advisor, agent, representatives or other intermediary), nor shall the Stockholder or any of its respective affiliates authorize or permit any of its officers, directors, members, advisors, agents, representatives or other intermediaries to, (i) solicit, initiate, encourage or take any action to facilitate any submission of inquiries, proposals or offers from any person relating to any acquisition or purchase of all or a material amount of assets of, or any equity interest in, the Company (or any subsidiary or division thereof) or any merger, consolidation, tender offer (including a self tender offer), exchange offer, business combination, recapitalization, liquidation, dissolution or similar transaction involving the Company (or any subsidiary or division thereof), other than the transactions contemplated by this Agreement or the Merger Agreement, or any other transaction the consummation of which would or could reasonably be expected to impede, interfere with, prevent or materially delay the Merger or which would or could reasonably be expected to materially dilute the benefits to Merger Sub of the transactions contemplated by the Merger Agreement (collectively, "Transaction Proposals") or agree to or endorse any Transaction Proposal, other than the transactions contemplated by the Merger Agreement, or (ii) enter into or participate in any discussions or negotiations regarding any of the foregoing, or furnish to any other person any information with respect to the Company's business, properties or assets or any of the foregoing, or otherwise cooperate in any way with, or assist or participate in, facilitate or encourage, any effort to attempt by any other person to do or seek any of the foregoing. Notwithstanding anything in this Agreement to the contrary, from and after the date hereof, the Stockholder shall promptly advise Merger Sub orally and in writing of the receipt by any of it (or any of the other entities or persons referred to above) of any Transaction Proposal or any inquiry which is likely to lead to any Transaction Proposal, the material terms and conditions of such Transaction Proposal or inquiry, and the identity of the person making any such Transaction Proposal or inquiry. The Stockholder will keep Merger Sub fully informed of the status and details of any such Transaction Proposal or inquiry.

(f) *Merger Agreement.* The Stockholder accepts the terms and conditions of the Merger Agreement as they apply to the holders of Shares.

4. Option.

(a) The Stockholder hereby grants to Merger Sub (or its designee), an irrevocable option to purchase the Subject Shares, on the terms and subject to the conditions set forth herein (the "Option").

(b) The Option may be exercised by Merger Sub, as a whole and not in part, at any time during the period commencing upon the occurrence of any of the following events and ending on the date which is the 60th calendar day following the first to occur of such events:

(i) the Merger Agreement shall have been terminated by Parent pursuant to Section 10.1(b) thereof;

(ii) the Merger Agreement shall have been terminated by either Parent or the Company pursuant to Section 10.1(c) thereof (other than a termination by the Company following a failure to consummate the Merger as a result of an actual material breach by Parent or Merger Sub of its obligations under the Merger Agreement);

(iii) the Merger Agreement shall have been terminated by either Parent or the Company pursuant to Section 10.1(d) thereof; or

(iv) the Merger Agreement shall have been terminated by Parent pursuant to Section 10.1(e) thereof.

(c) If Merger Sub wishes to exercise the Option, Merger Sub shall send a written notice to the Stockholder of its intention to exercise the Option, specifying the place, and, if then known, the time and the date (the "Option Closing Date") of the closing (the "Option Closing") of the purchase. The Option Closing Date shall occur on the fifth business day (or such longer period as may be required by applicable law or regulation) after the later of (i) the date on which such notice is delivered, and (ii) the satisfaction of the conditions set forth in Section 4(f).

(d) At the Option Closing, the Stockholder shall deliver to Merger Sub (or its designee) all of the Subject Shares by delivery of a certificate or certificates evidencing the Subject Shares duly endorsed to Merger Sub or accompanied by powers duly executed in favor of Merger Sub, with all necessary stock transfer stamps affixed.

(e) At the Option Closing, Merger Sub shall pay to the Stockholder pursuant to the exercise of the Option, by wire transfer, cash in immediately available funds to the account of the Stockholder (such account to be specified in writing at least two days prior to the Option Closing), an amount equal to the product of $● and the number of Subject Shares (the "Subject Shares Purchase Price").

(f) The Option Closing shall be subject to the satisfaction of each of the following conditions:

(i) no court, arbitrator or governmental body, agency or official shall have issued any order, decree or ruling and there shall not be any statute, rule or regulation, restraining, enjoining or prohibiting the consummation of the purchase and sale of the Subject Shares pursuant to the exercise of the Option;

(ii) any waiting period applicable to the consummation of the purchase and sale of the Subject Shares pursuant to the exercise of the Option under the HSR Act shall have expired or been terminated; and

(iii) all actions by or in respect of, and any filing with, any governmental body, agency, official, or authority required to permit the consummation of the purchase and sale of the Subject Shares pursuant to the exercise of the Option shall have been obtained or made and shall be in full force and effect.

5. Further Agreements of Merger Sub. Merger Sub hereby agrees that, in the event that it purchases the Subject Shares pursuant to the Option, as promptly as practicable thereafter, Merger Sub will make a tender offer for the remaining Shares to the stockholders of the Company (the consummation of which shall be subject only to the condition that no court, arbitrator or governmental body, agency or official shall have issued any order, decree or ruling and there shall not be any statute, rule or regulation, restraining, enjoining or prohibiting the consummation of such tender offer) pursuant to which the stockholders of the Company (other than the Company, any direct or indirect subsidiary of the Company or Merger Sub) will receive an amount of cash consideration per Share equal to $●, and will take such actions as may be necessary or appropriate in order to effectuate such tender offer at the earliest practicable time.

6. Stop Transfer Order. The Stockholder hereby authorizes and requests the Company's counsel to notify the Company's transfer agent that there is a stop transfer order with respect to all of the Subject Shares (and that this Agreement places limits on the voting of the Subject Shares).

7. Assignment. Neither this Agreement nor any of the rights, interests or obligations hereunder, except as expressly provided herein with respect to Merger Sub's rights under the Option, shall be assigned by any of the parties without the prior written consent of the other parties, except that Merger Sub may assign, in its sole discretion, any or all of its rights, interests and obligations hereunder to any direct or indirect wholly owned subsidiary of Merger Sub. Subject to the preceding sentence, this Agreement will be binding upon, inure to the benefit of and be enforceable by the parties and their permitted assigns and their respective successors (including the Company as successor to Merger Sub pursuant to the Merger), heirs, agents, representatives, trust beneficiaries, attorneys, affiliates and associates and all of their respective predecessors, successors, permitted assigns, heirs, executors and administrators.

8. Termination. Except as set forth in Section 4 and Section 6, this Agreement shall terminate, and no party shall have any rights or obligations hereunder and this Agreement shall become null and void and have no further effect immediately following the earliest to occur of (x) the Effective Time, (y) the 60th day following the termination of the

Merger Agreement pursuant to Section 10.1(b), 10.1(c) or 10.1(d) thereof, or (z) the termination of the Merger Agreement pursuant to Section 10.1(a) thereof. Notwithstanding the foregoing, in the event the Option shall have been exercised in accordance with Section 4, but the Option Closing shall not have occurred, this Agreement shall not terminate. Nothing in this Section 9 shall relieve any party of liability for breach of this Agreement.

9. General Provisions.

(a) *Amendments.* This Agreement may not be amended except by an instrument in writing signed by the party to be charged therewith.

(b) *Notice.* All notices and other communications hereunder shall be in writing and shall be deemed given if delivered personally or sent by overnight courier (providing proof of delivery) to Merger Sub in accordance with Section 11.1 of the Merger Agreement and to the Stockholder c/o ● (or at such other address for a party as shall be specified by like notice).

(c) *Interpretation.* When a reference is made in this Agreement to Sections, such reference shall be to a Section of this Agreement unless otherwise indicated. The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. Wherever the words “include,” “includes” or “including” are used in this Agreement, they shall be deemed to be followed by the words “without limitation.”

(d) *Counterparts.* This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, and shall become effective when one or more of the counterparts have been signed by each of the parties and delivered to the other parties, it being understood that each party need not sign the same counterpart.

(e) *Governing Law.* This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware regardless of the laws that might otherwise govern under applicable principles of conflicts of law thereof.

10. Enforcement. The parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the parties shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement in any Federal court of the United States located in the Southern District of the State of New York or in a New York state court located in Manhattan, this being in addition to any other remedy to which they are entitled at law or in equity. In addition, each of the parties hereto (i) consents to submit such party to the personal jurisdiction of any Federal court located in the Southern District of the State of New York or any New York state court located in Manhattan in the event any dispute arises out of this Agreement or any of the transactions contemplated hereby, (ii) agrees that such party will not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from any such court, (iii) agrees that such party will not bring any action relating to this Agreement or the transactions contemplated hereby in any court other than a Federal court sitting in the Southern

District of the State of New York or a New York state court located in Manhattan, and (iv) waives any right to trial by jury with respect to any claim or proceeding related to or arising out of this Agreement or any of the transactions contemplated hereby.

IN WITNESS WHEREOF, Merger Sub and the Stockholder have each caused this Agreement to be signed by its signatory thereunto duly authorized, each as of the date first written above.

[MERGERSUB]

By: ___________________________________
Name:
Title:

[MAJORITY HOLDER]

By: ___________________________________
Name:
Title:

EXHIBIT D

Sample Negotiated Stock Option Agreement

STOCK OPTION AGREEMENT

STOCK OPTION AGREEMENT, dated as of ● (the "**Agreement**"), by and between ●, a Delaware corporation ("**Issuer**"), and ●, a Delaware corporation ("**Grantee**").

WHEREAS, Issuer, Grantee and ●, a Delaware corporation ("**Sub**"), which is a direct wholly owned subsidiary of Issuer, propose to enter into an Agreement and Plan of Merger, dated as of the date hereof (the "**Merger Agreement**"; capitalized terms used but not defined herein shall have the meanings set forth in the Merger Agreement), providing for, among other things, a merger (the "**Merger**") of Sub with and into Grantee;

WHEREAS, as a condition and inducement to Grantee's willingness to enter into the Merger Agreement, Grantee has requested that Issuer agree, and Issuer has agreed, to grant Grantee the Option (as defined below); and

NOW, THEREFORE, in consideration of the foregoing and the respective representations, warranties, covenants and agreements set forth herein and in the Merger Agreement, Issuer and Grantee agree as follows:

1. Grant of Options. Subject to the terms and conditions set forth herein, Issuer hereby grants to Grantee an irrevocable option (the "**Option**") to purchase up to ● shares (the "**Option Shares**") of common stock, par value $● per share, of Issuer (the "**Shares**") (being 14.9%of the number of Shares outstanding on ● before such issuance), together with the associated purchase rights (the "**Rights**") under the Rights Agreement, dated as of ●, between Issuer and ●, as Rights Agent (references to the Option Shares shall be deemed to include the associated Rights), at a purchase price of $● per Option Share (such price, as adjusted if applicable, the "**Purchase Price**"). The number of Option Shares that may be received upon the exercise of the Option and the Purchase Price are subject to adjustment as set forth herein.

2. Exercise of Option. (a) Grantee may exercise the Option, in whole or in part, at any time or from time to time following the occurrence of a Purchase Event (as defined below); provided that, except as otherwise provided herein, the Option shall terminate and be of no further force and effect upon the earliest to occur of (i) the Effective Time, (ii) 6 months after the first occurrence of a Purchase Event (or if, at the expiration of such 6-months after the first occurrence of a Purchase Event, the Option cannot be exercised by reason of any applicable judgment, decree, order, law or regulation, 10 business days after such impediment to exercise shall have been removed, but in no event under this clause (ii) later than the first anniversary of the Purchase Event), (iii) termination of the Merger Agreement under circumstances which do not and cannot result in Grantee's becoming entitled to receive termination fees from Issuer pursuant to Section 7.2(b) of the Merger Agreement of $● or more; and (iv) 12 months after the termination of the Merger Agreement under circumstances which could result in Grantee's becoming entitled to receive termination fees from Issuer pursuant to Section 7.2(b)(ii)(ii) or

7.2(b)(C), unless during such 12-month period, a Purchase Event shall occur. Notwithstanding the foregoing, the Option shall terminate and not be exercisable if (x) at the time the Merger Agreement is terminated, Grantee has the right to terminate the Merger Agreement pursuant to Section 7.1(f) thereof and the circumstances referred to in Section 7.2(b)(E)(II) of the Merger Agreement are not applicable, and (y) prior to the 90th day following termination of the Merger Agreement, Issuer does not (A) enter into a definitive agreement with any third party with respect to a Business Combination or (B) consummate any Business Combination with respect to Issuer, which in each case is more favorable to Issuer's stockholders (in their capacities as such) from a financial point of view than the Merger, such determination of whether such Business Combination is more favorable than the Merger shall be made in accordance with the terms of Section 7.2(b)(iv) of the Merger Agreement. The termination of the Option shall not affect any rights hereunder which by their terms extend beyond the date of such termination.

(1) As used herein, a "**Purchase Event**" means an event the result of which is that the total fee or fees required to be paid by Issuer to Grantee pursuant to Section 7.2(b) of the Merger Agreement equals or exceeds $●.

(2) In the event Grantee wishes to exercise the Option, it shall send to Issuer a written notice (the "**Exercise Notice**"; the date of which being herein referred to as the "**Notice Date**") specifying (i) the total number of Option Shares it intends to purchase pursuant to such exercise and (ii) a place and date not earlier than three business days nor later than 10 business days from such Notice Date for the closing of such purchase (a "**Closing**"; and the date of such Closing, a "**Closing Date**"); provided that such closing shall be held only if (A) such purchase would not otherwise violate or cause the violation of applicable law (including the HSR Act), (B) no law, rule or regulation shall have been adopted or promulgated, and no temporary restraining order, preliminary or permanent injunction or other order, decree or ruling issued by a court or other governmental authority of competent jurisdiction shall be in effect, which prohibits delivery of such Option Shares (and the parties hereto shall use their reasonable best efforts to have any such order, injunction, decree or ruling vacated or reversed) and (C) any prior notification to or approval of any other regulatory authority in the United States or elsewhere required in connection with such purchase shall have been made or obtained, other than those which if not made or obtained would not reasonably be expected to result in a significant detriment to the Grantee and its Subsidiaries taken as a whole or the Issuer and its Subsidiaries taken as a whole. If the Closing cannot be consummated by reason of a restriction set forth in clause (A), (B) or (C) above, notwithstanding the provisions of Section 2(a), the Closing shall be held within 5 business days following the elimination of such restriction.

3. <u>Payment and Delivery of Certificates</u>. (a) On each Closing Date, Grantee shall pay to Issuer in immediately available funds by wire transfer to a bank account designated by Issuer an amount equal to the Purchase Price multiplied by the Option Shares to be purchased on such Closing Date.

(1) At each Closing, simultaneously with the delivery of immediately available funds as provided in Section 3(a), Issuer shall deliver to Grantee a certificate or certificates representing the Option Shares to be purchased at such closing, which Option Shares shall be free and clear of all liens, charges or encumbrances ("**Liens**"), and Grantee shall deliver

to Issuer a letter agreeing that Grantee shall not offer to sell or otherwise dispose of such Option Shares in violation of applicable law or the provisions of this Agreement.

(2) Certificates for the Option Shares delivered at each Closing shall be endorsed with a restrictive legend which shall read substantially as follows:

THE TRANSFER OF THE STOCK REPRESENTED BY THIS CERTIFICATE IS SUBJECT TO RESTRICTIONS ARISING UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND PURSUANT TO THE TERMS OF A STOCK OPTION AGREEMENT DATED AS OF ________________. A COPY OF SUCH AGREEMENT WILL BE PROVIDED TO THE HOLDER HEREOF WITHOUT CHARGE UPON RECEIPT BY THE ISSUER OF A WRITTEN REQUEST THEREFOR.

It is understood and agreed that (i) the reference to restrictions arising under the Securities Act in the above legend shall be removed by delivery of substitute certificate(s) without such reference if Grantee shall have delivered to Issuer a copy of a letter from the staff of the SEC, or an opinion of counsel in form and substance reasonably satisfactory to Issuer and its counsel, to the effect that such legend is not required for purposes of the Securities Act and (ii) the reference to restrictions pursuant to this Agreement in the above legend shall be removed by delivery of substitute certificate(s) without such reference if the Option Shares evidenced by certificate(s) containing such reference have been sold or transferred in compliance with the provisions of this Agreement under circumstances that do not require the retention of such reference.

4. Authorized Stock. Issuer hereby represents and warrants to Grantee that Issuer has taken all necessary corporate and other action to authorize and reserve and to permit it to issue, at all times from the date hereof until the obligation to deliver Shares upon the exercise of the Option terminates, will have reserved for issuance, upon exercise of the Option, Shares necessary for Grantee to exercise the Option, and Issuer will take all necessary corporate action to authorize and reserve for issuance all additional Shares or other securities which may be issued pursuant to Section 6 upon exercise of the Option. The Shares to be issued upon due exercise of the Option, including all additional Shares or other securities which may be issuable upon exercise of the Option pursuant to Section 6, upon issuance pursuant hereto, shall be duly and validly issued, fully paid and nonassessable, and shall be delivered free and clear of all Liens, including any preemptive rights of any stockholder of Issuer.

5. Purchase Not for Distribution. Grantee hereby represents and warrants to Issuer that any Option Shares or other securities acquired by Grantee upon exercise of the Option will not be taken with a view to the public distribution thereof and will not be transferred or otherwise disposed of except in a transaction registered or exempt from registration under the Securities Act.

6. Adjustment upon Changes in Capitalization, etc. (a) In the event of any change in Shares by reason of reclassification, recapitalization, stock split, split-up, combination, exchange of shares, stock dividend, dividend, dividend payable in any other securities, or any similar event, the type and number of Shares or securities subject to the Option, and the Purchase

Price therefor (including for purposes of repurchase thereof pursuant to Section 7), shall be adjusted appropriately, and proper provisions shall be made in the agreements governing such transaction, so that Grantee shall receive upon exercise of the Option the number and class of shares or other securities or property that Grantee would have received in respect of Shares if the Option had been exercised immediately prior to such event or the record date therefor, as applicable. If any additional Shares are issued after the date of this Agreement (other than pursuant to an event described in the immediately preceding sentence), the number of Shares subject to the Option shall be adjusted so that immediately prior to such issuance, it equals 14.9% of the number of Shares then issued and outstanding. In no event shall the number of Shares subject to the Option exceed 14.9% of the number of Shares issued and outstanding at the time of exercise (without giving effect to any shares subject or issued pursuant to the Option).

(1) Without limiting the foregoing, whenever the number of Option Shares purchasable upon exercise of the Option is adjusted as provided in this Section 6, the Purchase Price per Option Share shall be adjusted by multiplying the Purchase Price by a fraction, the numerator of which is equal to the number of Option Shares purchasable prior to the adjustment and the denominator of which is equal to the number of Option Shares purchasable after the adjustment.

(2) Without limiting the parties'relative rights and obligations under the Merger Agreement, in the event that Issuer enters into an agreement (i) to consolidate with or merge into any person, other than Grantee or one of its Subsidiaries, and Issuer will not be the continuing or surviving corporation in such consolidation or merger, (ii) to permit any Person, other than Grantee or one of its Subsidiaries, to merge into Issuer and Issuer will be the continuing or surviving corporation, but in connection with such merger, the shares of Common Stock outstanding immediately prior to the consummation of such merger will be changed into or exchanged for stock or other securities of Issuer or any other Person or cash or any other property, or (iii) to sell or otherwise transfer all or substantially all of its assets to any Person, other than Grantee or one of its Subsidiaries, then, and in each such case, the agreement governing such transaction will make proper provision so that the Option will, upon the consummation of any such transaction and upon the terms and conditions set forth herein, be converted into, or exchanged for, an option with identical terms appropriately adjusted to acquire the number and class of shares or other securities or property that Grantee would have received in respect of Option Shares had the Option been exercised immediately prior to such consolidation, merger, sale or transfer or the record date therefor, as applicable. Issuer shall take such steps in connection with such consolidation, merger, liquidation or other such transaction as may be reasonably necessary to assure that the provisions hereof shall thereafter apply as nearly as possible to any securities or property thereafter deliverable upon exercise of the Option.

7. Repurchase of Option. (a) Notwithstanding the provisions of Section 2(a), at any time commencing upon the first occurrence of a Purchase Event and ending upon termination of this Option in accordance with Section 2, Issuer (or any successor entity thereof) shall at the request of Grantee (any such request, a "**Cash Exercise Notice**"), repurchase from Grantee the Option or a portion thereof (if and to the extent not previously exercised or terminated) at a price which, subject to Section 10 below, is equal to the excess, if any, of (x) the Applicable Price (as defined below) as of the Section 7 Request Date (as defined below) for a

Share over (y) the Purchase Price (subject to adjustment pursuant to Section 6), multiplied by all or such portion of the Option Shares subject to the Option as the Grantee shall specify in the Cash Exercise Notice (the "**Option Repurchase Price**").

(1) Notwithstanding the provisions of Section 2(a), at any time following the occurrence of a Purchase Event, Issuer (or any successor entity thereof) may, at its election, repurchase the Option (if and to the extent not previously exercised or terminated) at the Option Repurchase Price; provided that the aggregate number of Option Shares as to which the Option may be repurchased shall not exceed ●. For purposes of this Agreement, an exercise of the Option shall be deemed to occur on the Closing Date and not on the Notice Date relating thereto.

(2) In connection with any exercise of rights under this Section 7, Issuer shall, within 5 business days after the Section 7 Request Date, pay the Option Repurchase Price in immediately available funds, and Grantee or such owner, as the case may be, shall surrender to Issuer the Option. Upon receipt by the Grantee of the Option Repurchase price, the obligations of the Issuer to deliver Option Shares pursuant to Section 3 of this Agreement shall be terminated with respect to the number of Option Shares specified in the Cash Exercise Notice or the number of Option Shares as to which the Option is repurchased under Section 7(b).

(3) For purposes of this Agreement, the following terms have the following meanings:

(1) "**Applicable Price**", as of any date, means the highest of (A) the highest price per Share paid or proposed to be paid by any third party for Shares or the consideration per Share received or to be received by holders of Shares, in each case pursuant to any Acquisition Proposal for or with Issuer made on or prior to such date or (B) the average closing price per Share as reported on the New York Stock Exchange, Inc. ("**NYSE**") Composite Tape or if the Shares are not listed on the NYSE, the highest bid price per Share as quoted on the National Association of Securities Dealers Automated Quotation System or, if the Shares are not quoted thereon, on the principal trading market on which such Shares are traded as reported by a recognized source during the 10 trading days preceding such date. If the consideration to be offered, paid or received pursuant to the foregoing clause (A) shall be other than in cash, the value of such consideration shall be determined in good faith by an independent nationally recognized investment banking firm selected by Grantee and reasonably acceptable to Issuer.

(2) "**Section 7 Request Date**" means the date on which Issuer or Grantee, as the case may be, exercises its rights under this Section.

8. Registration Rights. Issuer shall, if requested by Grantee or any Subsidiary of the Grantee which is the owner of Option Shares (collectively with Grantee, the "Owners") at any time and from time to time within two years of the first exercise of the Option, as expeditiously as possible prepare and file up to two registration statements under the Securities Act if such registration is necessary in order to permit the sale or other disposition of any or all shares of securities that have been acquired by or are issuable to such Owners upon

exercise of the Option in accordance with the intended method of sale or other disposition stated by such Owners, including a “shelf” registration statement under Rule 415 under the Securities Act or any successor provision, and Issuer shall use all reasonable efforts to qualify such shares or other securities under any applicable state securities laws. Issuer shall use all reasonable efforts to cause each such registration statement to become effective, to obtain all consents or waivers of other parties which are required therefor and to keep such registration statement effective for such period at least 90 days from the day such registration statement first becomes effective as may be reasonably necessary to effect such sale or other disposition. The obligations of Issuer hereunder to file a registration statement and to maintain its effectiveness may be suspended for a period of time not exceeding 90 days in the aggregate if the Board of Directors of Issuer shall have determined in good faith that the filing of such registration statement or the maintenance of its effectiveness would require disclosure of nonpublic information that would materially and adversely affect Issuer (but in no event shall Issuer exercise such postponement right more than once in any 12-month period). Any registration statement prepared and filed under this Section 8, and any sale covered thereby, shall be at Issuer’s expense except for underwriting discounts or commissions, brokers’ fees and the reasonable fees and disbursements of Owners’ counsel related thereto. The Owners shall provide all information reasonably requested by Issuer for inclusion in any registration statement to be filed hereunder. If during the time period referred to in the first sentence of this Section 8 Issuer effects a registration under the Securities Act of Shares for its own account or for any other stockholders of Issuer (other than on Form S-4 or Form S-8, or any successor form), it shall allow the Owners the right to participate in such registration, and such participation shall not affect the obligation of Issuer to effect two registration statements for the Owners under this Section 8; provided that, if the managing underwriters of such offering advise Issuer in writing that in their opinion the number of Shares requested to be included in such registration exceeds the number which can be sold in such offering without adversely affecting the offering price, Issuer and the Owners shall each reduce on a pro rata basis the Shares to be included therein on their respective behalf. In connection with any registration pursuant to this Section 8, Issuer and the Owners shall provide each other and any underwriter of the offering with customary representations, warranties, covenants, indemnification and contribution in connection with such registration.

9. Additional Covenants of Issuer. (a) If Shares or any other securities to be acquired upon exercise of the Option are then listed on the NYSE or any other securities exchange or market, Issuer, upon the request of any Owner, will promptly file an application to list the Shares or other securities to be acquired upon exercise of the Options on the NYSE or such other securities exchange or market and will use its reasonable best efforts to obtain approval of such listing as soon as practicable.

(1) Issuer will use its reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to permit the exercise of the Option in accordance with the terms and conditions hereof, as soon as practicable after the date hereof, including making any appropriate filing pursuant to the HSR Act and any other applicable law, supplying as promptly as practicable any additional information and documentary material that may be requested pursuant to the HSR Act and any other

applicable law, and taking all other actions necessary to cause the expiration or termination of the applicable waiting periods under the HSR Act as soon as practicable.

(2) Issuer agrees not to avoid or seek to avoid (whether by charter amendment or through reorganization, consolidation, merger, issuance of rights, dissolution or sale of assets, or by any other voluntary act) the observance or performance of any of the covenants, agreements or conditions to be observed or performed hereunder by it.

(3) Issuer shall take all such steps as may be required to cause any acquisitions or dispositions by Grantee (or any affiliate who may become subject to the reporting requirements of Section 16(a) of the Exchange Act) of any Shares acquired in connection with this Agreement (through conversion or exercise of the Option or otherwise) to be exempt under Rule 16b-3 promulgated under the Exchange Act.

10. Limitation of Grantee Profit. (a) Notwithstanding any other provision in this Agreement, in no event shall Grantee's Total Profit (as defined below) exceed $● (the "**Maximum Profit**") and, if it otherwise would exceed such amount, Grantee, at its sole discretion, shall either (i) reduce the number of Shares subject to the Option, (ii) deliver to Issuer for cancellation Shares (or other securities into which such Option Shares are converted or exchanged) previously purchased by Grantee, (iii) pay cash to Issuer, or (iv) any combination of the foregoing, so that Grantee's actually realized Total Profit shall not exceed the Maximum Profit after taking into account the foregoing actions.

(1) Notwithstanding any other provision of this Agreement, the Option may not be exercised for a number of Option Shares as would, as of any Notice Date, result in a Notional Total Profit (as defined below) of more than the Maximum Amount and, if exercise of the Option otherwise would result in the Notional Total Profit exceeding such amount, Grantee, at its discretion, may (in addition to any of the actions specified in Section 10(a) above) (i) reduce the number of Shares subject to the Option or (ii) increase the Purchase Price for that number of Option Shares set forth in the Exercise Notice so that the Notional Total Profit shall not exceed the Maximum Profit; provided that nothing in this sentence shall restrict any exercise of the Option permitted hereby on any subsequent date at the Purchase Price set forth in Section 1 hereof.

(2) For purposes of this Agreement, "**Total Profit**" shall mean: (i) the aggregate amount (before taxes) of (A) any excess of (x) the net cash amounts or fair market value of any property received by Grantee pursuant to a sale of Option Shares (or securities into which such shares are converted or exchanged) over (y) the Grantee's aggregate purchase price for such Option Shares (or other securities), plus (B) any amounts received by Grantee on the repurchase of the Option by Issuer pursuant to Section 7, plus (C) any termination fee paid by Issuer and received by Grantee pursuant to Section 7.2(b) of the Merger Agreement, minus (ii) the amounts of any cash previously paid by Grantee to Issuer pursuant to this Section 10 plus the value of the Option Shares

(or other securities) previously delivered by Grantee to Issuer for cancellation pursuant to this Section 10.

(3) For purposes of this Agreement, "**Notional Total Profit**" with respect to any number of Option Shares as to which Grantee may propose to exercise the Option shall mean the Total Profit determined as of the Notice Date assuming that the Stock Option was exercised on such date for such number of Option Shares and assuming that such Option Shares, together with all other Option Shares previously acquired upon exercise of the Option and held by Grantee as of such date, were sold for cash at the closing price per Share on the NYSE as of the close of business on the preceding trading day (less customary brokerage commissions).

(4) Notwithstanding any other provision of this Agreement, nothing in this Agreement shall affect the ability of Grantee to receive, nor relieve Issuer's obligation to pay, any termination fee provided for in Section 7.2(b) of the Merger Agreement; provided that if and to the extent the Total Profit received by Grantee would exceed the Maximum Profit following receipt of such payment, Grantee shall be obligated to promptly comply with the terms of Section 10(a).

(5) For purposes of Section 10(a) and clause (ii) of Section 10(c), the value of any Option Shares delivered by Grantee to Issuer shall be the Applicable Price of such Option Shares.

11. Loss, Theft, Etc. of Agreement. This Agreement (and the Option granted hereby) is exchangeable, without expense, at the option of Grantee, upon presentation and surrender of this Agreement at the principal office of Issuer for other Agreements providing for Options of different denominations entitling the holder thereof to purchase in the aggregate the same number of Shares purchasable hereunder. The terms "Agreement" and "Option" as used herein include any other Agreements and related Options for which this Agreement (and the Option granted hereby) may be exchanged. Upon receipt by Issuer of evidence reasonably satisfactory to it of the loss, theft, destruction or mutilation of this Agreement, and (in the case of loss, theft or destruction) of reasonably satisfactory indemnification, and upon surrender and cancellation of this Agreement, if mutilated, Issuer will execute and deliver a new Agreement of like tenor and date. Any such new Agreement executed and delivered shall constitute an additional contractual obligation on the part of Issuer, whether or not the Agreement so lost, stolen, destroyed or mutilated shall at any time be enforceable by anyone.

12. Miscellaneous.

(1) Expenses. Except as otherwise provided in Section 9 hereof or in the Merger Agreement, each of the parties hereto shall bear and pay all expenses incurred by it or on its behalf in connection with the transactions contemplated hereunder, including fees and expenses of its own financial consultants, investment bankers, accountants and counsel.

(2) Waiver and Amendment. Any provision of this Agreement may be waived at any time by the party that is entitled to the benefits of such provision. This Agreement may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the parties hereto.

(3) Entire Agreement; No Third-Party Beneficiary; Severability. Except as otherwise set forth in the Merger Agreement, this Agreement, together with the Merger Agreement (i) constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, between the parties with respect to the subject matter hereof and (ii) is not intended to confer upon any person other than the parties hereto any rights or remedies hereunder. If any term, provision, covenant or restriction of this Agreement is held by a court of competent jurisdiction or a federal or state regulatory agency to be invalid, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated. If for any reason such court or regulatory agency determines that the Option does not permit Grantee to acquire, or does not require Issuer to repurchase, the full number of Shares as provided in Sections 2 and 7, as adjusted pursuant to Section 6, it is the express intention of Issuer to allow Grantee to acquire or to require Issuer to repurchase such lesser number of Shares as may be permissible without any amendment or modification hereof.

(4) Governing Law. THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE (WITHOUT GIVING EFFECT TO CHOICE OF LAW PRINCIPLES).

(5) Descriptive Headings. The descriptive headings contained herein are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

(6) Notices. All notices and other communications hereunder shall be in writing and shall be deemed given as set forth in Section 8.2 of the Merger Agreement.

(7) Counterparts. This Agreement and any amendments hereto may be executed in two counterparts, each of which shall be considered one and the same agreement and shall become effective when both counterparts have been signed by each of the parties and delivered to the other party, it being understood that both parties need not sign the same counterpart.

(8) Assignment. Grantee may not, without the prior written consent of Issuer (which shall not be unreasonably withheld), assign this Agreement or the Option to any other person. This Agreement shall not be assignable by Issuer except by operation of law. Subject to the preceding sentence, this Agreement shall be binding upon, inure to the benefit of and be enforceable by the parties and their respective successors and assigns.

(9) Representations and Warranties. The representations and warranties contained in Sections 3.1(a)(i) and 3.2(a)(i) of the Merger Agreement, and, to

the extent they relate to this Stock Option Agreement, in Sections 3.1(b), (c), (f), (g) and (q) and Section 3.2(c) of the Merger Agreement, are incorporated herein by reference.

(10) Further Assurances. In the event of any exercise of the Option by Grantee, Issuer and Grantee shall execute and deliver all other documents and instruments and take all other action that may be reasonably necessary in order to consummate the transactions provided for by such exercise.

(11) Enforcement. The parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms. It is accordingly agreed that the parties shall be entitled to specific performance of the terms hereof, this being in addition to any other remedy to which they are entitled at law or in equity. Both parties further agree to waive any requirement for the securing or posting of any bond in connection with the obtaining of any such equitable relief and that this provision is without prejudice to any other rights that the parties hereto may have for any failure to perform this Agreement.

(12) Captions. The Article, Section and paragraph captions herein are for convenience only, do not constitute part of this Agreement and shall not be deemed to limit or otherwise affect any of the provisions hereof.

(13) Confidentiality Agreement. Issuer hereby waives the restrictions on Grantee's acquisition of Shares contained in the Confidentiality Agreement to the extent necessary to permit Grantee to exercise the Option and purchase the Option Shares as herein provided.

IN WITNESS WHEREOF, Issuer and Grantee have caused this Stock Option Agreement to be signed by their respective officers thereunto duly authorized, all as of ●.

<u>EXHIBIT E</u>

Agreement to Submit Merger Agreement to Stockholders Notwithstanding Withdrawal of the Board of Directors' Recommendation (see DGCL §251(c))

5.2 Company Stockholders' Meeting.

(a) The Company shall take all action necessary under all applicable Legal Requirements to call, give notice of and hold a meeting of the holders of Company Common Stock to vote on a proposal to adopt this Agreement (the "Company Stockholders' Meeting"). Subject to Section 5.2(e), the Company Stockholders' Meeting shall be held (on a date selected by the Company in consultation with Parent) as promptly as practicable after the Form S-4 Registration Statement is declared effective under the Securities Act. The Company shall ensure that all proxies solicited in connection with the Company Stockholders' Meeting are solicited in compliance with all applicable Legal Requirements.

(b) Subject to Section 5.2(c): (i) the Proxy Statement shall include a statement to the effect that the board of directors of the Company recommends that the Company's stockholders vote to adopt this Agreement at the Company Stockholders' Meeting (the recommendation of the Company's board of directors that the Company's stockholders vote to adopt this Agreement being referred to as the "Company Board Recommendation"); and (ii) the Company Board Recommendation shall not be withdrawn or modified in a manner adverse to Parent, and no resolution by the board of directors of the Company or any committee thereof to withdraw or modify the Company Board Recommendation in a manner adverse to Parent shall be adopted or proposed.

(c) Notwithstanding anything to the contrary contained in Section 5.2(b), at any time prior to the adoption of this Agreement by the Required Company Stockholder Vote, the Company Board Recommendation may be withdrawn or modified in a manner adverse to Parent if: (i) a proposal to acquire (by merger or otherwise) all of the outstanding shares of Company Common Stock is made to the Company and is not withdrawn; (ii) the Company provides Parent with at least five business days prior notice of any meeting of the Company's board of directors at which such board of directors will consider and determine whether such offer is a Superior Proposal; (iii) the Company's board of directors determines in good faith (based upon a written opinion of an independent financial advisor of nationally recognized reputation) that such offer constitutes a Superior Proposal; (iv) the Company's board of directors determines in good faith, after having taken into account the written advice of the Company's outside legal counsel, that, in light of such Superior Proposal, the withdrawal or modification of the Company Board Recommendation is required in order for the Company's board of directors to comply with its fiduciary obligations to the Company's stockholders under applicable law; and (v) neither the Company nor any of its Representatives shall have violated any of the restrictions set forth in Section 4.3.

(d) The Company's obligation to call, give notice of and hold the Company Stockholders' Meeting in accordance with Section 5.2(a) shall not be limited or otherwise affected (except as provided in Section 5.2(e)) by the commencement, disclosure, announcement or submission of any Superior Proposal or other Acquisition Proposal, or by any withdrawal or modification of the Company Board Recommendation.

(e) Notwithstanding anything to the contrary contained in this Agreement, if the Company Board Recommendation shall be withdrawn or modified in a manner adverse to Parent, then, at the request of Parent:

(i) the Company shall call, give notice of and hold the Company Stockholders' Meeting on a date and at a time and place determined by Parent;

(ii) the Company shall set a record date for persons entitled to notice of, and to vote at, the Company Stockholders' Meeting on a date determined by Parent;

(iii) the Company shall cause its transfer agent to make a stockholder list and other stock transfer records relating to the Company, and shall cause any depositary for the Company Common Stock to make a position list and any other relevant information, available to Parent;

(iv) the Company shall waive any standstill or similar provisions applicable to Parent;

(v) a copy of the opinion of [investment banker for the Company] shall be included in the Joint Proxy Statement, provided that the Joint Proxy Statement may also include such additional disclosure regarding such opinion as [investment banker for the Company] may reasonably require; and

(vi) the Company shall render such other assistance to Parent in the solicitation of proxies by Parent in favor of the adoption of this Agreement and otherwise in connection with the Company Stockholders' Meeting as Parent may reasonably request.

EXHIBIT F

Summary of Hart-Scott-Rodino Amendments

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 has been amended, effective February 1, 2001, to increase both the "size of the transaction" threshold and the filing fees for larger transactions and to effect other changes.

- The size of the transaction threshold has been increased to $50 million from $15 million. The 15% of voting securities threshold has been abolished. Acquisitions valued at $50 million or less are not reportable, without regard to the percentage of voting securities acquired.

- The "size of the person test" has been eliminated for transactions valued above $200 million. The size of the person test (which generally requires one party to a transaction to have sales or assets of $100 million or more and the other party to have sales or assets of $10 million or more) remains applicable to transactions valued at $200 million or less.

- A new three-tier filing fee structure has been established. Previously, the fee for all reportable transactions was $45,000. Under the new legislation the acquiring person will pay the following:

Size of the Transaction	***Fee***
Less than $100 million	$ 45,000
At least $100 million but less than $500 million	$125,000
$500 million or more	$280,000

- Starting in September 2004, the size of the transaction and size of the person thresholds and the filing fees will be adjusted each fiscal year to account for changes in the Gross National Product during the previous year.

- The new legislation also provides that the waiting period following substantial compliance with a second request is 30 days, rather than 20 days. With regard to cash tender offers and bankruptcy transactions, the 10-day waiting period following compliance with a second request has not changed.

- Any waiting period that ends on a Saturday, Sunday or legal public holiday will be extended to the next regular business day.