PENN STATE
LAW REVIEW

Transcripts

Negotiating Acquisitions of Public Companies in Transactions Structured as Friendly Tender Offers[1]

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Commentator

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Tom Johnson;[6] MJ Moltenbrey;[7]
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INDEX

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I. INTRODUCTION

RICK CLIMAN: (Moderator)

Good morning everyone, and welcome to our presentation. Our topic today is negotiating acquisitions of public companies, and with us on the panel are:

- Gar Bason, an M&A partner at the law firm of Davis Polk & Wardwell in New York City;
- Fred Green, an M&A partner at the law firm of Weil, Gotshal & Manges in New York City; and
- Joel Greenberg, an M&A partner at the law firm of Kaye Scholer in New York City.

We are also joined by:

- Tom Johnson of the well-known strategic communication advisory firm of Abernathy MacGregor in New York City;
- Rachel Posner, General Counsel of Georgeson, a leading proxy solicitation firm in New York City;
- Lisa Schmidt, a litigation partner at the Delaware law firm of Richards, Layton & Finger in Wilmington; and
- MJ Moltenbrey, an antitrust partner in the Washington, D.C. office of the law firm of Dewey & LeBoeuf.

My name is Rick Climan. I'm a partner in the Mergers & Acquisitions Group at Dewey & LeBoeuf in Silicon Valley, California, and I have the distinct privilege of chairing this session.

As the title of this segment suggests, we're going to be confining our discussions this morning to acquisitions of *publicly traded* companies. More specifically, we're going to limit our focus to acquisitions of U.S.-based Delaware corporations with shares listed on a U.S. securities exchange. We will not be addressing acquisitions of privately held companies, which will be covered in a separate panel this afternoon.[10]

With cash remaining the acquisition currency of choice in today's M&A marketplace, we're going to further limit our discussions this morning to deals in which the acquisition currency used to pay the purchase price consists exclusively of cold, hard cash on the barrelhead, as distinct from, say, shares of the buyer's stock or some other form of non-cash consideration.

A quick note on terminology: for ease and consistency of reference throughout the presentation this morning, we're going to be using the term "target company," or simply "target," to refer to the public company that is being acquired by the buyer.

In this realm of cash acquisitions of U.S.-based publicly traded companies, we're going to emphasize a particular deal structure that has become quite popular in today's M&A marketplace, at least for strategic acquirers. This is the so-called "two-step" acquisition structure, comprising a first-step, friendly cash tender offer made by the buyer for the

10. Byron F. Egan et al., *Private Company Acquisitions: A Mock Negotiation*, 116 PENN ST. L. REV. 743 (2012).

outstanding shares of the target company, followed by a second-step, back-end, clean-up cash merger in which the price per share payable to the target company's stockholders is exactly the same as the price per share paid for shares tendered in the first-step tender offer.[11]

Please turn to the materials for our presentation, as I think you're going to want to follow along.[12] They include a series of excerpts both from the preliminary deal documentation and from the definitive acquisition agreement for a hypothetical two-step cash acquisition of a publicly traded Delaware corporation. You may want to turn to the index to the materials to get a general sense of what we're going to be covering this morning.

Our format today, as advertised, is going to be a modified mock negotiation. Fred Green will generally play the role of outside counsel for the buyer, which we're going to assume for most purposes today is a strategic buyer and not a private equity fund or so-called "financial" buyer. Gar Bason will generally play the role of the lawyer for the publicly traded target company. I will act as the not-necessarily-neutral moderator, referee, and peacekeeper all rolled into one, reserving to myself the right to take sides and flip-flop as I see fit.

11. See *infra* Appendix P for an illustration of a two-step acquisition transaction. For a discussion of acquisitions of public companies structured as one-step, *stock-for-stock* mergers, see Richard E. Climan, Joel I. Greenberg, Lou R. Kling & Norman Veasey, *Negotiating Acquisitions of Public Companies*, 10 U. MIAMI BUS. L. REV. 219 (2002). *See also* MERGERS AND ACQUISITIONS COMMITTEE, ABA SECTION OF BUSINESS LAW, MODEL MERGER AGREEMENT FOR THE ACQUISITION OF A PUBLIC COMPANY (2011) [hereinafter MODEL MERGER AGREEMENT].

12. The presentation materials can be found in the appendices to this article.

I'm going to be asking both Fred and Gar to step out of character frequently today to illuminate their negotiating strategies, and I'll also be soliciting comments from Joel Greenberg, who will help us understand the way these deals work. In addition, I'm going to be requesting comments from the others on the podium on issues that fall within their respective spheres of expertise.

II. CHOICE OF STRUCTURE: ONE-STEP *VS.* TWO-STEP TRANSACTIONS

RICK CLIMAN: (Moderator)

Before we get into the give and take of the actual deal negotiation, let's take a moment to examine some relevant threshold considerations.

Fred, your client, the buyer, is seeking to buy a public target company for cash. Why use this two-step structure? It seems very complicated. What's wrong with the straightforward, tried and true single-step cash merger with which almost everyone in this audience is very familiar? That's the structure in which the target company merges, either directly with the buyer or—more typically—with a subsidiary of the buyer, and in which each of the outstanding shares of the target company's stock is converted into the right to receive the per-share purchase price in cash, all in a single step.[13] This one-step structure gets you to the very same place as the two-step structure, and it would certainly seem to be a lot simpler.

FRED GREEN (Counsel for Buyer):

Rick, there's nothing wrong with a one-step deal and there are lots of transactions which still get done using a one-step structure. In a

13. See *infra* Appendix O for an illustration of a one-step, reverse subsidiary cash merger.

one-step deal, you sign the merger agreement and announce it, and then the target company prepares a proxy statement and clears it with the SEC, mails the proxy statement to its stockholders and holds a meeting of its stockholders to vote on the merger.

In a two-step structure, you again begin by signing and announcing the acquisition agreement, but the buyer promptly begins a tender offer for the target company's shares. The tender offer will lead, if it is successful, to a back-end merger, perhaps without the need for a vote of the target's stockholders at the end of the process.[14]

The main advantage of a two-step structure in an all-cash deal is the potential time savings you can achieve in executing the transaction compared to a one-step deal. As we will discuss later in the presentation,[15] the parties hope to avoid the need for a meeting of the target's stockholders after the front-end tender offer. They want to get right to a short-form back-end merger, and they can do this if they've had a highly successful tender offer in which the buyer has acquired at least 90% of the target's outstanding shares.

But a two-step structure has another timing-related advantage even where the tender offer attracts a majority, but less than 90%, of the target's outstanding shares and the parties have to do the back-end merger as a long-form merger. The advantage is that the buyer will have cut off the interloper risk once the tender offer is completed, and that alone can be a very important benefit.

14. *See infra* Part V; *see also infra* Appendix P (providing an illustration of a two-step acquisition transaction).
15. *See infra* note 62 and accompanying text.

RICK CLIMAN: (Moderator) What, exactly, do you mean when you refer to "interloper risk"?

FRED GREEN (Counsel for Buyer): From the buyer's standpoint, once you have committed to go forward with the acquisition, you don't want to lose. And you lose if an interloper—and by that I mean a competing bidder—shows up with a higher offer before the buyer has acquired control of the target company. So in the right circumstances, the two-step structure can help the buyer protect the transaction by shortening the period in which an interloper can come in, even where the buyer cannot close the back-end merger transaction concurrently with the closing of the tender offer.

RICK CLIMAN: (Moderator) You save time by utilizing a two-step structure rather than a one-step structure because in a two-step structure you can begin the tender offer very soon after you sign the acquisition agreement, and the tender offer has to stay open for only 20 business days—about a month.[16] You can get a two-step deal done in about a month, or a little longer given the time it may take to prepare the tender offer materials before you commence the tender offer.

FRED GREEN (Counsel for Buyer): That's absolutely right. If you have the time, then you will begin preparing the tender offer materials while you're negotiating the acquisition agreement, and literally within a day or two after the acquisition agreement is signed, you file your tender offer materials with the SEC[17] and commence the tender offer.

16. *See infra* note 54.

17. The buyer is required to file a Schedule TO, which includes the buyer's Offer to Purchase, with the SEC "as soon as practicable on the date of the commencement of the tender offer." 17 C.F.R. § 240.14d-3(a)(1) (2011). In a negotiated transaction, the parties will typically include the recommendation of the target company's board of directors in the tender offer materials, which requires the target company to file a Schedule 14D-9 with the SEC at the same time. 17 C.F.R. § 240.14d-9(b)(1) (2011).

If the tender offer is received well in the market, then 20 business days later the buyer can close on the tender offer. And—if the tender offer has been received extremely well, so that the buyer ends up with 90% or more of the target's outstanding shares, the buyer can close the back-end merger immediately upon the completion of the tender offer.[18]

RICK CLIMAN: (Moderator) And even if you get SEC comments on your tender offer documents, those comments will come while that 20-business-day clock is running, right?

FRED GREEN (Counsel for Buyer): Right. You typically get SEC comments on tender offer documents sooner than you do on a preliminary proxy statement, where a month or so is the typical turnaround time for the SEC.[19] If you receive comments well in advance of the expiration of the tender offer, you will not have to delay the expiration of the tender offer, nor in most instances will you be required to mail a supplement to your tender offer materials to the target's stockholders.[20]

18. *See infra* notes 62-63 and accompanying text.

19. Given that a tender offer may be commenced as soon as a tender offer statement is filed and disseminated, and that the offer need only remain open for a 20-business-day period, the SEC will review and provide comments on the tender offer statement in an expedited manner. See Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 33-7760, Exchange Act Release No. 34-42055, Investment Company Act Release No. 24107, 64 Fed. Reg. 61408 (Nov. 10, 1999), for a discussion of the SEC's commitment to review tender offer documents in an expedited manner.

20. *See* Amendments to Tender Offer Rules—All-Holders and Best-Price, Investment Company Act Release No. 15199, Exchange Act Release No. 34-23421, Securities Act Release No. 33-6653, 36 SEC Docket 96-01 (July-11, 1986) ("The minimum period during which an offer must remain open following material changes in the terms of the offer or information concerning the offer, other than a change in price or percentage of securities sought, will depend on the facts and circumstances, including the relative materiality of the terms or information. As a general rule, the [SEC] is of the view that, to allow dissemination to shareholders "in a manner reasonably designed to inform them of such change" (17 C.F.R. 240.14d-4(c)), the offer should remain open for a minimum of five business days from the date that the material change is first published, sent or given to security holders. If material changes are made with respect to information that approaches the significance of price and share levels, a minimum period of ten business days may be required to allow for adequate dissemination and investor response. Moreover, the five business day period may not be sufficient where revised or

RICK CLIMAN: (Moderator) In contrast, if you're doing a single-step deal and you get SEC comments, the applicable clock hasn't even begun to run. Fred, what is the "clock" that applies in a single-step deal? And when does that "clock" actually start running? Please walk us through the timing considerations.

FRED GREEN (Counsel for Buyer): In a one-step deal, if you have adequate time, you can begin to prepare your proxy statement before the merger agreement is signed and announced. You might have a separate team of lawyers working on the proxy statement while you're negotiating the merger agreement. When you have that luxury, you should be able to file a preliminary proxy statement within a week or so after the merger agreement is signed. More typically, however, even though you may have started work on the proxy statement before the merger agreement is signed, much work remains to be done after the merger agreement is signed. And, of course, input from both parties is needed, as is input from the target's investment banker.

So normally the target will not be ready to file its proxy statement until about two or three weeks after the merger agreement is signed. Roughly 30 days after filing the proxy statement, you would expect to receive SEC comments. Of course, it always is possible that the SEC staff will choose not to review the proxy statement, which you should know by the end of the 10-day waiting period.[21] If the

additional materials are required because disclosure disseminated to security holders is found to be materially deficient. Similarly, a particular form of dissemination may be required. For example, amended disclosure material designed to correct materially deficient material previously delivered to security holders would have to be delivered rather than disseminated by publication.").

21. *See* 17 C.F.R. § 240.14a-6 (2011) (requiring five copies of the proxy statement and form of proxy to "be filed with the [SEC] at least 10 calendar days prior to the date definitive copies of such material are first sent or given to security holders. . . .").

proxy statement is reviewed by the SEC, and assuming the parties know what they're doing and there aren't any special wrinkles, you should be able to resolve the SEC comments in a week to ten days, and then mail the final proxy statement to the target's stockholders.

So you're already out close to 60 days after the announcement of the deal when you're first ready to mail the proxy statement. Compare that to a two-step deal where the parties could conceivably already have closed on the tender offer by that time. And in a one-step deal, the "clock" doesn't even start ticking until you've mailed the proxy statement to stockholders. Once you've mailed out the proxy statement, you have a minimum of another 20 days[22] to solicit proxies. Then the target would have its stockholder meeting and the merger would close on the day of the meeting. So, assuming SEC review, call it a period of three to four months from announcement to closing in a typical one-step transaction, with the buyer

22. In a one-step merger transaction, after the proxy statement is cleared by the SEC, the target company sets a shareholder meeting date that complies with the laws of its state of incorporation as well as the requirements of its organizational documents. For example, Section 251(c) of the Delaware General Corporation Law requires that shareholders receive notice at least 20 *calendar* days prior to the stockholder meeting at which the merger is to be voted upon. 8 DEL. CODE ANN. tit. 8, § 251(c) (West 2012). Under the federal securities laws, if a buyer is registering securities that are to be issued as part of the merger consideration on Form S-4 (which would serve as both a proxy statement and a prospectus) and is incorporating into the Form S-4 certain information by reference, the SEC requires that the prospectus/proxy statement be distributed to shareholders at least 20 *business* days prior to the shareholder meeting date. *See* General Instructions, Note A to Form S-4.

The time it actually takes to solicit a sufficient number of proxies to ensure obtaining the requisite stockholder vote in the context of a one-step merger transaction varies. The needed time is determined primarily by (1) how many shares the buyer already owns, (2) how closely the remaining shares are held and the breakdown between institutional and retail shareholders, and (3) what percentage of the target's outstanding shares is required to approve the merger under the law of the target's state of incorporation and under the target's charter documents.

subject to interloper risk up until the time of the stockholder vote.[23]

RICK CLIMAN: (Moderator)

So you're potentially looking at a three- to four-month process for a one-step transaction versus five to six weeks for a two-step transaction. There's obviously a timing advantage from the buyer's standpoint in using a two-step structure rather than a one-step structure.

Gar, as counsel for the target company, would you typically object to a two-step structure? Might you actually prefer a lengthier period between signing and closing to maximize the chance that a higher bid might emerge?

GAR BASON: (Counsel for Target)

Normally not. Fred and I have our own mantras. One of my mantras as target's counsel is, "Time is not on our side." And that's because while Fred is worried about an interloper coming in, I'm worried about two other things. First, I'm worried about getting money to the target's stockholders as quickly as possible. Second, I'm worried even more about deal risk.

We live in risky times with market problems and any manner of other problems that might affect the buyer's ability to close and that might affect my client's business and the continued accuracy of its representations and warranties in the acquisition agreement. Any day that the transaction has not yet closed is a day when my business can suffer a problem which—even though it's inconceivable to me that Fred's client would ever change its mind

23. The period it takes to complete a one-step merger transaction may be shortened significantly (*e.g.*, by 30 days or more) if the SEC declines to review and comment upon the target company's proxy statement. Typically, the SEC advises the target company within 10 days after the filing date as to whether it will be reviewing and commenting upon the proxy statement. *See supra* note 21.

about doing the deal—could give Fred's client, the buyer, the right to walk away. So I'm interested in getting to the closing quickly, and 20 business days nowadays is plenty of time for the investment banking community to find other potential suitors for the target. As Chancellor Strine has said, the banking industry is not shy and retiring.[24] A month is plenty of time.

RICK CLIMAN: (Moderator) So, bottom line, our parties are in violent agreement, perhaps for the only time today: two steps are generally better than one. But let's talk about the circumstances in which the parties might actually prefer a one-step deal over a two-step deal.

Fred, as deal lawyers we used to complain about SEC Rule 14d-10,[25] the so-called "best-price" rule, and its potential application in the friendly tender offer context. What was the problem and how did the SEC fix it?

FRED GREEN: (Counsel for Buyer) Rule 14d-10 under the '34 Act is known as the "all-holders, best-price" rule. That rule provides that all stockholders who are

24. *See, e.g.*, *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1006-07 (Del. Ch. 2005) (noting disagreement with the characterization by plaintiffs that the M&A market is "comprised of buyers of exceedingly modest and retiring personality, too genteel to make even the politest of uninvited overtures"). Rather than shy suitors waiting to be asked to dance, "[t]hey are not like some of us were in high school. They have no problem with rejection. . . . [S]trategic buyers have not felt shy about 'jumping' friendly deals crafted between their industry rivals." *Id.* at 1008. Indeed, "capitalists are not typically timid, and any buyer who seriously [wants to buy a company could send] a bear hug letter at any time, if it wanted to be genteel about expressing an interest." *Id.* at 1009.

Of course, there may be situations, such as if the company was not shopped at all pre-signing, where the board needs some room for a post-signing market check. Even then, a month from announcement to closing of the tender offer could be more than enough time depending on the circumstances. But where the company was adequately shopped over an extended period, "the decision to time limit the final auction process cannot be deemed unreasonable given the length of the process . . . and the risk of losing one of the finalists." *Id.* at 1009.

25. 17 C.F.R. § 240.14d-10 (2006).

tendering shares have to be paid the same per-share consideration.[26] The purpose of the rule is to prevent unfair treatment and coercive tender offers—like the old "early bird special," where those who tendered quickly would receive a higher price for their shares.[27]

Ten or 15 years ago, a split arose in the interpretation of Rule 14d-10 by the federal courts, with some courts interpreting the rule more broadly to encompass payments and other benefits received by tendering stockholders *outside* the tender offer, including, for example, in their capacities as employees of the target. These courts took the position that Rule 14d-10 was implicated because stockholders who were also employees were being treated differently from non-employee stockholders.[28] That set off all sorts

26. *Id.* ("(a) No Bidder shall make a tender offer unless: (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and (2) The consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.").

27. Amendments to Tender Offer Rules—All-Holders and Best-Price, Investment Company Act Release No. 15199, Exchange Act Release No. 34-23421, Securities Act Release No. 33-6653, 36 SEC Docket 96-01 (July 11, 1986) ("Without the all-holders and best-price requirements, the investor protection purposes of the Williams Act would not be fully achieved because tender offers could be extended to some security holders but not to others. Such discriminatory tender offers could result in the abuses inherent in 'Saturday Night Specials,' 'First-Come First Served' offers and unconventional tender offers since security holders who are excluded from the offer may be pressured to sell to those in the included class in order to participate, at all, in the premium offered."). *Id.*

28. *See, e.g.*, Gerber v. Computer Assocs. Int'l, 303 F.3d 126, 128 (2d Cir. 2002) ("Gerber alleged that, in acquiring On-Line, CA paid more money per share to Jack Berdy, On-Line's chairman and chief executive officer, than it paid to other On-Line shareholders, in violation of various provisions of the Williams Act, 15 U.S.C. §§ 78l(i), 78m(d)-(e), and 78n(d)-(f), and regulations promulgated thereunder, 17 C.F.R. § 240.14d-10."); Mark Khmelnitskiy, Note, *Structuring Transactions Outside All Holders/Best Price Rule*, 9 FORDHAM J. CORP. & FIN. L. 501, 502-503 (2004) ("While the provisions of Rule 14d-10 addressed the original purpose of protecting security holders from coercive tender offers, within the past decade, Rule 14d-10 has been invoked as a sword to invalidate agreements made in conjunction with tender offers, or make the agreements a part of the tender offers. These agreements, although frequently conferring various benefits upon key employees and management, who are usually large security holders, nevertheless do not constitute a greater consideration for the tendered securities. The courts, however, have entertained allegations that such agreements violate Rule 14d-

of alarm bells, and what we essentially saw was a significant fall-off in the use of two-step transactions.[29]

The SEC finally addressed this issue in 2006 by amending Rule 14d-10.[30] The amendments clarified that Rule 14d-10 is *not* intended to apply to compensatory arrangements. Rather, it is intended to apply more narrowly to the actual consideration paid for shares tendered in the tender offer.
It took a while for the market to digest the new rule and for two-step transactions to catch back on, but within a couple of years they came back into fashion, and, as you'll hear, they are now widely used.[31]

RICK CLIMAN: (Moderator) The Rule 14d-10 amendments were a wonderful example of the SEC actually listening to the practical concerns of deal practitioners.

Joel, suppose the buyer here, instead of being a strategic buyer as we posited, were a private equity buyer, a financial buyer. Could that affect the buyer's preference for a two-step structure over a one-step merger structure?

10 and created controversy in interpreting payments and promises made near, or in relation to, tender offers.") (citations omitted).

29. Of the 212 transactions surveyed by the Negotiated Acquisitions Committee (now known as the Mergers & Acquisitions Committee) of the Section of Business Law of the American Bar Association ("ABA M&A Committee") for its "2007 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study" covering M&A transaction announced in 2005 and 2006, only 15 (7%) were structured as tender offers. ABA M&A COMMITTEE, *2007 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study*, *available at* http://apps.americanbar.org/dch/committee.cfm?com=CL560003.

30. Amendments to the All Holders Best-Price Rules, Exchange Act Release No. 34,54684, 2006 SEC LEXIS 2536, 1 (2006) ("These amendments are intended to make it clear that the best-price rule was not intended to capture employment compensation, severance or other employee benefit arrangements.").

31. *See infra* note 44 and accompanying text.

JOEL GREENBERG: (Commentator)

It definitely would, because a private equity firm or other financial buyer will generally be using debt financing to fund a significant portion of the purchase price. A two-step deal presents the very real possibility that, if the buyer is unable to reach the 90% ownership threshold that would enable it to do the back-end merger as a short-form merger, it could be required to take down and pay for somewhere between 50% and 90% of the target's outstanding shares at the closing of the tender offer. Then, given the need to go through the SEC proxy or information statement process for the second step, it could be another two months or more before the buyer could effect a long-form merger and acquire the remainder of the outstanding shares.[32]

That interim period is very uncomfortable for financing sources, because the only available collateral is a majority stock position in a target that still has a public stub; the direct security in the target's assets that lenders prefer is not available until the buyer acquires 100% ownership of the target through the second-step merger. The lenders also have to be concerned about the margin rules in this scenario.[33] While it's not impossible to finance a deal on this basis, it is certainly more challenging and costly.

32. *See infra* notes 62-63 and accompanying text.

33. Acting under Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g (2006), which requires the adoption of "rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security . . ."), the Board of Governors of the Federal Reserve System has adopted the margin rules: Regulation T ("Credit by Brokers and Dealers"), 12 C.F.R. Part 220; Regulation U ("Credit by Banks and Persons Other Than Brokers or Dealers for the Purpose of Purchasing or Carrying Margin Stock"), 12 C.F.R. Part 221; and Regulation X ("Borrowers of Securities Credit"), 12 C.F.R. Part 224. The general effect of these requirements is to limit the amount of secured (or indirectly secured) debt financing for the purchase of such a majority stock position to 50% of its value.

Of course, a buyer could set a 90% minimum condition for its tender offer, which would eliminate the problem because with 90% ownership it could do a short-form merger and eliminate the time gap between the completion of the front end and the back end. But a buyer really wouldn't want to do that because it could have a very successful bid and still not meet the 90% condition, and then there's no deal.

RICK CLIMAN: (Moderator) And of course it's not just the *buyer* that wouldn't want the 90% minimum condition . . .

GAR BASON: (Counsel for Target) That's right. As target counsel, I get a vote here too, and I would be getting red in the face pointing out that in a sample size of thousands of U.S. acquisitions, there were maybe two that had 90% minimum tender conditions.[34]

FRED GREEN (Counsel for Buyer): You certainly could see a scenario where the buyer would be fine having a 90% minimum tender condition because it adds optionality and addresses the financing condition that Joel described. The buyer can always waive the condition and close with fewer shares tendered as long as there are tenders for a majority of the outstanding shares. But a 90% condition is never used in practice. The target would never agree to that high a minimum condition.

JOEL GREENBERG: (Commentator) Both parties share that same concern. We have seen a couple of examples of a hybrid structure which was pioneered in the Burger King transaction,[35] where the bidder went out concurrently with a tender offer and a merger proxy statement and, if it couldn't reach the 90% short-form ownership threshold in the tender offer, it could immediately switch to the one-step mode and conclude the transaction

34. *See infra* note 66 and accompanying text.
35. *See* Burger King Corp., Current Report (Form 8-K) (Sept. 3, 2010).

that way. That's expensive, because you're doing two transactions at once, and I think it's only been followed once that I'm aware of.

GAR BASON: (Counsel for Target) The SEC Staff has weighed in on that, and has expressed concern at the concept of having a proxy statement out there when the tender offer is "live." The worry is that the proxy statement could be considered an offer for a potential acquisition outside the tender offer, which is prohibited by Rule 14e-5.[36] So you have to terminate the tender offer or wait until after it has expired before a proxy statement can be filed.

RICK CLIMAN: (Moderator) So Joel, putting aside the Burger King situation and the Gymboree situation,[37] which is the other situation where this hybrid structure was used, is it fair to say that deals in which private equity buyers, or for that matter strategic buyers, need debt financing are still almost always done as one-step mergers?

JOEL GREENBERG: (Commentator) That's right. The burden of financing that first step is too great. There have been a few transactions, particularly in the middle market, in which a private equity firm provided its own bridge financing for a tender offer,[38] but that's rare.

GAR BASON: (Counsel for Target) Particularly now where virtually every deal that's out there is getting flexed to the max and

36. Rule 14e-5 prohibits purchases of any subject securities except as part of the tender offer, from the time of public announcement of the tender offer until the tender offer expires. 17 C.F.R. § 240.14e-5 (2011). The Chief of the Office of Mergers and Acquisitions of the Division of Corporation Finance of the SEC has stated that the Staff views the filing of a preliminary or definitive proxy statement for a second-step merger while the first-step tender offer is pending as a violation of Rule 14e-5. *See Securities Regulations and Compliance Alert* (Skadden, Arps, Slate, Meagher & Flom LLP, Wash., D.C.), Dec. 20, 2011, at 1.

37. *See* Gymboree Corp., Current Report (Form 8-K) (Oct. 12, 2010).

38. *See, e.g.*, Onex Rescare Acquisition, LLC, Tender Offer Statement (Schedule TO) (Oct. 7, 2010) (in respect to the acquisition of Res-Care, Inc.).

beyond . . .

RICK CLIMAN: (Moderator)

Rachel, let me turn to you, because you work at a firm that solicits proxies in one-step deals and that also gets involved in helping buyers solicit tenders in two-step deals. Might the parties prefer a two-step tender offer deal over a one-step merger on the theory that it's somehow easier for a buyer to solicit tenders than it is for a target company to solicit proxies?

RACHEL POSNER: (Information Agent)

Yes. We all would think it's probably easier to solicit tenders than it is to solicit votes. That being said, we have seen situations where index funds have to abide by a firm mandate not to tender, and that can actually hold up a two-step deal. Index funds generally prefer to get squeezed out in the back-end merger.[39] So where a large number of target shares are held by index funds, it may actually be preferable to structure the acquisition as a one-step merger rather than as a tender offer.

RICK CLIMAN: (Moderator)

Rachel, let me ask you another question. ISS[40] scrutiny is a hot issue now in many large and even not-so-large M&A transactions, and it's certainly of great concern to some of your firm's clients. Does structuring a deal as a tender offer rather than a one-step merger

39. *See, e.g.*, David Fox, Daniel E. Wolf & Susan J. Zachman, *Some Tender Offer Quirks*, Kirkland & Ellis LLP Client Memorandum (Oct. 9, 2009) (describing generally understood index fund policies and practices). For example, index funds typically will not tender into an offer where the market price is above the offer price. "Moreover, many will not tender into an offer at all, regardless of the relationship of the market price to the offer price, so long as the stock is still included in the relevant index the fund is mirroring or tracking." *Id.*

40. "ISS is the leading provider of corporate governance solutions to the global financial community. More than 1,700 clients rely on ISS' expertise to help them make more informed investment decisions on behalf of the owners of companies. ISS' services include objective governance research and analysis, end-to-end proxy voting and distribution solutions, turnkey securities class-action claims management, and reliable governance data and modeling tools." *About ISS*, ISS AN MSCI BRAND, http://www.issgovernance.com/about (last visited Jan. 13, 2012).

actually avoid ISS scrutiny?

RACHEL POSNER: (Information Agent) Once upon a time people would prefer to structure a deal as a tender offer to avoid ISS scrutiny. But today, ISS scrutiny reaches far and wide and structuring your deal as a tender offer does not always avoid ISS scrutiny.[41]

RICK CLIMAN: (Moderator) Joel, are there any other reasons why a buyer might not prefer a two-step structure in an all cash acquisition?

JOEL GREENBERG: (Commentator) Yes, Rick. Regulatory reasons, such as a perceived antitrust issue that might lead to a "second request" [42] or a regulatory approval

41. According to ISS, its "US research team generally provides proxy analyses and voting recommendations for common shareholder meetings of publicly-traded U.S. companies that are held in [its] institutional investor clients' portfolios." ISS, FREQUENTLY ASKED QUESTIONS ON US POLICY INTERPRETATION AND RESEARCH, http://www.issgovernance.com/policy/USResearchFAQ (last visited Feb. 17, 2012). While ISS's policies do not require ISS to provide recommendations with respect to acquisition transactions—such as friendly tender offers—that do not initially entail a meeting of stockholders, in practice ISS does provide recommendations with respect to certain such transactions. *See, e.g.*, Press Release, Agrium urges CF stockholders to tender shares into Agrium offer of $40.00 in cash plus one Agrium share per CF share, which expires June 22 (June 16, 2009), *available at* http://www.agrium.com/news/05784_9328.jsp ("ISS . . . the leading independent proxy voting and corporate governance advisory firm, has recommended that stockholders of CF Industries Holdings, Inc . . . tender their shares into Agrium's exchange offer of $40.00 in cash plus one Agrium share per CF share."); *see also Interview: Chris Young of ISS/RiskMetrics*, THE PROXY FILES (Morrow & Co, LLC, Stamford, Conn.) April 2010, at 7, *available at* http://www.morrowco.com/knowledge_base/PDF/theProxyFilesAPR10.pdf (explaining that ISS does not "promise systematic 100% coverage of tender offers as . . . for merger proxies," but generally covers tender offers that are contentious and where a recommendation may make a difference in the outcome).

42. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a) (the "HSR Act"), requires parties to provide notice of mergers and acquisitions that meet certain size thresholds to the Federal Trade Commission and U.S. Department of Justice. An HSR Act filing triggers an initial 30-day waiting period during which the transaction cannot be consummated, although transactions that do not raise substantive antitrust concerns routinely receive early termination of the waiting period. *Id.* at § 18(b)(1). If a transaction raises antitrust issues, the regulators can issue a "second request" for information, which extends the waiting period during which the transaction cannot close until 30 days after the parties have substantially complied with the second request, a process that can take several months. *Id.* at § 18(e). In the case of an all-cash tender offer (including a "friendly," negotiated cash tender offer of the type discussed in this article), the HSR Act waiting period is only 15 days, or 10 days after substantial compliance with any second request. *Id.* at § 18(b)(1).

that's going to take time, in an insurance company or bank acquisition, for example. In these cases, the speed advantage of the two-step structure is actually a disadvantage. The buyer can't take down the shares in the first-step tender offer without clearing the regulatory hurdles, because it is generally the buyer's acquisition of shares over a specified threshold that is prohibited without regulatory approval.

But you can take a vote of stockholders before obtaining regulatory approval, because the vote by itself doesn't give the buyer control of the target company. It just locks the deal in with stockholder approval, eliminating the interloper risk while you're waiting for the needed regulatory clearance. So if you expect a three- or four-month regulatory process, you're not going to want to make a tender offer and then have to keep extending it, because throughout the time you're extending the tender offer, the deal is vulnerable to interlopers. But if you use the one-step structure, you can hold the stockholder meeting, get the vote out of the way and eliminate the interloper risk early in the process.

There's another situation I can think of in which a one-step merger may be preferable to a two-step structure involving a tender offer. There are some companies with high-low vote structures, with a control block of high-vote shares that could deliver the required vote in a merger transaction, but can't meet the minimum condition in a tender offer because the high vote shares generally convert to low-vote shares upon, among other things, being tendered in a tender offer.[43]

43. *See, e.g.*, Emergency Med. Servs. Corp., Proxy Statement (Schedule 14A) (Apr. 22, 2011) (in respect to acquisition by affiliates of Clayton, Dubeilier & Rice Fund, L.P.).

RICK CLIMAN: (Moderator) Joel, let's tie this all together. If I asked you to run some statistics on the prevalence of two-step deals versus one-step deals in situations where the deal doesn't require debt financing, and where the deal is not antitrust sensitive and does not involve a regulated industry, about what percentage of that universe of deals do you think would be done as two-step deals rather than one-step mergers?

JOEL GREENBERG: (Commentator) It's hard to be precise, because from the outside you can't always tell whether the parties perceived a meaningful antitrust risk or not, but I think it's fair to say a significant majority of the deals that don't present one of these negative factors are now done as two-step deals.[44]

RICK CLIMAN: (Moderator) So for that category of transactions, the two-step deal is not only favorable in theory, but in practice it is the structure used most often.

III. STANDSTILL PROVISIONS

RICK CLIMAN: (Moderator) Let's turn now to the specific documents that the parties will be negotiating, and let's get into some of the back and forth that goes on in the negotiations. We'll begin by spending some time on the preliminary documents—the documents that precede the execution of the definitive acquisition agreement.

44. Of the 126 transactions surveyed by the ABA M&A Committee for its "2011 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study" covering M&A transactions announced in 2010 (the "2011 ABA Study"), 39 (31%) were structured as tender offers, an increase from 7% of the transactions surveyed four years earlier. ABA MERGERS & ACQUISITIONS SUBCOMMITTEE ON M&A TRENDS, *2011 ABA Strategic Buyer/Public Target M&A Acquisitions Deal Point Study*, *available at* http://apps.americanbar.org/dch/committee.cfm?com=CL560003. The 126 transactions surveyed for purposes of the 2011 ABA Study undoubtedly include some antitrust-sensitive transactions and some transactions that required debt financing. The relevant percentage would presumably be higher than 31% if these categories of transactions were excluded from the survey sample.

One particularly important preliminary document, and often the very first document signed by the parties in their transaction, is the confidentiality agreement, the first draft of which is usually prepared by the target company's counsel.

Despite its straightforward title, this is a document that often incorporates important substantive provisions beyond the prospective buyer's basic non-disclosure covenant. These additional substantive provisions may include, for example, a non-solicitation provision—a provision prohibiting the prospective buyer from soliciting the target company's employees for some period of time. But for our purposes, the most important of these additional provisions is the so-called "standstill" provision, which is illustrated [in *Appendix A*].

Gar, what is a standstill and what kinds of restrictions does it incorporate? And what's the target company's rationale for proposing a standstill provision?

GAR BASON:
(Counsel for Target)

A standstill provision basically says to the buyer, "You will not try to buy this target on an unsolicited basis; you won't buy its securities in the open market; you won't make offers to buy the target."

RICK CLIMAN:
(Moderator)

You won't go hostile.

GAR BASON:
(Counsel for Target)

You won't go hostile. And, the rationale is this: it's extraordinarily buyer-friendly to provide your material nonpublic information to a potential buyer, and as a target you would never do that without making sure you basically control your fate, subject to some escape hatches that the buyer may fairly ask for.

Think of two hypotheticals that will help illustrate why this is important. The first hypothetical involves a target thinking about a possible transaction with one prospective buyer in particular. The target is not interested in a broad sale process, but it is interested in discussing a possible deal with one particular prospective buyer—a potential deal it views as highly strategic, and I understand that's a loaded word. The notion is the target will have some discussions with this particular prospective buyer, and will see if there is a deal to be had here. If not, each party will go home—no harm, no foul—and return to business as usual.

From the target's perspective, the nightmare scenario is that it has shown its confidential information to this would-be buyer, and the would-be buyer says, "I'll pay $30 per share to buy your company." The target in good faith says, "No, that number is way too low for us. Let's just go our separate ways." And then a week later the would-be buyer announces a hostile bid at $30 per share. That is a nightmare scenario. In addition to looking foolish, you have also done a very bad thing in that you have given this would-be buyer a leg up on any other potential bidder in the market because this would-be buyer knows what's under the hood.

So that's the first hypothetical, where the going-in premise that I have in discussions with Fred is, "We'd love to have these discussions with you, but the rules of the game are if we can't reach agreement on a friendly basis, your client will not unilaterally go hostile."

Here's the second hypothetical—the second troublesome scenario. In an auction process, the pressure on the target to get some form of standstill—and I'll emphasize the words "some form of standstill," because, as we'll see later, there are standstills and there are standstills—is even higher. That's because if you're trying to run a "process," in quotes, the one thing you want is to be able to control the methodology and timing of that process. And what you really want is an auction where everyone participating puts forth its best bid.

Now, what you worry about as counsel for the target is, if there is nothing that restricts a potential buyer from unilaterally going hostile, then there's also nothing that restricts the potential buyer from not putting its best foot forward in the auction. There's nothing that prevents the potential buyer from laying back, trying to buy the target on the cheap with a lowball bid in the auction, and then trying to subvert the auction process by unilaterally going hostile if the highest bidder in the auction ends up winning the auction at a price that the potential buyer is willing to top.

That is not a result that I want to be possible in an auction situation. So in that situation as well, as counsel for the target, I'm quite concerned with making sure that my client controls the playing field.

RICK CLIMAN: (Moderator) So Fred, Gar has given some good justifications for demanding a standstill in this situation. As the prospective buyer's counsel, what do you think about the proposed standstill provision [in *Appendix A*] that Gar has proposed?

FRED GREEN (Counsel for Buyer): We might try to resist having any standstill at all. After all, this is the earliest possible stage of discussions and we haven't decided that we're interested in doing a deal at all. If we are ultimately interested in doing a deal, it would have to be at a price that we would find attractive, and we don't know today if we will see eye-to-eye on value. There are no limitations on what my client, the prospective buyer, can do today, and we're not asking the target for any binding commitments. So my conversation with Gar might begin with "My client isn't prepared to give up any rights at this point in time, so why don't we just move this process along, start the preliminary conversations and see whether in fact there is a deal to be done, without anybody asking the other party to make concessions."

But the bottom line is that some form of standstill is commonly negotiated. As a prospective buyer you can resist all you want, but if the target has made up its mind to require standstills from all interested parties, in the end you have to decide whether you want to stay in the game and go forward or not. In most cases, going forward requires working out a standstill.

GAR BASON: (Counsel for Target)

There's one thing you often find buyers pushing very hard, both in the one-on-one situation and in the auction sale process. Remember, the target knows what's in its mind. It knows whether it's having one-on-one discussions. It knows whether it's going out to multiple parties. What the buyer is worried about—and it's not an unfair worry—is that it will sign this confidentiality agreement containing a standstill, it will get fairly un-illuminating or scanty confidential information and then the target will cut it off. And the buyer will feel foolish because it's sitting on the bench without the ability to play unilaterally.

But at the end of the day, most buyers conclude that this is likely not the agenda of the target.

RICK CLIMAN: (Moderator) Gar, do you really need this standstill? We have reproduced at the beginning of [*Appendix A*] a use restriction that you might expect to find in a confidentiality agreement. We all know that the basic prohibitions in most M&A-related confidentiality agreements are: (1) the buyer must not *disclose* confidential information; and (2) the buyer must not *use* confidential information except for the specific purpose of pursuing a transaction with the target company. This second prohibition is the use restriction, and it can be written in several different ways.

Clearly if the use restriction in the confidentiality agreement signed by the buyer were identical to the use restriction [in *Appendix A*], and if the buyer used your sensitive information to go hostile on you, then the buyer would be violating that use restriction, because the buyer would be utilizing your confidential information for a purpose other than pursuing a friendly, *negotiated* deal. Why doesn't that give you enough protection?

GAR BASON: (Counsel for Target) Well, I look to the guidance of that famous M&A lawyer Clint Eastwood for my response, which is, "How lucky do you feel?" The answer is, that's a good argument, but if in fact there is no disagreement in principle as to whether or not the prospective buyer can unilaterally go hostile, I don't want there to be any doubt or question. So humor me and let's spell it out in a separate standstill provision.

RICK CLIMAN: (Moderator) Fred, how much attention do you pay to the language of the use restriction in the confidentiality agreement?

FRED GREEN (Counsel for Buyer): Many practitioners don't focus on the use restriction with a standstill mindset, and as a result they may not be sensitive to the fact that some formulations of the use restriction can create a potential back-door standstill. "You shall not use the confidential information except in connection with your assessment of a *negotiated* transaction *between* the buyer and the target," is a back-door standstill. "You shall not use the information except in connection with a potential acquisition *involving* the target" is *not* a back-door standstill.

RICK CLIMAN: (Moderator) Right. The use of the word "negotiated" is obviously important, and the use of the word "between" rather than "involving" is also important. A hostile acquisition of the target is not a transaction *between the buyer and the target*, it's a transaction between the buyer and the target's *stockholders*. But it's pretty clearly a transaction "*involving*" the target.

FRED GREEN (Counsel for Buyer): In fact there is a Canadian case, the *Research in Motion* case,[45] where there was both a standstill provision and a separate use restriction. The parties agreed that the standstill would expire after a given number of months. It expired. The use restriction had a longer term and hadn't expired. The court enjoined the prospective buyer's hostile takeover attempt based on the use restriction, notwithstanding the seemingly clear intent that the standstill commitments would have an earlier termination date. So yes, you have to

45. *See* Certicom Corp. v. Research in Motion (2009), 94 O.R. 3d 511 (Can. Ont. Sup. Ct. J.); *see also* Res. Exploration v. Yankee Oil & Gas, Inc., 566 F. Supp. 54 (N.D. Ohio 1983) (declining to provide preliminary injunctive relief to target of hostile tender offer where (i) information subject to confidentiality agreement was not disclosed in SEC offering materials (and was not required to be so disclosed), (ii) the Court found that the bidder did not rely on the confidential information in making the tender offer, and (iii) confidentiality agreement did not contain a standstill provision).

	worry about the wording of the use restriction as a buyer.[46]
RICK CLIMAN: (Moderator)	So, gentlemen, let's start negotiating. Let's assume there will be a standstill of some sort. I think you'd both agree that standstills are frequently executed in this context, perhaps more frequently than not. Fred, what problems do you have with the version proposed by Gar [in *Appendix A*]?
FRED GREEN (Counsel for Buyer):	OK, so we'll agree to some sort of standstill, but Gar, this one is quite unreasonable. The time of survival of the standstill, which you have as three years, has to be greatly limited; it should not be more than six months. Frankly the information that you are going to share with us is going to lose its value in a relatively short period of time and become stale. So there's no reason why a protracted time period is needed.
GAR BASON: (Counsel for Target)	Six months sounds a little low to me, but I think we can agree to a slightly longer period of time. We're going to be giving you our projections, which are of course rock solid and will guide you in your understanding of the target company for at least a couple of years.

46. In late 2011, Vulcan Materials sought preliminary injunctions in the Delaware Court of Chancery, Answer And Counterclaims of Vulcan Materials Co., Martin Marietta Materials, Inc. v. Vulcan Materials Co. (Del. Ch. 2011) (No. 7102-CS), and the United States District Court for the Northern District of Alabama, Brief for Vulcan Materials, Vulcan Materials Co. v. Martin Marietta Materials, Inc. (N.D. Ala. 2011) (No. 11-4248), against an exchange offer by Martin Marietta, alleging that Martin Marietta's use of confidential information to launch a hostile exchange offer violated confidentiality agreements that did not contain standstill provisions, but limited the use of the confidential information to evaluating a possible business combination transaction between Vulcan Materials and Martin Marietta (the two actions involve different confidentiality agreements; the use restriction in the agreement at issue in the Northern District of Alabama action is less clear). There had not been a decision in either action at the time this article was written in late January 2012; a decision in the Delaware Chancery Court action is expected in April 2012.

RICK CLIMAN: (Moderator)	Gar, if your projections are so "rock solid," will you be willing to include a representation as to their accuracy?
GAR BASON: (Counsel for Target)	No, our word processor doesn't have that form. I would guess nine months or a year is the right time period for a standstill from our perspective.
FRED GREEN (Counsel for Buyer):	That works. But you've swept in all of your affiliates to be protected under the umbrella of this standstill. We are not expecting to get confidential diligence information about all of your affiliates, so we would like to cut the scope back to the target and its subsidiaries. We can talk about wholly owned versus majority controlled subsidiaries, but the provision should be limited to the specific companies my client is looking to buy and as to which you're going to be sharing information.
GAR BASON: (Counsel for Target)	We don't have any upwardly controlling shareholders, so our affiliates—beyond the target and its subs—are very limited. We can work on carving those out.
RICK CLIMAN: (Moderator)	Gar, if I were representing the prospective buyer, I might also object to the fact that the things that are prohibited here seem to go far beyond overtly hostile actions. You're prohibiting Fred's client from buying even a few shares of the target's stock in the open market and, if I read this language correctly, from making even *friendly* acquisition proposals.
GAR BASON: (Counsel for Target)	That's right. There's no such thing as a "friendly" proposal in this context.
RICK CLIMAN: (Moderator)	Why is that?

GAR BASON: (Counsel for Target) There's no such thing as a "friendly" proposal, Rick, because if you're out there with our information and we've decided to go our separate ways because we can't reach a deal, it's not acceptable from our perspective for you to be able to subvert that by unilaterally putting us in play in the market at what, by definition, we will at that point consider to be an inadequate price.

RICK CLIMAN: (Moderator) Fred, what else are you going to ask for here? What about a fall-away provision?

FRED GREEN (Counsel for Buyer): The fall-away provision is one that I would care about a lot. The fall-away provision serves as an escape hatch for the buyer. The target is trying to run an organized process and wants be able to control, and eventually shut down, the process. That's the basis for the standstill. If, in fact, the process gets away from the target because other bidders who are not burdened by a standstill go after the target, or if the target signs a definitive acquisition agreement with another bidder, and in either of those instances my client is prepared to offer more value, my client would like to be free of the standstill so that it could come in with its higher offer.

RICK CLIMAN: (Moderator) Let's look at the fall-away provision you've proposed. It's [in *Appendix B*]. It says that the standstill falls away—it disappears—under certain circumstances. One of those circumstances is a hostile takeover attempt by another party. If someone else makes a hostile bid for the target company, then the standstill falls away. After all, as Fred has said, at this point the sale process has gotten away from the target and it's no longer a controlled process.

GAR BASON: (Counsel for Target) You're right. It's no longer a controlled process. But if the standstill falls away and

Fred's client can jump in at this point, it will be even more uncontrolled.

That said, I think my reaction is generally that a fall-away is an acceptable provision. And while in the abstract it might be nice to completely control the field of play, if intervening events occur I think most targets' counsel would conclude that, you know what, if there is a destabilizing situation let a hundred flowers bloom because Fred's client coming back in and offering more money is likely to be a good thing.

RICK CLIMAN: (Moderator) But wait a second, Gar. Let's assume that this hostile offer that initially comes in is a real lowball offer—a clearly inadequate offer that you're confident you can defend against. Why should that let the standstill fall away with respect to Fred's client, which may be able to make a much stronger and more threatening hostile offer, in part on the basis of all the confidential information that you've shared with Fred's client?

GAR BASON: (Counsel for Target) Because you're positing a double lowball. First you're assuming that there's a lowball offer made by some other party, and then that we don't get to an agreement with Fred's client because its offer is a lowball offer too. I can't argue that this isn't theoretically possible, but ultimately the target has usually concluded that it very much wants to get the buyer that originally signed the standstill back into the mix. So a fall-away of some variety strikes me as a fair request by the buyer. Not surprisingly, however, what Fred served up is a little broader than I would like. I certainly believe that a tender offer should free him up to come on to the field, but I'm not sure if a tender offer for only 15% of the target's outstanding shares should trigger the fall-away.

As for the other circumstance that triggers the fall-away—entering into a definitive acquisition agreement with another buyer—there is always a robust argument about whether that's an appropriate trigger. Again, I want Fred's client to perceive that it's now or never with respect to reaching an agreement on price. I want his client to put its best price forward. If Fred's client knows it can always put another bid out there if it ends up being the loser, then there's a real worry it won't put its best foot forward.

Having said that, though, this is one fall-away trigger that you often just agree to, because people start to get ossified in their positions. At the end of the day, if you have what you think is the highest price in an auction, it's not a bad thing that Fred's client wants to come in and put more money on the table.

RICK CLIMAN: (Moderator) Gar, you're a pretty accommodating target's counsel, given that you're inclined to accept the fall-away trigger relating to hostile bids. Joel, when you're advising a target, are you willing to agree to a standstill fall-away that says that if a hostile bid is made by someone else all bets are off and the standstill is gone?

JOEL GREENBERG: (Commentator) It's partly a question of the context in which it arises. If the target has decided that it's for sale and is going to run a process that's going to end in a sale, I have more sympathy for that fall-away trigger. But in the situation where the target is exploring a transaction with one party and would like to be able to go back to business as usual if the negotiations don't work out, I think the fact that some other bid—which as you say, may or may not be credible—is made on an unsolicited basis shouldn't automatically extinguish the standstill.

RICK CLIMAN: (Moderator)

Joel, are standstills generally enforceable? Isn't there an argument on the part of a buyer who breaches a standstill that the target won't suffer any damages? Can't a buyer say, "Look, all I've done is put a higher bid on the table for the benefit of the target's stockholders. Maybe I technically breached the standstill, but neither the target nor any of its stockholders was hurt."

JOEL GREENBERG: (Commentator)

We've seen relatively recently, in the series of *Ventas* cases, an example of just what the damages could be. In *Ventas* there was an auction where the confidentiality agreement signed by the bidders included a standstill. One party won, as is normally the case, and another company—HCP—was the loser. The losing party decided it was going to try to make a competing bid anyway, in effect to reopen the auction, even though it was bound by a standstill.

In the first piece of litigation, the winning bidder sued the target in Ontario to require the target to enforce the standstill against HCP, the losing bidder.[47] This suit was based on a provision of the acquisition agreement between the target and the winning bidder—a very typical provision—that requires the target not to waive standstills binding upon competing bidders.

Then, the first deal with the original winning bidder was submitted to a vote of the target's stockholders but failed to achieve the required vote, arguably because of the offer by HCP. So the original winning bidder upped its price in order to get the needed stockholder

47. Ventas, Inc. v. Sunrise Senior Living Real Estate Inv. Trust (2007), O.J. No. 908, 2007 ON.C. LEXIS 974, at *1 (Can. Ont. Sup. Ct. J.) ("This case involves the interpretation of a purchase agreement entered into following an auction. The issue to be considered is whether the vendor has an obligation under that agreement to enforce a standstill agreement signed by an unsuccessful auction participant.").

approval, closed the transaction and then sued HCP—the losing bidder that had violated the standstill—for tortious interference.[48]

It's very easy to identify and quantify the damages in that case. The original winning bidder's damages claim is essentially as follows: "I could have had the company at $15.00 per share. I wound up paying $16.50 per share, only because you, the interloper, breached a standstill agreement that was clearly intended in part for my benefit. I want to recover the difference in a suit for tortious interference."

That case survived a motion to dismiss. So I think you certainly can have real damages in a case like this.

It's fair to assume that the court that decided the *Research in Motion* case,[49] which we mentioned earlier—the court that found an implied standstill in a use restriction—would have enforced an express standstill as well. And there are some other cases enforcing standstill agreements. So the answer to your question is generally, yes, standstills should be enforceable, and their breach can give rise to serious damages.

48. Ventas, Inc. v. HCP, Inc., 647 F.3d 291, 301 (6th Cir. 2011) ("By April 9, 2007, a sufficient number of proxies had been entered against the Purchase Agreement to prevent its approval. On April 11, 2007, to salvage the deal and avoid injury to its reputation, Ventas increased its original offer of $15.00 per unit to $16.50 per unit. The unitholders approved Ventas' increased offer on April 19, 2007, and the deal closed on April 26, 2007. Ventas commenced this diversity action under 28 U.S.C. § 1332 soon thereafter. On May 3, 2007, Ventas filed a Complaint against HCP in the district court, asserting Kentucky state law claims of tortious interference with contract, and tortious interference with a prospective advantage. Ventas alleged that HCP improperly interfered with its valid expectancy that the Sunrise unitholders would approve its $15.00 per unit offer to purchase Sunrise, causing Ventas to raise its offer to $16.50 per unit.") (citations omitted).

49. *See Research in Motion*, 94 O.R. 3d 511.

There is also the *Topps* decision[50] in 2007 in which the Delaware Court of Chancery required the target to release a standstill, but that was a remedy to cure a defective sale process. It wasn't an indictment of standstills *per se*. In general, yes, I believe that standstills will be respected by the courts.[51]

IV. EXCLUSIVITY AGREEMENT

RICK CLIMAN: (Moderator) Let's turn now to another preliminary document, the exclusivity agreement.[52] This document is proposed by prospective *buyers*, as opposed to standstills, which are proposed by *target companies*. You'll find the form of exclusivity agreement proposed by Fred, the buyer's counsel, [in *Appendix C*]. You'll find

50. *See* Upper Deck. Co. v. Topps Co. (*In re* Topps Co. S'holders Litig.), 926 A.2d 58 (Del. Ch. 2007).

51. For other cases relating to standstills, see Enterra Corp. v. SGS Ass., 600 F. Supp. 678 (E.D. Pa. 1985) (finding that board did not breach its fiduciary duties in approving and declining to amend standstill agreement with a substantial stockholder); Crescott Inv. Assocs. v. Davis, No. 10839, 1989 WL 155469 (Del. Ch. Dec. 5, 1989) (interpreting standstill agreement not to bar the consent solicitation that the target sought to enjoin); ONEOK, Inc. v. S. Union Co., No. 99-CV-345-H(M), 1999 WL 34861197 (N.D. Okla. May 11, 1999) (finding that successful bidder was a third party beneficiary of, and entitled to a temporary restraining order to enforce, target's standstill agreement with subsequent bidder); Aurizon Mines Ltd. v. Northgate Minerals Corp. (2006), 19 B.L.R. (4th) 318; 57 B.C.L.R. (4th) 137 (Can. B.C. 2006) (holding target entitled to an injunction enforcing a standstill agreement against a take-over bid (the Canadian equivalent of a tender offer) even though no confidential information had been shared); LNB Bancorp, Inc. v. Osborne, No. 1:09 CV 643, 2011 WL 6012324 (N.D. Ohio Nov. 30, 2011) (holding target entitled to an injunction enforcing standstill agreement included in a litigation settlement agreement with a substantial stockholder). A target board does not breach its *Revlon* duties by requiring all bidders to sign a standstill agreement as a condition to access to confidential information. Golden Cycle, LLC v. Allan, No. 16301, 1998 WL 892631 (Del. Ch. Dec. 10, 1998); Alliance Gaming Corp. v. Bally Gaming Int'l, Inc., No. 1444, 1995 WL 523543 (Del. Ch. Aug. 11, 1995); *In re* J.P. Stevens & Co. S'holder Litig., 542 A.2d 770 (Del. Ch. 1988), *appeal refused*, 540 A.2d 1089 (Del. 1988).

52. *See* MODEL MERGER AGREEMENT, *supra* note 11, at 385-94; *see also* ARTHUR FLEISCHER JR. & ALEXANDER R. SUSSMAN, TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 14.04 (7th ed. 2010); SIMON M. LORNE, ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS § 2:23 (2003).

Gar's very aggressive response on behalf of the target company [in *Appendix D*].

Fred, what does your draft exclusivity agreement say? What are the salient provisions?

FRED GREEN (Counsel for Buyer): This is all about trying to buy a little time to conduct due diligence and get a deal negotiated. We want to make sure that, during a reasonable and limited period of time, the target is going to stand down in terms of discussions with others, and dedicate its management team to negotiations with my client. So essentially, we are asking that the target not solicit acquisition proposals from anyone else, not engage in negotiations with anyone else and agree to keep my client apprised of any incoming unsolicited acquisition inquiries so we know what's going on. In the meantime the buyer is going to dedicate all the resources necessary so that in a short period of time we can get the deal documented and signed.

RICK CLIMAN: (Moderator) We're not going to do a full-blown negotiation of this document today. But I do want to pose some basic questions that relate specifically to the use of exclusivity agreements in the public company context.

Gar, how frequently do you see these agreements in connection with potential acquisitions of public targets, outside the context of a target running a formal auction-type sale process with multiple bidders?

GAR BASON: (Counsel for Target) Exclusivity agreements tend to be somewhat unusual in public company deals. Where the target has any leverage at all they're almost unheard of. Typically, your ability as a target to fight off a request for an exclusivity agreement is pretty good.

Assuming I'm willing to entertain entering into an exclusivity agreement at all, my reaction to Fred's main points is that I may agree not to solicit and not to talk to other prospective buyers, but I'm certainly not going to provide information on other bids that may come in. What you focus on as the target is that the prospective buyer is giving you nothing in the exclusivity agreement. To give a contractual undertaking that you'll turn over valuable information about other bids is normally an anathema to a target company.

RICK CLIMAN: (Moderator) In the *private company* context it's not unusual to see exclusivity periods of 45 days, 60 days, or even longer. What's the typical duration of the exclusivity period when the target company is *publicly traded*?

GAR BASON: (Counsel for Target) Shorter. The first thing that the target might say is, "We won't agree to binding exclusivity, but our management team is spending 100% of their time with you now, so as a practical matter, you don't have to worry about us spending time with other bidders." That's so-called "soft" exclusivity.

When the buyer pushes back and says, "Soft exclusivity doesn't do it for me," you would normally start the negotiations at two weeks. And you would probably get beaten into giving 30 days. But every day is considered a huge give on your part.

RICK CLIMAN: (Moderator) Fred, in Gar's response [in *Appendix D*], he's done a number of things. First he's added a fiduciary exception at the end of paragraph 1. It basically says that notwithstanding the specific prohibitions in the exclusivity agreement, the target *can* negotiate with other bidders during the exclusivity period if failing to do so would give rise to a breach of the fiduciary duties of the target company's board of directors. Are you going to object to this?

FRED GREEN (Counsel for Buyer): Absolutely.

RICK CLIMAN: (Moderator) Is that sort of fiduciary exception really required here, and if not, why not?

FRED GREEN (Counsel for Buyer): It's certainly *not* required, and it completely vitiates the benefit of the exclusivity agreement for the prospective buyer. Gar, we're trying to assure that your client and mine have set aside time to get this deal negotiated. The buyer really wants to do this deal, and has put a price on the table that your client is excited about. We just need a little time and we'll get the deal done. If along the way a higher bid is lobbed in and your client loses interest in doing a deal with us, then you should simply wait out the exclusivity period. The "rope-a-dope" treatment is available—there's nothing wrong with simply waiting things out. You come to the end of the exclusivity period soon enough, and the parties can go their separate ways. So Gar, there's no need to negotiate for an early termination right.

RICK CLIMAN: (Moderator) At the end of the day, Gar, I assume you agree with that.

GAR BASON: (Counsel for Target) Yes, I try to keep a straight face when I request a fiduciary exception, but the fiduciary exception is really the kind of lawyer's trick that people don't like. Fred's right. If business people agree to the concept of exclusivity, then it's just kind of trying to take it away with the fiduciary exception, and if the exclusivity period is short enough you can always do the "rope-a-dope."

RICK CLIMAN: (Moderator)

So fiduciary exceptions may have their place in the definitive acquisition agreement, but in most cases they are inappropriate in a stand-alone exclusivity agreement that is put into place before the definitive acquisition agreement is signed.

Gar, you deleted the provision requiring your client, the target, to disclose to the prospective buyer the terms of any acquisition proposal or offer that comes in from another party during the exclusivity period. Doesn't the prospective buyer have some sort of right to transparency—a right to know everything that's going on vis à vis other bidders?

GAR BASON: (Counsel for Target)

A prospective buyer who signs a *definitive acquisition agreement* with a price in it and with obligations binding on the prospective buyer has the right to get a full panoply of information when there's a counter-bid. But prior to signing an acquisition agreement the buyer is giving us absolutely nothing, and we're restricting our freedom. So the last thing I'm willing to do is give the buyer valuable pricing information when it hasn't given me anything in return for it.

RICK CLIMAN: (Moderator)

Fred, do you agree with that?

FRED GREEN (Counsel for Buyer):

Yes and no. The buyer is going to be putting a lot of resources into getting this deal done. And frankly, if there is a point along the way where a third party has come in with an offer that looks like it might be preferable to ours, we'd like to know about it. We're acting in good faith and if our deal is not going to happen, we'll understand that, but we'd like to stand down rather than waste our time. However, I am sympathetic to Gar's position.

GAR BASON: (Counsel for Target)	Why do you need the specific terms of other bids? That's what's confusing to us.
RICK CLIMAN: (Moderator)	Gar, isn't there a risk that someone will come in and make an unsolicited offer at a price *lower* than the price Fred's client has on the table? What do you do then?
GAR BASON: (Counsel for Target)	Exactly. My nightmare as the target is that Fred's client is thinking of $40 per share, and a bid comes in from someone else at $32. Fred's client thinks, "Whoa, I can beat this other bid by offering only $34." I don't want Fred's client to have a notion of what the market-clearing price might be. As a buyer, you have a right to get that by signing a binding, definitive acquisition agreement with a price in it.
JOEL GREENBERG: (Commentator)	Isn't that issue accentuated because, for the most part, the only time you're going to get the target to sign an exclusivity agreement is when the target is in a position of weakness to start with?
RICK CLIMAN: (Moderator)	I'm amazed, candidly, at how often I see this "transparency" provision in stand-alone exclusivity agreements. My sympathies on this issue lie with Gar's position. Fred, I assume you'd agree that if a target company has any leverage at all and pushes back on this issue against a prospective buyer who has no obligations whatsoever at this point, the prospective buyer should lose the argument.
FRED GREEN (Counsel for Buyer):	I totally agree. You can give it a try, but if the target's counsel identifies and holds firm on the issue, you should just give up and move on.[53]

53. For an example of a litigated dispute involving an exclusivity agreement, see Wachovia Corp. v. Citigroup, Inc., 634 F. Supp. 2d 445 (S.D.N.Y. 2009). Wachovia sought a declaratory judgment that its merger with Wells Fargo was not prohibited by an exclusivity agreement entered into by Citigroup and Wachovia prior to Wachovia's

V. DEFINITIVE ACQUISITION AGREEMENT—TENDER OFFER MECHANICS

RICK CLIMAN: (Moderator)

Let's move away from the preliminary deal documents to the full-blown definitive acquisition agreement, which begins [in *Appendix E*]. As you would expect, the definitive agreement for a two-step deal covers both the front-end tender offer and the back-end merger.

The excerpt [at the beginning of *Appendix E*] is an example of the first section of the buyer's draft of the definitive acquisition agreement. This section provides something of a blueprint for the buyer's front-end cash tender offer.

Section 1.1(d) provides that the tender offer has to stay open for a minimum of 20 business days, a little less than a month, as required by the SEC tender offer rules.[54]

Section 1.1(b) provides that the buyer doesn't have to purchase shares tendered in the tender offer unless certain specified conditions are satisfied, including the all-important minimum condition, which is spelled out in the first sentence of section 1.1(b).

Joel, to set the stage for the upcoming negotiation, and for those in our audience who

merger with Wells Fargo. *Id.* Citigroup and Wells Fargo eventually reached a settlement whereby Citigroup received $100 million to resolve the claims. *See* Eric Dash, *Wells Fargo to Pay Citigroup $100 Million for Wachovia Claims*, N.Y. TIMES, Nov. 19, 2010, http://dealbook.nytimes.com/2010/11/19/wells-to-pay-citi-100-million-for-wachovia-claims.

54. *See infra* Appendix E, § 1.1(d). Rule 14e-1 requires that any tender offer be held open for at least 20 business days from the date the tender offer is first published or sent to security holders. *See* 17 C.F.R. § 240.14e-1 (2011). Since Rule 14d-7 gives each tendering shareholder the right to withdraw the tendered securities at any time the tender offer remains open, the buyer cannot acquire any tendered securities until the offer expires. *See id.* § 240.14d-7; *see also infra* note 61 and accompanying text.

are not intimately familiar with the two-step acquisition structure, maybe you can shed some light on how all this is stitched together.

JOEL GREENBERG: (Commentator)

Sure. The important thing to remember when you look at provisions like those in section 1 is that this is where all the action is in the acquisition agreement. The key issues all relate to the first step because once shares are taken down in the tender offer the deal is over except for some back-end mechanics. At that stage the interloper risk is over, because the buyer owns a majority of the target's outstanding voting stock. The obligation of the buyer to complete the back-end merger and to buy the remaining untendered shares is going to be as unconditional as the parties can make it. Basically the only conditions to the consummation of the back-end merger would relate to illegality and the like—the back-end merger can't take place if there's an injunction against it in place.[55] So you have to focus on the front-end tender offer-related provisions as though they really define the deal terms.

So what do we have here? To start, we have a provision requiring that the tender offer be commenced promptly,[56] sometimes within a certain, limited number of days. Years ago you didn't need that because there was an SEC rule that required the buyer to commence its tender

55. For an example of a provision in a definitive acquisition agreement specifying the conditions to the completion of a back-end merger, see *infra* Appendix Q, which reproduces § 8.01 of the Agreement and Plan of Merger, dated July 14, 2011, among BHP Billiton Limited, BHP Billiton Petroleum (North America) Inc., North America Holdings II Inc., and Petrohawk Energy Corporation. The stockholder approval condition in § 8.01 is not substantively significant because the buyer is obligated to vote the shares it purchases in the tender offer in favor of that approval and, as a consequence of the minimum condition in the tender offer, the buyer's vote will necessarily be sufficient without regard to the votes of other stockholders.

56. *See infra* Appendix E, § 1.1(a).

offer within five business days after announcement,[57] but that's gone, so you provide something contractually. The target doesn't want to leave it in the buyer's hands to decide when to start its tender offer. There will clearly be limitations on the buyer's ability to vary the terms of the tender offer from those that were agreed. This is a negotiated transaction, and the buyer has to stick with the deal that was negotiated.[58]

The tender offer conditions are going to be of great interest to both parties because, again, this is the only part of the deal where conditionality really is in play. For example, if the buyer wants a last clear opportunity to walk away from the deal because of a material adverse change in the target's business, it's going to have to include that walk right in the tender offer conditions, not in the merger conditions. Once the buyer buys shares in the tender offer, it's over—the closing of the back end is a *fait accompli*.

Lastly, there is going to be a lot of focus from both sides on what happens when you get to the end of the initial tender offer period. Assume, for example, that you haven't hit the minimum condition. A condition has failed, but I don't know that it's obvious that both parties will agree that the buyer can just walk

57. Rule 14d-2(b), which became effective in 1980, required that a tender offer commence within five business days after it was first publicly announced. Tender Offers, Exchange Act Release No. 6158; Investment Company Act Release 10958, 1979 WL 182305, at *7 (Nov. 29, 1979). The SEC noted in the adopting release that this requirement would pre-empt state anti-takeover statutes, which typically required a public filing before the tender offer commenced. The Commission concluded that pre-emption was appropriate since existing anti-takeover statutes "frustrate[d] the operation and purposes of the Williams Act." *Id.* at *8. The five business day commencement rule was eliminated in 2000. Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 33-7760, Exchange Act Release 34-42055, Investment Company Act Release No. 24107, 70 SEC Docket 2229 (Oct. 22, 1999).

58. *See infra* Appendix E, § 1.1(c).

away at that point.

RICK CLIMAN: (Moderator) Please explain the minimum condition, Joel. What percentage level is typically set for that condition?

JOEL GREENBERG: (Commentator) The minimum condition is typically going to be set at the lowest level that permits the buyer to force the second-step merger. In Delaware that would be acquisition of a majority of the target's outstanding shares,[59] typically fully diluted, because you don't want the risk that new shares could be issued after you take down tendered shares in the tender offer. In other words, it will be set at a level that makes the second-step merger really nothing but mechanics.

RICK CLIMAN: (Moderator) In other words, 50% plus one share.

JOEL GREENBERG: (Commentator) Fifty percent plus one share, less whatever the buyer already owned going into the transaction.

If you include the minimum condition and nothing else relating to it, then in the event the minimum condition is not satisfied, the buyer could walk away at the end of 20 business days. But the target might have something to say about that. That's where provisions relating to the mandatory extension of the tender offer come in.[60]

On the other hand, you wouldn't want the buyer to be able to get to the end of the 20 business day period and say, "Well, 80% of the target's outstanding shares have been tendered, and that's a great result, but it would really

59. See Delaware General Corporation Law § 251(c), which requires that "a majority of the outstanding stock of the corporation entitled to vote thereon" be voted for the adoption of a merger agreement. DEL. CODE ANN. tit. 8, § 251(c) (West 2011).

60. *See infra* Appendix E, § 1.1(d).

make my life easier if I could do the back-end merger as a short-form merger, so I'm going to extend the tender offer for another ten days so I can try to get enough additional shares to get me to the 90% ownership level." Because if the buyer were to do that, both the buyer and the target would remain subject to deal risk.

Keep in mind that if you extend the tender offer, you can't buy any shares, because withdrawal rights have to be extended to tendering shareholders through the completion of the offer.[61] So while it is theoretically possible a buyer might want to follow that strategy, I'm not sure that in reality a buyer would be willing to put its deal in jeopardy. And the target would certainly not be terribly receptive to that either.

In short, what you tend to see in these provisions are carefully crafted and negotiated provisions defining how the tender offer is made, what its terms are going to be and the specific circumstances under which it may be, or must be, extended.

RICK CLIMAN: (Moderator) Joel, you mentioned two relevant thresholds: the minimum condition threshold, which is 50% plus one share; and the 90% threshold, which is the ownership threshold that the buyer has to achieve in order to do the back-end merger as a *short-form*, rather than a long-form, merger.[62] But just to be clear, even if you don't hit that 90% short-form merger

61. Rule 14d-7 gives each tendering shareholder the right to withdraw the tendered securities "at any time that the offer remains open," including during any extension. *See* 17 C.F.R. § 240.14d-7 (2011).

62. *See* DEL. CODE ANN. tit. 8, § 253 (West 2011). A short-form merger does not require any vote of the target's stockholders to complete, and accordingly does not require the filing of any proxy statement or information statement. Therefore, if a short-form merger can be effected, it can be completed immediately upon completion of the front-end tender offer.

threshold, as long as you get above 50%, the back end is a *fait accompli*, correct?

JOEL GREENBERG: (Commentator) Absolutely. Even if the buyer owns only 51% of the target's outstanding stock, it has enough votes to guarantee stockholder approval of a long-form merger in Delaware. I can think of only one example in all the years I've been doing this where a two-step transaction actually failed after the completion of the first step.[63] In general, once the bidder has purchased the shares tendered in the tender offer, the back end is certain to close.

RICK CLIMAN: (Moderator) Right. Once you've completed the front end, even with less than 90% of the target's outstanding shares, it's "game over." And it really doesn't matter whether the back-end merger is going to be done as a short-form merger or a long-form merger. A long-form merger will take longer than a short-form merger to complete, but one way or another, the back end will ultimately be completed.

Rachel, your firm is frequently retained by buyers to serve as information agent in friendly tender offers. What does this entail, and more importantly, what determines how easy it's going to be to get tenders of 50% plus one share to satisfy the minimum condition, or better yet, 90% of the target's outstanding shares?

RACHEL POSNER: (Information Agent) When we're asked to act as information agent, the first thing we have to figure out is who owns the target's outstanding shares. Who are the right people to contact? How concentrated

63. In Farley Inc.'s 1989 acquisition of West Point-Pepperell Inc., approximately 95% of the outstanding shares were acquired in the tender offer, but the second step merger did not occur because the needed financing failed. *See Farley Behind on Pepperell Debt Payments*, N.Y. TIMES, June 27, 1990, http://www.nytimes.com/1990/06/27/business/farley-behind-on-pepperell-debt-payments.html?src=pm.

are the "positions"? How far down the list do we have to go? That will determine how easy or difficult our job will be.

RICK CLIMAN: (Moderator) Rachel, anyone who has read the dense documentation prepared in connection with a tender offer sees references to "notices of guaranteed delivery" or, in the vernacular of information agents, "protects." What role do notices of guaranteed delivery play?

RACHEL POSNER: (Information Agent) Notices of guaranteed delivery enable holders to tender shares in the tender offer even if the share certificates are not readily available. A notice of guaranteed delivery is essentially a promise, guaranteed by a financial institution, to deliver the share certificates within three business days. For purposes of the tender offer documents, the shares are deemed to have been properly tendered when the notice of guaranteed delivery is given.

RICK CLIMAN: (Moderator) Joel, as a matter of state law, do shares represented by share certificates that haven't yet been tendered but that are subject to notices of guaranteed delivery count toward the 90% short-form merger threshold?

JOEL GREENBERG: (Commentator) Short and simple answer—no. Ultimately a notice of guaranteed delivery is simply a promise, made by an institution that is thought to be creditworthy, to deliver the shares. But it's still just a promise. The short-form merger statute in Delaware, and in every other state I'm aware of, requires that you be the owner of the requisite percentage of the shares, not just have a contract to buy them.[64]

64. *See* DEL. CODE ANN. tit. 8, § 253(a) (2011) (providing for short-form mergers where "at least 90% of the outstanding shares of each class of stock of a corporation . . . is *owned* by another corporation") (emphasis added).

RICK CLIMAN: (Moderator) Rachel, is it fair to say that most of the shares tendered in a friendly tender offer are generally tendered at the very end of the tender offer period? Bear in mind that tendering stockholders have their withdrawal rights throughout the pendency of the tender offer,[65] so there is no apparent disadvantage to tendering early. A stockholder who has tendered his shares can always withdraw them and get them back before the tender offer expires. As a practical matter, do stockholders nonetheless typically wait until near the end of the tender offer to tender their shares?

RACHEL POSNER: (Information Agent) Yes. People tend to wait until the last minute to tender. So the last 24 hours before the expiration of the tender offer can certainly be an interesting time.

RICK CLIMAN: (Moderator) Joel, let's assume that when you get down to the witching hour the buyer ends up having gotten only, say, 85% of the target's outstanding shares in the tender offer. You've talked about how it can be advantageous to get to 90% so you can do your back-end merger as a short-form merger in Delaware. Even though the back-end merger is a *fait accompli* at any level above 50%, if the buyer can get to 90%, the buyer can do the back-end merger right away as a short-form merger, without the need for a vote of stockholders or the filing of a proxy or information statement with the SEC. What are some of the techniques a buyer can utilize to get to 90% in order to avoid the cost and delay associated with having to do a long-form back-end merger?

JOEL GREENBERG: (Commentator) There are several, Rick, and some of them require some advance planning. They're not all things you can suddenly decide to do once

65. *See* 17 C.F.R. § 240.14d-7; *see also supra* notes 54 and 61.

you've seen that only 85% of the outstanding shares have come in.

The first alternative is one we talked about before. You could extend the tender offer and just go back and beat the bushes some more and get some more shares tendered. But as we discussed, the problem with that is that all of the shares that you already received are still in play at that point. They're subject to withdrawal rights and you've just added a great deal of uncertainty to the transaction by extending the tender offer. In any event, it's very likely the acquisition agreement is going to prohibit the buyer from extending the tender offer under these circumstances.[66]

What are the other alternatives? Well, the SEC rules now permit a so-called "subsequent offering period" after the bidder has taken down the shares that have been tendered and closed the tender offer.[67] Withdrawal rights to those shares are gone, and then, in effect, you make a second tender offer—a "subsequent offering"—for a limited period of time at the same price and on the same terms as the original tender offer to see what else you can take down. You have to have disclosed the possibility of a subsequent offering period in the original disclosure document, and the acquisition agreement has to permit it,[68] but

66. *See infra* Appendix E, § 1.1(d); *see also supra* notes 34-35 and accompanying text.

67. *See* Rule 14d-11. 17 C.F.R. § 240.14d-11 (2011). A "subsequent offering period" permits the acquirer to acquire additional shares of the target after the termination of the tender offer. While a subsequent offering period was initially limited in length to 20 days, the SEC removed the maximum time limit on the length of a subsequent offering period to prevent conflict with foreign jurisdictions in both domestic and foreign tender offers. Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, Securities Act Release No. 33-8957, Exchange Act Release No. 34-58597, 94 SEC Docket 339 (Oct. 9, 2008).

68. *See infra* Appendix E, § 1.1(d)(iv).

this is a much lower risk strategy for going for additional shares than extending the original tender offer. It does have the issue, though, that you have to pay for the shares that you bought in the initial tender offer while you're going through the subsequent offering period. This can be tricky if you're financing the transaction.

FRED GREEN (Counsel for Buyer): The subsequent offering period, which became available in 2000 with the adoption of Rule 14d-11, has in fact proven to be quite valuable. In a situation where the buyer receives tenders approaching 90% but the target doesn't have enough authorized shares to enable the buyer to benefit from the exercise of a top-up option,[69] a useful strategy is for the buyer to close on the tender offer and put out an announcement that informs the market that it has purchased whatever percentage of the target's shares came in and that it will commence a brief subsequent offering period after which either (1) a short-form merger can be accomplished because 90% of the target's shares were purchased and all remaining minority stockholders will be paid the purchase price immediately in a short-form merger, or (2) the buyer will pursue a long-form merger which will result in the stockholders who have not tendered being paid that same price, but two or three months later. And you know, magically people wake up and realize that they missed the boat on the original tender offer and don't want to wait months longer than others to be paid. You find in many instances that within a few days after commencing a subsequent offering period, you're at 90%.

RICK CLIMAN: (Moderator) When it originally proposed the adoption of Rule 14d-11, the SEC noted that the

69. *See infra* note 72 and accompanying text.

subsequent offering period would be similar to the extended offering period available under the U.K. regulatory regime;[70] and since the adoption of Rule 14d-11, the subsequent offering period has in fact proven to be a useful tool for buyers in the U.S.

Joel, aside from the subsequent offering period, what other alternatives are available to a buyer that owns less than 90% of the target's outstanding shares after completion of the tender offer?

JOEL GREENBERG: (Commentator) There's something else you can do, if the acquisition agreement and confidentiality agreement you signed permit it. You can go into the market and try to buy some additional shares after you close the tender offer. You can't do that while the tender offer is open—SEC Rule 14e-5[71] prohibits that. But if you close the tender offer and there is still a meaningful market, and if you're not contractually prohibited from doing so, you can just go out into the market and buy some more shares.

Finally, and perhaps the most interesting alternative of all because it comes with very few downsides, is the so-called top-up option, which is an option built into the definitive acquisition agreement under which the buyer can buy additional, newly-issued shares directly from the target, generally at the tender

70. Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 33-7607, Exchange Act Release 34-40633, Investment Company Act Release No. 23520, 1998 WL 767321 (proposed Nov. 3, 1998) ("The proposed subsequent offering period would be similar to the extended offering period that sometimes applies to tender offers made in the United Kingdom subject to the City Code on Takeovers and Mergers."); *see also* THE PANEL ON TAKEOVERS AND MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS r. 31 (10th ed. 2011) (U.K.), *available at* http://www.thetakeover panel.org.uk/wp-content/uploads/2008/11/code.pdf.

71. 17 C.F.R. § 240.14e-5 (2011).

offer price but not necessarily for cash, to get the buyer to the 90% ownership threshold.[72]

RICK CLIMAN: (Moderator) Lisa, our statistics show just how universal top-up options have become.[73] They are included in a vast majority of friendly tender offer deals. But these top-up options have been a frequent target of plaintiffs' lawyers in recent years. What issues have these plaintiffs' lawyers been raising, and have dealmakers actually been changing their practices as a result of these challenges?

LISA SCHMIDT: (Delaware Counsel) There was a flurry of judicial activity in 2010 and 2011 addressing top-up options in *EV3*,[74] *American Pasta*[75] and *Cogent*[76] among other cases. The challenges advanced by plaintiffs' lawyers were two-fold. The first type of challenge was based on a so-called "appraisal dilution" theory—a contention that the top-up shares would have to be counted as part of the shares outstanding for appraisal purposes.[77]

72. For an example of a top-up option, see *infra* Appendix R, which reproduces § 1.04 of the Agreement and Plan of Merger, dated as of July 14, 2011, among BHP Billiton Limited, BHP Billiton Petroleum (North America) Inc., North America Holdings II Inc., and Petrohawk Energy Corporation.

73. Top-up options were included in 97% of the cash tender offers surveyed in the 2011 ABA Study, *supra* note 44.

74. Olson v. EV3, Inc., No. 5583-VCL, 2011 WL 704409 (Del. Ch. Feb. 21, 2011).

75. Transcript of Record, *In re* Am. Italian Pasta Co. S'holder Litig., No. 5610-VCN (Del. Ch. Oct. 13, 2010) (approving a Memorandum of Understanding in which American Italian Pasta Co. abandoned its top-up option). For details of this agreement, see Am. Italian Pasta Co., Current Report (Form 8-K) (July 15, 2010).

76. *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487 (Del. Ch. 2010).

77. According to the "appraisal dilution theory," a top-up option allows for the issuance of a significant number of shares at less than fair value. Because the top-up shares are outstanding at the time of the short-form merger, it has been argued that the value of current stockholders' shares is significantly reduced as a result of the dilutive effect of a substantial increase in the number of shares outstanding. *See EV3*, 2011 WL 704409, at *3; *Cogent*, 7 A.3d at 507; *see also* Transcript of Record, *In re* Gateway, Inc. S'holders Litig., No. 3219–VCN (Del. Ch. Sep. 14, 2007); Edward B. Micheletti & Sarah T. Runnells, *The Rise and (Apparent) Fall of the Top–Up "Appraisal Dilution" Claim*, 15 M & A LAW. 9, 9 (2011). Although it is not entirely clear whether top-up shares would be considered by the Court of Chancery in an appraisal proceeding, a provision is now included in most top-up option provisions stipulating that the fair value of any shares for which appraisal is properly demanded will be determined without regard to any

The second theory focused on the possible invalidity of the top-up shares.[78]

I think practitioners have figured out how to head off both these types of challenges now, so we'll see far less of these issues raised in the future. Folks are putting language into their merger agreements confirming that you're not going to count the newly issued top-up shares in an appraisal proceeding.[79] And, to avoid validity-based challenges, practitioners are being more cautious in making sure that the resolutions authorizing the issuance of the top-up shares and approving the consideration payable for them are properly prepared. So, I think the challenges have been addressed, and although there are still some lingering complaints in the Delaware Court of Chancery, no one is moving for expedition on them.

dilution caused by the issuance of top-up shares. *See EV3*, 2011 WL 704409, at *8-11 (suggesting that the Court of Chancery would not take top-up shares into account in an appraisal proceeding and stating that parties can agree not to count top-up shares for purposes of appraisal); *Cogent*, 7 A.3d at 507 (indicating that such a provision would be permissible).

78. The "invalidity theory" is based on the procedural requirements under the DGCL that the issuance of stock must be specifically authorized by the board of directors and that consideration received by a corporation for the issuance of shares of stock must be equal to at least the par value of the shares. *See* DEL. CODE ANN. tit. 8, §§ 153(a), 157(d) (West 2011). A merger agreement typically provides that top-up shares may be purchased by the buyer with a promissory note which is typically due at some point after the acquirer has completed the back-end short form merger. Because the acquirer could then forgive the debt, plaintiffs have argued that the consideration received by the corporation for the top-up shares is essentially illusory. *See Cogent*, 7 A.3d at 506-07. Another variation of the invalidity theory is that the DGCL requires that option terms, including the consideration to be provided for the shares, be set forth in the certificate of incorporation "or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options." DEL. CODE ANN. tit. 8, § 153(b) (West 2011); *see also EV3*, 2011 WL 704409, at *12-13. If the parties fail to specify the material terms of the promissory note in the merger agreement, the Court of Chancery has found that there is a "strong argument" that the top-up shares would be invalidly issued if the top-up option were exercised. *See id.* at *12.

79. *See id.* at *8-11.

JOEL GREENBERG: (Commentator)
Rick, isn't the biggest single issue with top-up options having enough authorized shares?

GAR BASON: (Counsel for Target)
The math becomes a stunning problem when you actually do it.

RICK CLIMAN: (Moderator)
The math can indeed become daunting. In order to enable the buyer to get from an 80% ownership level to a 90% ownership level, the target company has to *double* the number of shares it has outstanding.[80] It's not at all inconceivable that the number of shares needed to be issued to the buyer to enable it to get to the 90% ownership threshold could exceed the number of authorized shares that the target company has available for issuance.

Before we begin the actual negotiation of the definitive agreement provisions, I'd like to turn to Tom Johnson of Abernathy MacGregor to get a brief summary of what role the public relations and communications specialists play in friendly tender offer deals, and what challenges they face in advising their clients on these types of deals.

TOM JOHNSON: (Communications Specialist)
At the stage in the process where a definitive acquisition agreement is being negotiated, we spend a lot of time trying to figure out the answers to some key questions: What are the key messages that need to be heard, and what are the audiences that need to hear them, in order to help sell this deal? What levers can

80. Assume, for example, that the target company has 100,000,000 shares outstanding and that the buyer (which owned no shares of target company stock before the closing of the tender offer) acquires 80,000,000 target company shares in the tender offer, representing 80% of the target's outstanding shares. In order to increase its percentage ownership from 80% to 90%, the buyer would have to acquire an additional 100,000,000 newly-issued shares from the target company. After acquiring the 100,000,000 newly-issued top-up shares, the buyer would own a total of 180,000,000 shares of the target's stock, and there would be a total of 200,000,000 shares of the target's stock outstanding. The 180,000,000 shares held by the buyer would constitute exactly 90% of the total number of outstanding target shares.

we use to help get those key messages to the optimal audience? Ultimately our role is to help use those messages to mitigate deal risk.

Obviously, the investor base from which we're going to go out and help solicit tenders is a key audience here, and we're going to spend a lot of time figuring out how to communicate with them. But we're also going to spend a lot of time talking to the executives of and the lawyers and other advisors for both companies in order to understand whether there is regulatory risk and, if there is, what the regulators need to hear. Are there key customers that we need to contact on day one? Or local politicians? Employees? Labor unions? We may even need to reach out to ISS[81] if we think they may be a factor.

We're trying to pre-script all those messages, and figure out where we might find pockets of resistance. Part of our job is to proactively help mitigate the interloper risk that was mentioned earlier.

We'll do a lot of scenario planning while the companies and their advisors are hammering out the definitive acquisition agreement. What do we do if there is a leak? What do we do if a regulator unexpectedly sticks its head up? What do we do if we don't hit the minimum tender condition? And we'll try to walk through as much of that as we can ahead of time so if any of these situations occurs, we're prepared for it. We want to be in a position to pull something off the shelf that we can immediately implement.

81. *See supra* notes 40-41.

VI. DEFINITIVE ACQUISITION AGREEMENT—TENDER OFFER CONDITIONS

RICK CLIMAN: (Moderator) Joel mentioned how important the tender offer conditions are.[82] Let's begin the negotiation of the definitive acquisition agreement by taking a look at the tender offer conditions themselves. They begin [near the end of *Appendix E*, under the caption "Annex I, Conditions to the Offer"].

Gar, as a preliminary matter, let me ask you this: are the negotiations relating to these tender offer conditions materially different from the negotiations you'd have over the merger closing conditions in a one-step deal? Or are they essentially the same?

GAR BASON: (Counsel for Target) They're essentially the same exercise. There may have been a time at which the conditions in a two-step deal deviated from the conditions in a one-step deal, but I'd say they have converged over the years.

RICK CLIMAN: (Moderator) Gar, as counsel to the target company, can you summarize your general mindset in considering these tender offer conditions?

GAR BASON: (Counsel for Target) Yes. I'm a paranoid man, basically because I look at every condition as a potential way that the deal won't go forward. The trench warfare back and forth is for me to try to tighten up every condition so that the opportunity for the buyer to walk away is as limited as possible.

RICK CLIMAN: (Moderator) One of the worst things that can happen to a target company is to have a deal announced and then not go forward, because the fickle marketplace tends to assume the worst—that

82. *See supra* text following note 58.

the buyer discovered something serious and troublesome about the target's business. The target company may well be branded as "damaged goods," particularly if its employee or customer base has eroded as a result of the deal announcement.

It's easy to understand why Gar would be so concerned about making sure these tender offer conditions are crafted narrowly. Basically Gar wants to try to make sure that only something truly catastrophic can result in the failure of a tender offer condition to be satisfied. Fred, can I assume you don't see eye-to-eye with Gar on this point?

FRED GREEN (Counsel for Buyer): "Paranoid man" also describes my perspective on this issue. The buyer is very interested in making sure it can get the benefit of its bargain. We've agreed to pay a full price and are happy to do so as long as the business is "as described." But we are going to be pushing hard to include conditions that will protect against having to close if there is a material variation from what was represented.

RICK CLIMAN: (Moderator) Let's talk about some specific tender offer conditions. We'll only have time to go through one or two.

One of the most controversial tender offer conditions is the "material adverse effect" or so-called "MAE" condition in clause "(c)". Fred has provided us with a definition of "material adverse effect" [at the end of *Appendix E*], and Gar has provided a responsive target-favorable definition [in *Appendix F*]. Not surprisingly the two definitions don't look anything alike.

Gar, please summarize what you didn't like about Fred's proposed definition and what you've done to change it.

GAR BASON: (Counsel for Target) Just about anything could potentially be a "material adverse effect" in Fred's definition because the definition not only covers material adverse effects on the target company's business as a whole, but also on its cash position, liquidity, working capital, assets, liabilities, cash flow, financial performance and—my favorite—"prospects."

I'm seeking to narrow the scope of this definition. I will argue to Fred that under Delaware law only something absolutely huge can constitute a material adverse effect. I have support for that proposition in the *IBP-Tyson* decision.[83]

As a commercial matter I also believe that the appropriate allocation of risk puts the risk of minor problems on the buyer. Again, the only thing that should give the buyer the ability to call off the deal is something absolutely huge. That's what I'm trying to reflect in my proposed definition.

RICK CLIMAN: (Moderator) Fred, let's respond to Gar's objections one at a time. First of all, let's focus on this long litany of financial terms—cash position, liquidity, working capital, assets, liabilities. You're cherry picking balance sheet items. Shouldn't the concept of material adverse effect focus on the target company—and its subsidiaries, if it has any—*as a whole*, and not on individual pieces of the target company? Isn't that a fair comment?

FRED GREEN (Counsel for Buyer): It's a fair comment. The typical formulation is to base the definition on effects that are adverse to the business or operations of the

83. *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001).

target company and its subsidiaries, taken as a whole, and in practice I would not spend time trying to define an MAE based on an event at one company in the group that did not adversely affect the group as a whole. Much of what Gar has proposed in his mark-up is reasonable. There are just a few items that we're going to have to tinker with.

Of course it would be optimal for the buyer if it could have "hair trigger" walk away conditions. That would give the buyer tremendous "optionality." But that's not the real world.

RICK CLIMAN: (Moderator)

Fred, Gar focused on the word "prospects"—a forward looking term. But I note that there's also other forward-looking language in your definition. You define MAE to encompass circumstances that could reasonably be expected to "result in" a material adverse effect in the future. Do you feel you may be going too far in asking for these forward-looking standards in the definition of material adverse effect?

FRED GREEN (Counsel for Buyer):

"Prospects" definitely is a hot button. It used to be included pretty regularly in MAE definitions, but M&A practitioners started focusing on it as being too exacting of a standard, and now it's routinely negotiated out.[84] However, for the buyer, the need to protect against having to close the tender in the face of clearly foreseeable adverse effects remains important. Things can happen between signing and closing that haven't had negative consequences yet, but the consequences may be just around the corner and be predictable. For example, a law might

84. The MAE definition included "prospects" in only 1% of the deals surveyed for the 2011 ABA Study, *supra* note 44.

be amended, but the amendment is not yet effective, and at a future time the change in law is expected to adversely affect the target. So yes, we'll agree to take out the word "prospects," but we're going to make sure that the language of the MAE definition has some prospective element, so that we're protected in the event some event has in fact occurred, but the ramifications, which will be adverse and material, haven't themselves yet materialized.

RICK CLIMAN: (Moderator) The biggest difference between the two versions of the material adverse effect definition is the lengthy carve-outs that Gar has added to his target-favorable version. By virtue of these carve-outs, certain things that would normally constitute a material adverse effect in terms of their effect on the target company's business or operations are specifically excluded from the definition. Is what Gar has proposed here fair, Fred?

FRED GREEN (Counsel for Buyer): Yes and no. Carve-outs are *de rigueur* now. It's just a question of how far they go. And frankly the list of carve-outs you see is starting to become almost identical from deal to deal.[85] There are some aspects of Gar's draft that I'm going to resist. For example, while I may agree that the buyer can't walk away because of adverse effects arising from conditions affecting the U.S. economy generally, I will want to retain the right for the buyer to walk away if those conditions have a disproportionate effect on Gar's client.[86]

85. Carve-outs for general economic conditions, general conditions in the target's industry and the announcement or pendency of the deal are present in at least 90% of the transactions surveyed for the 2011 ABA Study. *Id.* For an example of a case in which a carve-out in the definition of "material adverse effect" was central to the court's decision as to whether the buyer could walk away, see Genesco, Inc. v. The Finish Line, Inc., No. 07-2137-II(III), 2007 WL 4698244 (Tenn. Ch. Dec. 27, 2007).

86. The "disproportionate effect" concept was present in 91% of those transactions surveyed for the 2011 ABA Study that had a carve-out for general economic conditions. *Id.*

Gar has made a valiant effort on one or two other carve-outs that I would resist—such as the carve-out for legal, accounting, investment banking and other fees. There are representations that cover these costs. We should discuss and agree on what these costs are going to be. But if there's a gigantic surprise as to the amount of these professional fees that conceivably could rise to the level of an MAE, that shouldn't be carved out.[87]

RICK CLIMAN: (Moderator) Gar, let me ask you about one other condition here. What about the so-called "market-out" in clause "(k)"? It's not unusual in my experience to see this sort of condition in a *hostile* tender offer.[88] But does it belong in a

87. *See generally* Comment to Section 5.7 of the MODEL MERGER AGREEMENT, *supra* note 11.

88. *See, e.g.*, CKH Acquisition Corp. and Roche Holding Ltd Tender Offer Statement (Schedule TO) (Jan. 27, 2012) (in respect of the proposed acquisition of Illumina, Inc.) ("14(v) there occurs (a) any general suspension of trading in, or limitation on prices for, securities on any national securities exchange or in the over-the-counter market, (b) any decline in either the Dow Jones Industrial Average, the Standard and Poor's Index of 500 Industrial Companies or the NASDAQ-100 Index by an amount in excess of 15%, measured from the business day immediately preceding the commencement date of the Offer, (c) any change in the general political, market, economic or financial conditions in the United States, the European Union or elsewhere that, in our reasonable judgment, could have a material adverse effect on the business, financial condition or results of operations or prospects of Parent and its subsidiaries, taken as a whole, or the Company and its subsidiaries, taken as a whole, (d) the declaration of a banking moratorium or any suspension of payments in respect of banks in the United States, the European Union, Switzerland or elsewhere, (e) the nationalization, insolvency or placement into receivership of, or provision of extraordinary assistance to, any major bank in the United States, European Union or Switzerland, or the taking of possession of any such bank by a governmental or regulatory authority, (f) the default by any member of the European Union in payment of, or the inability of any such member to pay, any of its debts as they become due or the withdrawal (or announcement of an intent to withdraw) by any member of the European Monetary Union therefrom or any such member otherwise ceasing (or announcing its intent to cease) to maintain the Euro as its official currency, (g) any material adverse change (or development or threatened development involving a prospective material adverse change) in U.S. dollar or Euro currency exchange rates (including a material decline in the value of the Euro or dollar relative to any other currency) or the markets therefor (including any suspension of, or limitation on, such markets), (h) any material adverse change in the market price of the Shares or in the U.S. or European securities or financial markets, (i) the commencement of a war, armed hostilities or other international or national calamity directly or indirectly involving the United States or any attack on,

negotiated, friendly tender offer like this one?

GAR BASON: (Counsel for Target) No. I think that would be considered just an inadvertent holdover from a hostile deal. I don't think there are very many market-outs in friendly deals.

RICK CLIMAN: (Moderator) Agree, Fred?

FRED GREEN (Counsel for Buyer): I agree.

VII. DEFINITIVE ACQUISITION AGREEMENT—NON-RELIANCE PROVISION

RICK CLIMAN: (Moderator, in the role of Counsel for Target) Joel, let's assume you represent the buyer. Putting on my target lawyer's hat, it appears that you have left out a clause in the definitive acquisition agreement that I would really like to see in there. It's called a "non-reliance" clause, and the language I'm looking for appears [in *Appendix N*].

It says that your client, the buyer, understands that my client, the target company, is not making any representations to the buyer other than the express representations in the acquisition agreement, and that your client, the buyer, isn't relying on any representations outside the contract. That sounds like unobjectionable boilerplate to me. I assume this language shouldn't be controversial.

outbreak or act of terrorism involving the United States, (j) any limitation (whether or not mandatory) by any governmental authority or agency on, or any other event or change that, in our reasonable judgment, may adversely affect, the extension of credit by banks or other financial institutions or the availability of financing or (k) in the case of any of the foregoing existing at the time of the commencement of the Offer, a material acceleration or worsening thereof.").

JOEL GREENBERG: (Commentator, in the role of Counsel for Buyer)

You assume incorrectly. The problem with your language is that, as you well know, in getting to this definitive agreement we've had all kinds of interaction with the target. This is a friendly deal. You've made elaborate due diligence presentations—not just informal conversations, but scripted presentations. You've given us an offering memorandum. And we've looked at those things. If they were totally irrelevant to our decision process we wouldn't have bothered to attend the presentations and read the documents.

RICK CLIMAN: (Moderator, in the role of Counsel for Target)

Wait a second, Joel. If any information in those presentations and materials was truly central to your client's decision-making process, you should have negotiated express representations and warranties in the definitive acquisition agreement about that information.

I'll tell you why I want this non-reliance clause. There's some very powerful case law out there—not only in the context of private company transactions, but also in the public company context—confirming that, at least in some jurisdictions, the inclusion of this sort of non-reliance clause will, in effect, immunize the target company from certain types of fraud claims. In particular, it will preclude your client from successfully pursuing a fraud claim based on some misstatement outside the four corners of the acquisition agreement.

Among the cases you should look at are *ABRY Partners*,[89] Chancellor Strine's seminal opinion

89. ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1058 (Del. Ch. 2006) ("To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing—the lie that it was relying only on contractual representations and that no other representations had been made—to enable it to prove that another party lied orally or in a writing outside the contract's four corners.").

in Delaware in the private company context, and the *Genesco*[90] decision in Tennessee in the public company context.[91]

JOEL GREENBERG: (Commentator, in the role of Counsel for Buyer)

I concede that a well-drafted non-reliance clause may work as you've stated, and that's exactly the result I don't want. It's one thing to say you're not going to make a representation that the projections your client gave us will be achieved. But I think it's fair to say that I should have some remedy if the way the projections were created was your client's CFO and a junior investment banker went into the back room and said, "What sort of numbers do we have to put down to attract the interest of this buyer? Reality is not a concern. We're going to make it up as we go along." If I can prove that kind of fraudulent behavior actually occurred, I don't see why I should have agreed to a clause that will give your client an argument that it's immune from a fraud claim.

RICK CLIMAN: (Moderator, in the role of Counsel for Target)

Let me respond to that, Joel. If my client, the target company, doesn't get this non-reliance clause, and your client, the buyer, is disappointed with the acquisition for any reason before it closes, then your client will dig into its copious due diligence files and will try to find some piece of information that was inaccurate. And then it will try to use that allegedly inaccurate piece of information to try to avoid closing the deal by asserting a common law or securities fraud claim.

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90. *Genesco*, No. 07-2137-II(III), 2007 WL 4698244.

91. There is a split in the circuits as to whether non-reliance clauses are effective to bar an antifraud claim under the federal securities laws. *Compare* Harsco Corp. v. Segui, 91 F.3d 337 (2d Cir. 1996) (non-reliance clause effective), *with* AES Corp. v. Dow Chemical Co., 325 F.3d (3d Cir. 2003) (non-reliance clause not effective as a matter of law, but admissible as evidence on the issue of whether reliance was reasonable). *See generally* Glenn D. West and W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the "Entire" Deal*, 64 BUS. LAW. 999 (2009).

There's a lot of informal and even loose talk in the due diligence process. That's inevitable. Again, if there's anything that you've uncovered in due diligence that you feel is absolutely key to your deal, then you should enshrine it in an express representation in the acquisition agreement.

JOEL GREENBERG: (Commentator, in the role of Counsel for Buyer) I would remind you, Rick, that a fraud claim isn't that simple to prove. To establish a fraud claim based on a statement made in the due diligence process, at a minimum I'm going to have to show that it is actually false and made with knowledge of its falsity or with reckless disregard for the truth, and that I relied upon it. If I can find a document meeting all those standards, maybe I should be able to bring a fraud claim.

RICK CLIMAN: (Moderator) Let's step out of character, Joel. Who typically wins this fight? This is certainly an issue that's gotten a lot more attention in the recent past, perhaps because of these recent judicial precedents. Who generally prevails?

JOEL GREENBERG: (Commentator) As with everything else, it's chiefly a matter of leverage. But I think if you look at the data you're going to find that more agreements have a non-reliance provision than don't, because, despite the increased attention these provisions have received, I'm not sure many buyers' lawyers will focus on the fact that this type of provision can cut off the ability to assert a fraud claim as a defense to closing.

RICK CLIMAN: (Moderator) Right. Take a look at the 2011 ABA Strategic Buyer/Public Target Mergers and Acquisitions Deal Points Study[92] if you'd like to see some

92. Only 14% of the agreements surveyed in the 2011 ABA Study, *supra* note 44, included a non-reliance clause; however, approximately 56% contained a "no other representations and warranties clause." The latter provision, though superficially similar, cannot be relied on to have the same effect. *But see* Transched Sys. Ltd. v. Versyss

statistics from 2010 showing how frequently you're seeing non-reliance clauses in public company acquisition agreements. I think it's fair to say that parties are more sensitive now than they were a decade ago to the legal effect of non-reliance clauses.

One last question on this, Joel. Let's assume you win this negotiation, and the definitive acquisition agreement does *not* include a non-reliance clause. You still have to be careful, don't you, because it's likely that your client will have signed a confidentiality agreement that contains non-reliance language? Most confidentiality agreements I've seen that have been prepared by target companies' lawyers contain non-reliance language of some sort. I assume you're going to want to make sure that the non-reliance language in the confidentiality agreement does not survive the signing of the definitive acquisition agreement, right?

JOEL GREENBERG: (Commentator) That's exactly right. And that's an issue people don't focus on as much as they should. There's all kinds of stuff that finds its way into confidentiality agreements, particularly when there's an auction going on and your client, as a potential bidder, is really anxious to get its hands on the due diligence data. You can't always clean up all that stuff before the confidentiality agreement gets signed. So one thing to be very careful about, from a buyer's perspective, is to say to the target, "Look, we'll put a stand-alone disclosure

Transit Solutions, LLC, No. 07C-08-286 WCC, 2008 WL 948307, at *3 (Del. Super. Ct. Apr. 2, 2008) ("While Plaintiff correctly points out that anti-reliance language must be clear, nowhere in the cases Plaintiff cites have the Courts held that some form of the word 'rely' *must* appear in the contract for it to be 'clear.' Indeed, the thrust of the language . . . is unambiguous: no representations made outside of the four corners of the Agreement are to be given consideration by the parties in interpreting the terms. Consequently, Plaintiff cannot argue it justifiably relied on anything other than what is present in the contract.").

restriction in the definitive acquisition agreement to protect your data in case we don't close, but all this other stuff that was in the confidentiality agreement we signed, that has to fall away once we enter into a definitive agreement."

VIII. DEFINITIVE ACQUISITION AGREEMENT—DEAL PROTECTION PROVISIONS

RICK CLIMAN: (Moderator)

Let's move now to another potentially contentious area of negotiations, deal protection provisions. These are the provisions that are requested by the buyer to help keep potential competing bidders at bay. There are a host of provisions in the buyer's draft of the acquisition documentation that can be categorized as deal protections. Let's tick through some of them now:

First, we have the target's no-shop/no-talk covenant in Section 5.3(a) of the buyer's form of definitive acquisition agreement; you'll see an example [in *Appendix J*]. This is a provision that precludes the target from soliciting competing acquisition proposals and, subject to a fiduciary exception, prohibits the target from even speaking with a bidder who submits an unsolicited competing acquisition proposal.[93]

Second, we have the target's recommendation covenant, in Section 1.2 of the buyer's form of definitive acquisition agreement, [in *Appendix G*]. This is the provision that requires the

93. *See* Amy Y. Yeung & Charles B. Vincent, *Delaware's No-Go Treatment of No-Talk Provisions: Deal-Protection Devices after Omnicare*, 33 DEL. J. CORP. L. 311 (2008); Karl F. Balz, *No-Shop Clauses*, 28 DEL. J. CORP. L. 513 (2003); Kimberly J. Burgess, Note, *Gaining Perspective: Directors' Duties in the Context of No-Shop and No-Talk Provisions in Merger Agreements*, 2001 COLUM. BUS. L. REV. 431 (2001).

target's board of directors to recommend, and to continue recommending, the buyer's deal to the target's stockholders, subject to an important fiduciary exception.[94]

Third, we have the termination and break-up fee provisions in section 8 of the definitive acquisition agreement, appearing [in *Appendix L*].[95]

The buyer might also seek to include in the deal documentation even stronger protection, in the form of support agreements pursuant to which certain key stockholders of the target agree to tender their shares in the buyer's tender offer. These support agreements may also contain other features, such as an option granted to the buyer to purchase the shares of the key stockholders at the tender offer price under certain circumstances if a competing bid is launched, or perhaps some sort of "profit forfeiture" provision.[96]

There are other deal protections found in public

94. *See* MODEL MERGER AGREEMENT, *supra* note 11, at 169-89; *see also* Committee on Corporate Laws, Am. Bar Ass'n Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Force the Vote Amendments to Chapter 8, 9, 10, 11, 12, and 14*, 63 BUS. LAW. 511 (2007-2008); David B. Chubak, *Locking in the Lock-Up—Orman v. Cullman & Corporate Deal Protection Measures*, 1 N.Y.U. J. L. & BUS. 457 (2004-2005); Jay H. Knight, *Merger Agreements Post-Omnicare, Inc. v. NCS Healthcare, Inc.: How the Delaware Supreme Court Pulled the Plug on Mathematical Lock-ups*, 31 N. KY. L. REV. 29 (2004); John C. Coates & Guhan Subramanian, *A Buy-Side Model of Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000).

95. *See* MODEL MERGER AGREEMENT, *supra* note 11, at 276-93; *see also* Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899 (2002-2003); Leo E. Jr. Strine, *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919 (2000-2001); Paul L. Regan, *Great Expectations—A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 CARDOZO L. REV. 1 (1999-2000); Gregory V. Varallo & Srinivas M. Raju, *A Process Based Model for Analyzing Deal Protection Measures*, 55 BUS. LAW. 1609 (1999-2000).

96. *See* MODEL MERGER AGREEMENT, *supra* note 11, at 401-15; *see also* Brian JM Quinn, *Bulletproof: Mandatory Rules for Deal Protection*, 32 J. CORP. L. 865 (2006-2007).

company deals, including so-called "match rights."[97]

All of these various deal protections are obviously interrelated, and the target's board of directors has to evaluate the proposed deal protection measures together as a collective package.

If the target's directors allow the buyer to obtain deal protections that are too buyer-favorable—that are "preclusive" or "coercive" in the words of the Delaware courts—then these directors risk being found to have breached their fiduciary duties. Lisa, as the Delaware practitioner on the panel, would you care to elaborate?

LISA SCHMIDT: (Delaware Counsel) Sure. The courts in Delaware are going to look at the entire package of deal protections,[98] so the parties have to strike the right balance in negotiating them. Typically, Delaware courts won't "blue pencil" overly protective deal protections. They're going to look at the whole package, and you risk your entire transaction if the court feels it's too aggressive.[99] The most

97. *See* MODEL MERGER AGREEMENT, *supra* note 11, at 271-73; *see also* Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729 (2007-2008).

98. *In re* Answers Corp. S'holders Litig., No. 6170-VCN, 2011 WL 1366780, at *4 (Del. Ch. Apr. 11, 2011) ("The measure of a deal protection strategy, of course, is the cumulative effect."); *see also* La. Mun. Police Employees' Ret. Sys. v. Crawford, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007) ("[A] court focuses upon 'the real world risks and prospects confronting [directors] when they agreed to the deal protections.' That analysis will, by necessity, require the Court to consider a number of factors . . . and the preclusive or coercive power of *all* deal protections included in a transaction, taken as a whole.").

99. In *Unitrin, Inc. v. American General Corp*., 651 A.2d 1361 (Del. 1995), the Delaware Supreme Court held that:

> In assessing a challenge to defensive actions by a target corporation's board of directors . . . this Court has held that the Court of Chancery should evaluate the board's overall response, including the justification for each contested defensive measure, and the results achieved thereby. Where all of the target board's defensive actions are inextricably related, the principles of Unocal

extreme example is *Omnicare*.[100]

RICK CLIMAN: (Moderator) So as we negotiate these deal protections we have to be very mindful of the fact that the Delaware judges are, in effect, looking over the parties' shoulders. Fred, as counsel for the buyer, as much as you'd like to get away with extremely protective deal protections, you also have an interest in making sure the deal protections aren't too aggressive, right?

FRED GREEN (Counsel for Buyer): Yes, absolutely. I'm hoping this transaction is going to close and my client will wind up owning the target. To the extent there's litigation, which you plan for and frankly expect in just about every public M&A transaction, my client's going to inherit the need to defend that litigation. So the buyer will have a keen interest in having strong deal protection measures in place, and may seek to push close to the line of what is perceived to be permitted as a legal matter, but not beyond. We generally want to negotiate provisions that make it very difficult for an interloper to get into the mix, without making it impossible. Similarly, we realize that we cannot negotiate

> require that such actions be scrutinized collectively as a unitary response to the perceived threat.

Id. at 1386-87 (citing Gilbert v. El Paso Co., 575 A.2d 1131, 1145 (Del. Super. Ct. 1990))***; see also In re*** Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1022-23 n.80 (Del. Ch. 2005) (suggesting that the Court of Chancery should consider enjoining a merger's closing preliminarily rather than "blue pencil" deal protections). *But see* Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures In Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919, 941 n.71 (2001) (suggesting that some circumstances might justify judicial "blue penciling" of deal protections).

100. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003). In *Omnicare*, the Delaware Supreme Court held that a combination of deal protections that effectively "locks-up" a merger, in the sense of rendering it a "fait accompli" prior to formal stockholder approval, is invalid on the basis that it prevents the board from exercising its continuing fiduciary responsibilities. *Id.* at 936. The merger agreement at issue in *Omnicare* made it "mathematically impossible" and "realistically unattainable" for a potential third party bidder to complete a transaction with the company (no matter how superior the proposal) because it included a "force-the-vote" provision, voting agreements locking up in excess of 50% of the voting power and did not include a "fiduciary out" provision. *Id.*

for mechanisms that have a coercive effect on the target's stockholders.

RICK CLIMAN: (Moderator) We're short on time, so we won't be able to address this topic in depth. I would urge those of you who have an interest in this topic to look at the extensive literature on deal protection measures.[101]

We're going to conclude the deal protection segment of our presentation with a brief discussion regarding the size of break-up fees.

Lisa, let's assume a relatively standard break-up fee configuration in which the target company is required to pay the buyer a break-up fee if (1) the buyer terminates the acquisition agreement after the target's board "changes horses," if you will—after the target's board withdraws its recommendation that the target's stockholders tender their shares to the buyer—or (2) if the target company terminates the acquisition agreement in order to accept a better offer. Can we assume that a break-up fee of, say, 20% of deal value, just to take a very extreme example, is going to be excessive? How does that analysis work? Why is a 20% break-up fee considered impermissibly preclusive in a context like this?

LISA SCHMIDT: (Delaware Counsel) Well, a Delaware court is going to apply a *Unocal*[102] analysis and determine whether this

101. Brian JM Quinn, *Bulletproof: Mandatory Rules for Deal Protection*, 32 J. CORP. L. 865 (2007); Justin W. Oravetz, *Is a Merger Agreement Ever Certain? The Impact of the Omnicare Decision on Deal Protection Devices*, 29 DEL. J. CORP. L. 805 (2004); John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000).

102. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). The two-pronged *Unocal* test provides that defensive measures are permissible if (i) reasonable grounds to believe that a danger to corporate policy and effectiveness exist and (ii) the defensive measure adopted is reasonable in relation to the perceived threat. *Id.* at 955-56. Directors satisfy their burden under the first prong of *Unocal* by showing good faith and reasonable investigation of the threat. *Id.* at 955. The second prong of the *Unocal* test

	defensive measure precludes a topping bid. Adding 20% on to the top of a transaction is something that I don't think any of our judges would have trouble quickly finding preclusive.
RICK CLIMAN: (Moderator)	Now, when you talk about "adding 20%" to the transaction, we have to keep in mind that this is a break-up fee that's payable by the target company, not directly by an interloper. But it is the interloper—the competing bidder—that actually bears the fee, because that competing bidder is going to end up buying a target company whose cash resources have been depleted by the amount of the fee; and that will have the effect of lowering the price it's willing to pay for the target. This is what's going to preclude other bidders from putting a competitive price on the table, and that's why courts are so suspicious of large break-up fees, right?
LISA SCHMIDT: (Delaware Counsel)	That's exactly right.
RICK CLIMAN: (Moderator)	So given that, Fred, how big a break-up fee would you be asking for in the definitive agreement? Let's assume here that we're dealing with a target company that's valued at $1 billion based on your client's cash offer price.
FRED GREEN (Counsel for Buyer):	This is not a purely formulaic exercise. There is touch and feel involved, and as you and Lisa have said, you have to look at the break-up fee in combination with the rest of the deal protection measures. A rule of thumb is 2.5% to 4% of equity value, with the percentage

(*i.e.*, the reasonableness of the defensive measure), in turn, is determined through a two-step analysis as articulated by the Delaware Supreme Court in *Unitrin*. 651 A.2d at 1386-88. That analysis requires that the defensive measure adopted (i) must not be either "coercive or preclusive" and (ii) must fall within a "range of reasonable responses" to the threat posed. *Id.* at 1367.

declining slightly as the deals get larger. Here we've posited a deal value of a billion dollars, and I might ask for 3% or 3.5%, or possibly even 4%, of equity value, expecting that there is going to be give and take and wanting the record to show there's been real negotiation on the point. I'd probably hope to settle somewhere around 3%, but there truly is not a "one size fits all" approach to this.

GAR BASON: (Counsel for Target) I think there is an element of Kabuki Theater to this. I don't necessarily agree that the acceptable range is 2.5% to 4%. On the target side I would characterize the appropriate range as 2.5% to 3.5%. And the scatter pattern for larger deals starts to taper off after you get up to around 3%, I'd say.

RICK CLIMAN: (Moderator) But isn't part of the issue that you have to look at this not only in the context of the other deal protection measures you've negotiated, but also in the context of how actively this target company has been shopped? Presumably, the buyer should be able to justify a materially higher break-up fee if the target has been shopped than if it hasn't. But while *you* will know, Gar, whether the target has been shopped, Fred really isn't going to know that, because you're not going to share that information with him in the deal negotiations.

GAR BASON: (Counsel for Target) It's also very much a function of the directors' reaction to how good the price is. The more excited the target is about the price, the further the target ought to be willing to stretch in terms of the size of the break-up fee.

RICK CLIMAN: (Moderator) But basically, Gar, you're saying that a break-up fee in the range of $25 million to $35 million in this context—2.5% to 3.5% of the $1 billion total deal value—wouldn't necessarily offend you, right?

GAR BASON: (Counsel for Target)
That's right. Although I think I did say I thought the scatter pattern would be closer to 2.5% to 3%. But you do see 3.5%. I just think you see it a little bit less frequently.

RICK CLIMAN: (Moderator)
I take it, Lisa, that a 2.5% to 3.5% break-up fee wouldn't offend you either.

LISA SCHMIDT: (Delaware Counsel)
No, not at all.

RICK CLIMAN: (Moderator)
Now let me add a potentially important fact to the mix. Would your view of the appropriate size of the break-up fee change if, even though this target is valued at $1 billion, its assets include a huge chunk of cash—say $400 million in freely available cash? Let's assume that the target has little or no debt, so that the net cost to the buyer—the *enterprise* value as distinct from the *equity* value of the target company—is in the range of $600 million, even though the target's outstanding stock has a market value of $1 billion.[103] So the $35 million break-up fee represents close to 6% of the target's enterprise value. Are you going to be uncomfortable with a number that high, Lisa?

LISA SCHMIDT: (Delaware Counsel)
No, because I think a Delaware court is still going to look at the fee as a percentage of equity value, not enterprise value, and the fee

103. "Equity value" is generally defined as the cost necessary to purchase the equity of a company in the market, while "enterprise value" is the equity value plus the cost of acquiring the target's debt, minus cash and cash equivalents on the company's balance sheet. *See, e.g.*, *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 502 n.41 (Del. Ch. 2010). Arguably, enterprise value offers a more accurate picture of the aggregate consideration required by an acquirer to purchase the target at the end of the day (because, for example, a potential topping bidder would also have to take into account the cost of acquiring the target's debt, or on the flip side, the buyer could conceivably use the target's significant cash reserves to offset the cost of the bid), but as the Court of Chancery noted in *Cogent*, the fact that a company has no debt and a sizeable part of its "assets are especially liquid, like cash, does not change the fact that a buyer still must come up with the cash to purchase it, even if the buyer may be able to obtain very favorable financing (by using the cash of the target as security)." *Id.* at 504.

represents only 3.5% of the target's equity value.

RICK CLIMAN: (Moderator) So you would conclude that *equity* value, rather than *enterprise* value, is the right metric in this context. What do you base that on?

LISA SCHMIDT: (Delaware Counsel) There was a trend of arguing that you should look at enterprise value after some comments that Chancellor Strine made in *Lear*,[104] where he observed that, in a highly leveraged transaction, maybe you should look at enterprise value. But, since then, in cases where there was a substantial amount of cash on the target's balance sheet, the courts have consistently looked at equity value, not enterprise value.[105]

JOEL GREENBERG: (Commentator) Of course, the facts are never quite as simple as those we have been discussing. We're talking about a target company with a lot of cash on its balance sheet, yet in the case of most large U.S. companies a good part of that is probably parked overseas and requires a significant tax cost to get it back to the U.S.

Conversely, if you were making an acquisition of a large investment bank, which typically runs at 40-to-one or 50-to-one leverage, nobody is going to suggest that you could ask for a break-up fee of 100% of equity value on the theory that it's only 2% of enterprise value. I would like the strike suit lawyers' chances in

104. *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 120 (Del. Ch. 2007).

105. *See, e.g.*, *In re* Orchid Cellmark Inc. S'holder Litig., No. 6373-VCN, 2011 WL 1938253, at *7 (Del. Ch. May 12, 2011) ("Delaware's case law . . . teaches that such termination fees are generally measured according to a Company's equity value."); *In re* Answers Corp. S'holders Litig., No. 6170-VCN, 2011 WL 1366780, at *4 n.52 (Del. Ch. Apr. 11, 2011) ("Our law has evolved by relating the break-up fee to equity value. The Plaintiffs have offered no compelling reason for deviating from that approach."); *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487 (Del. Ch. 2010) (measuring termination fee by transaction's equity value and noting that the reasonableness of such a fee "depends on the particular facts surrounding the transaction").

that lawsuit.

RICK CLIMAN: (Moderator) So let me put a similar hypothetical to Lisa by changing the facts. Suppose this target company, that has shares valued at $1 billion, has $3 billion in debt and very little cash. So while its *equity* value is only $1 billion, its *enterprise* value is $4 billion. Could we increase the break-up fee to, say, $100 million? That's only 2.5% of enterprise value—but it is a whopping 10% of equity value. What about that footnote in *Lear* that you alluded to earlier, Lisa?

LISA SCHMIDT: (Delaware Counsel) This is a closer call because there is the comment in *Lear*, but I don't know that a court is going to endorse a fee that's 10% of equity value, regardless of the fact that it's only 2.5% of enterprise value. In *Lear* you had 3.5% versus 2.4%. So the relevant percentages there were much closer. Ten percent, I think, is going to be tough for a court to swallow.

RICK CLIMAN: (Moderator) Does anyone on the panel think that the answer might turn in part on whether that debt has to be refinanced in the context of the transaction? If the $3 billion in debt becomes due and has to be replaced immediately as a result of the buyer's acquisition of the target, might a court be more inclined to endorse a larger break-up fee?

JOEL GREENBERG: (Commentator) Logically maybe it should, but I think this is an area the courts are very reluctant to get into. You're going to have all kinds of variations as to what kind of debt you're talking about. Take a company that leverages itself on an extreme basis in the commercial paper market. That company is refinancing its debt all the time. But you wouldn't really think that should justify a break-up fee that's 30% or 40% of equity value.

FRED GREEN (Counsel for Buyer): What's happened since the *Lear* footnote, though, is practitioners have begun to focus a good deal more on the issue of equity value vs. enterprise value for this purpose, and some publications now track both percentages in reporting on the break-up fee in every deal. The awareness level has changed and that leads to debate, and perhaps future flexibility in considering what might be upheld by the courts.

IX. ANTITRUST ISSUES

RICK CLIMAN: (Moderator) Let's spend the final ten minutes of our presentation talking about some of the provisions of the acquisition agreement that bear on antitrust risks.

MJ, let's assume that the buyer and the target company are fierce competitors, and you're the target company's antitrust lawyer. Let's also assume you've tentatively concluded, as a result of significant overlaps between the buyer's products and the target company's products, that there is a significant risk that the contemplated acquisition of the target by the buyer is going to be challenged by the antitrust authorities, perhaps both here in the U.S. and abroad. As the target company's antitrust lawyer, what's the most aggressive thing you might ask for initially in order to address the risk to the target that the inevitable antitrust challenge will kill the deal?

MJ MOLTENBREY: (Antitrust Counsel for Target) My opening bid is certainly going to be to ask for a "hell-or-high-water" clause.

RICK CLIMAN: (Moderator) What's a hell-or-high-water clause?

MJ MOLTENBREY: (Antitrust Counsel for Target)

A hell-or-high-water clause would require the buyer to do anything and everything demanded by the antitrust authorities in order to satisfy the antitrust regulatory conditions to the closing of the deal. That would include product divestitures of any size, agreements imposing limitations on the buyer's future conduct and agreements to license products—whatever it takes to get antitrust clearance, including vigorously litigating the challenge by the authorities.[106]

106. For an example of a hell-or-high-water provision, see section 5.4(d) of the Agreement and Plan of Merger among Kinder Morgan, Inc., Sherpa Merger Sub, Inc., Sherpa Acquisition, LLC, Sirius Holdings Merger Corporation, Sirius Merger Corporation, and El Paso Corporation, which provides in part:

> Parent (including by its Subsidiaries) agrees to take, or cause to be taken (including by its Subsidiaries), any and all steps and to make, or cause to be made (including by its Subsidiaries), any and all undertakings necessary to resolve such objections, if any, that a Governmental Authority may assert under any Antitrust Law with respect to the Transactions, and to avoid or eliminate each and every impediment under any Antitrust Law that may be asserted by any Governmental Authority with respect to the Transactions, in each case, so as to enable the Closing to occur as promptly as practicable and in any event no later than the Extended Walk-Away Date, including, without limitation, (x) proposing, negotiating, committing to and effecting, by consent decree, hold separate order, or otherwise, the sale, divestiture or disposition of any businesses, assets, equity interests, product lines or properties of Parent or the Company (or any of their respective Subsidiaries) or any equity interest in any joint venture held by Parent or the Company (or any of their respective Subsidiaries), (y) creating, terminating, or divesting relationships, ventures, contractual rights or obligations of the Company or Parent or their respective Subsidiaries and (z) otherwise taking or committing to take any action that would limit Parent's freedom of action with respect to, or its ability to retain or hold, directly or indirectly, any businesses, assets, equity interests, product lines or properties of Parent or the Company (including any of their respective Subsidiaries) or any equity interest in any joint venture held by Parent or the Company (or any of their respective Subsidiaries), in each case as may be required in order to obtain all approvals, consents, clearances, expirations or terminations of waiting periods, registrations, permits, authorizations and other confirmations required directly or indirectly under any Antitrust Law or to avoid the commencement of any action to prohibit the Transactions under any Antitrust Law, or, in the alternative, to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any action or proceeding seeking to prohibit the Transactions or delay the Closing beyond the Extended Walk-Away Date.

Kinder Morgan, Inc., Agreement and Plan of Merger dated as of October 16, 2011 among Kinder Morgan, Inc., Sherpa Merger Sub, Inc., Sherpa Acquisition, LLC, Sirius Holdings Merger Corp. Sirius Merger Corp. and El Paso Corp. (Form 8-K, Ex. 2.1) § 5.4(d) (Oct. 19, 2011).

RICK CLIMAN: (Moderator) Aggressively litigating the matter right until the drop-dead date, and then divesting anything and everything that it takes to get the antitrust authorities to bless the deal.

GAR BASON: (Counsel for Target) But aren't there situations where the government just says no, there is nothing curative you can do, we will oppose this?

MJ MOLTENBREY: (Antitrust Counsel for Target) Yes. But a true hell-or-high-water clause would call for the buyer to pay the full purchase price whether or not the buyer can actually close the acquisition. Now, I don't think you're going to see that very often, but conceptually . . .

JOEL GREENBERG: (Commentator) But you do occasionally see it. I was involved in a private deal where the purchase price was secured by a letter of credit that the sellers could draw on if the buyer couldn't obtain antitrust clearance.[107]

FRED GREEN (Counsel for Buyer): You see hell-or-high-water provisions being requested by a target when a bidder who is a competitor of the target puts a compelling price on the table, which it is able to do because of the synergies that can be realized. The target may resist doing the deal with this bidder because of the antitrust risk, and the bidder will have to search for a means of reassuring the target that it is worth accepting the offer.

The solution in that scenario could be that the bidder offers to "take the antitrust risk." That way, the target can compare the bidder's offer with offers made by other potential buyers who

107. *See* Stock Purchase Agreement dated April 12, 1984, among Condec Corp., Norman I. Schafler, Rubelle Schafler, R. Scott Schafler, Julie Schafler Dale, Gerald Rosenberg, Richard M. Cion, Condec Acquisition Corp., William F. Farley, Farley Acquisition Corporation, Farley Metals, Inc., and Farley Industries, Inc. filed as Exhibit Q to Amendment No. 12 to Schedule 13D of William F. Farley (Apr. 17, 1984) (in respect to the Common Stock of Condec Corporation).

aren't competitors. The bidder essentially agrees to close the deal "come hell or high water"—even if it has to divest its own assets, or divest some of the assets it would otherwise be acquiring in the deal, or has to give a proxy to a third party or enter into a "hold separate agreement" that separates the offending assets and allows the parties to close the transaction.

RICK CLIMAN: (Moderator) Let's assume that in this deal, as is likely to be the case, the buyer gets heartburn over a true hell-or-high-water clause. You do see hell-or-high-water clauses, but they are exceedingly rare. MJ, as the target's antitrust counsel, might you request something less extreme than a hell-or-high-water clause?

MJ MOLTENBREY: (Antitrust Counsel for Target) I would ask for a "best efforts" clause, requiring the buyer to use its best efforts[108] to get the needed antitrust clearances. I probably would want to specify that best efforts would include divestitures . . .

RICK CLIMAN: (Moderator) Divestitures of specific assets that are actually identified, or divestitures of unspecified assets up to a certain dollar amount?

MJ MOLTENBREY: (Antitrust Counsel for Target) You could do it either way. It could be divestitures up to a particular dollar value, but oftentimes you do see very specific assets identified. Obviously, the concerns with identifying specific mandatory asset divestitures in your acquisition agreement is that you are providing a roadmap to the regulators in terms of what they should demand from the buyer. So sometimes the buyer might prefer not to specify exactly what assets are to be divested and would prefer to simply say that

108. The meaning of an obligation to use "best efforts" is not clearly established. *See* MODEL MERGER AGREEMENT, *supra* note 11, at 124-26; Zachary Miller, Note, *Best Efforts?: Differing Judicial Interpretations of a Familiar Term*, 48 ARIZ. L. REV. 615 (2006).

	it will be required to divest assets generating up to a specified dollar amount of annual revenues.[109]
RICK CLIMAN: (Moderator)	Right. Would you also specify that "best efforts" includes vigorously litigating any governmental litigation challenges to the transaction?
MJ MOLTENBREY: (Antitrust Counsel for Target)	Yes.
RICK CLIMAN: (Moderator)	Where do reverse break-up fees fit into this? We see deals with reverse break-up fee provisions that say that if the deal falls apart, and the reason it falls apart is an antitrust challenge, then the buyer will pay the target company a reverse break-up fee of a specified dollar amount. It's called a *reverse* break-up fee because, unlike the break-up fees we talked about earlier, which are paid *by the target to the buyer* in the deal protection context, the *buyer* pays the target an antitrust-related break-up fee. It goes in the opposite direction. MJ, are reverse break-up fees an effective way to address and allocate antitrust risk? And when you have a reverse break-up fee, is it layered on top of a best efforts-type provision, or is it a substitute for that type of efforts clause?

109. *Compare, e.g.*, United Technologies Corp., Agreement And Plan Of Merger by and among United Technologies Corp., Charlotte Lucas Corp. and Goodrich Corp., dated as of September 21, 2011 (Form 8-K, Ex. 2.1), at 38 (Sept. 23, 2011) (limiting United Technologies' divestiture commitments to business, product lines or asset generating revenues in excess of $900 million), *with* Bureau of National Affairs, Inc., Agreement And Plan Of Merger by and among Bloomberg Inc., Brass Acquisition Corp., and The Bureau Of National Affairs, Inc. dated August 24, 2011 (Form 8-K, Ex. 2.1), at 46-47 (Aug. 30, 2011) (limiting Bloomberg's divestiture obligations to its legal publication assets and businesses).

MJ MOLTENBREY: (Antitrust Counsel for Target)

Most of the time there is going to be some type of efforts clause in the deal—perhaps a *reasonable* best efforts clause—along with the reverse break-up fee. But if the reverse break-up fee is high enough, it is conceivable that it would be the only provision you would have.

The reverse break-up fee can serve a couple of functions. One of them is to give the buyer every incentive it needs to get the deal done, and to do what it takes to get the antitrust clearances it needs. But it also serves a separate function, which is to compensate the target for disruption to its business while the deal is pending and while antitrust review is going on. During that time the target is likely at risk of losing employees and potentially losing customers, and its business plans and strategic plans are put on hold. Part of the idea of the reverse break-up fee is to compensate the target for that in the event the deal is ultimately blocked.

RICK CLIMAN: (Moderator)

MJ, in the deal protection context, Gar, Fred, and Lisa said they would be comfortable with a 3% break-up fee, but that a fee significantly higher than that could create fiduciary issues.[110] Is there some limit on how high an antitrust-related reverse break-up fee can be?

MJ MOLTENBREY: (Antitrust Counsel for Target)

No. There's really no limit on what you might see, and in fact we have many examples of reverse break-up fees much greater than 3%.[111]

110. *See supra* notes 102-105 and accompanying text.

111. Examples of deals involving reverse break-up fees significantly greater than three percent of the transaction value include Grifols SA's acquisition of Talecris Biotherapeutics (9.4%), Talecris Biotherapeutics Holdings Corp., Agreement and Plan of Merger (Form 8-K, Ex. 2.1), at 92 (June 6, 2010); Seagate's acquisition of Maxtor (15.8%), Seagate Technology PLC, Agreement and Plan of Merger by and among Seagate Technology, MD Merger Corp. and Maxtor Corp., dated as of December 20, 2005 (Form 8-K, Ex. 2.1), at 39 (Dec. 22, 2005); and Monsanto's acquisition of Delta and Pine Land (40%), Monsanto Co., Agreement And Plan Of Merger dated as of August

RICK CLIMAN: (Moderator) Didn't Google just offer up a 20% reverse break-up fee in its pending acquisition of Motorola Mobility?[112] I take it that's an outlier . . .

MJ MOLTENBREY: (Antitrust Counsel for Target) It's pretty unusual.

RICK CLIMAN: (Moderator) Isn't it fair to say that most antitrust-related reverse break-up fees fall in the range of 2% to 10% of deal value?

MJ MOLTENBREY: (Antitrust Counsel for Target) Yes.

RICK CLIMAN: (Moderator) Because of our time constraints, we've only been able to scratch the surface. We haven't been able to cover anywhere near the full range of issues that the parties confront in the negotiated acquisition of a publicly traded company by way of a friendly tender offer.

Thanks for your attention.

14, 2006 by and among Monsanto Co., Monsanto Sub, Inc. and Delta & Pine Land Co. (Form 8-K, Ex. 2.1) § 7.07(f) (Aug. 18, 2006).

112. Google, Inc., Agreement and Plan of Merger (Form 8-K, Ex. 2.1) (Aug. 15, 2011); *see also* Steven M. Davidoff, Behind Google's Huge Breakup Fee in Motorola Deal, N.Y. TIMES (Aug. 18, 2011, 4:07 PM), http://dealbook.nytimes.com/2011/08/18/behind-googles-huge-breakup-fee-in-motorola-deal/.

APPENDICES

APPENDIX A

EXCERPTS FROM TARGET COMPANY'S FORM OF CONFIDENTIALITY AGREEMENT (INCLUDING "STANDSTILL" PROVISION)

*** * * ***

2. LIMITATION ON USE OF CONFIDENTIAL INFORMATION. The Prospective Acquirer agrees that neither the Prospective Acquirer nor any of its Representatives will use any Confidential Information in any manner except for the specific purpose of pursuing a negotiated **acquisition of Target.**

*** * * ***

8. STANDSTILL PROVISION. The Prospective Acquirer agrees that, during the three-year period commencing on the date of this Agreement (the "Standstill Period"), neither the Prospective Acquirer nor any of the Prospective Acquirer'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 Target or any securities of any subsidiary or other affiliate of Target, (ii) any acquisition of any assets of Target or any assets of any subsidiary or other affiliate of Target, (iii) any tender offer, exchange offer, merger, business combination, recapitalization, reorganization, restructuring, liquidation, dissolution or extraordinary transaction involving Target or any subsidiary or other affiliate of Target, or involving any securities or assets of Target or any securities or assets of any subsidiary or other affiliate of 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 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 Target;

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

(d) take any action that could reasonably be expected to require 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, facilitate or propose (publicly or otherwise) the taking of, any action referred to in clause "(a)," "(b)," "(c)" or "(d)" of this sentence;

(f) 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 Target or any of Target's Representatives amend, waive or consider the amendment or waiver of any provision set forth in this Section 8.

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

* * * *

For purposes of this Agreement, a party's "Representatives" will be deemed to include each Person that is or becomes (i) a subsidiary or other affiliate of such party, or (ii) an officer, director, employee, partner, attorney, advisor, accountant, agent or representative of such party or of any of such party's subsidiaries or other affiliates.

APPENDIX B

SAMPLE RESPONSE BY PROSPECTIVE ACQUIRER TO "STANDSTILL" PROVISION PROPOSED BY TARGET COMPANY

- Shorten duration of "Standstill Period" to 180 days
- Delete references to "affiliate" of Target
- Replace "Representatives" with "subsidiaries"
- Add the following "fall-away" provision:

  "Notwithstanding anything to the contrary contained in this Agreement, if, at any time during the Standstill Period, any Person (other than the Prospective Acquirer) or group of Persons (i) commences, or announces an intention to commence, a tender or exchange offer for at least 15% of any class of Target's securities, (ii) commences, or announces an intention to commence, a proxy contest or a solicitation of consents with respect to the election of any director or directors of Target, (iii) acquires beneficial ownership of at least 15% of any class of Target's securities, or (iv) enters into, or announces an intention to enter into, an agreement with Target contemplating the acquisition (by way of merger, tender offer or otherwise) of at least 15% of any class of Target's securities or all or a substantial portion of the assets of Target or any of Target's subsidiaries, then (in any of such cases) the restrictions set forth in this Section 8 shall immediately terminate and cease to be of any further force or effect."

APPENDIX C

PROSPECTIVE ACQUIRER'S FORM OF EXCLUSIVITY AGREEMENT

_________, 20__

[Target Co.]
____
____

Ladies and Gentlemen:

[Target Co.] ("Target") has advised [Prospective Acquirer Co.] (the "Prospective Acquirer") that Target wishes to engage in negotiations with the Prospective Acquirer regarding a possible transaction involving the Prospective Acquirer and Target (a "Possible Transaction"). In order to induce the Prospective Acquirer to enter into negotiations with Target regarding a Possible Transaction (and in recognition of the time and effort that the Prospective Acquirer may expend and the expenses that the Prospective Acquirer may incur in pursuing these negotiations and in investigating Target's business), Target, intending to be legally bound, agrees as follows:

1. Target acknowledges and agrees that, until the earlier of __________, 20__ or the date on which the Prospective Acquirer advises Target in writing that the Prospective Acquirer is terminating all negotiations regarding a Possible Transaction, Target will not do, and will ensure that none of its Representatives (as defined in paragraph 7 of this letter agreement) does, any of the following, directly or indirectly:

(a) solicit, or encourage or facilitate the initiation or submission of, any expression of interest, inquiry, proposal or offer from any person or entity (other than the Prospective Acquirer) relating to a possible Acquisition Transaction (as defined in paragraph 7 of this letter agreement);

(b) participate in any discussions or negotiations or enter into any agreement with, or provide any nonpublic information to, any person or entity (other than the Prospective Acquirer) relating to or in connection with a possible Acquisition Transaction; or

(c) entertain, consider or accept any proposal or offer from any person or entity (other than the Prospective Acquirer) relating to a possible Acquisition Transaction.

Target shall, and shall cause each of its Representatives to, immediately discontinue any ongoing discussions or negotiations (other than any ongoing discussions with the Prospective Acquirer) relating to a possible Acquisition Transaction, and shall promptly provide the Prospective Acquirer with (i) an oral and a written description of any expression of interest, inquiry, proposal or offer relating to a possible Acquisition Transaction that is received by Target or by any of Target's Representatives from any person or entity (other than the Prospective Acquirer) on or prior to ________, 20__, including in such description the identity of the person or entity from which such expression of interest, inquiry, proposal or offer was received (the "Other Interested Party") and (ii) a copy of each written communication and a complete summary of each other communication transmitted on behalf of the Other Interested Party or any of the Other Interested Party's Representatives to Target or any of Target's Representatives or transmitted on behalf of Target or any of Target's Representatives to the Other Interested Party or any of the Other Interested Party's Representatives.

2. Target acknowledges and agrees that neither this letter agreement nor any action taken in connection with this letter agreement will give rise to any obligation on the part of the Prospective Acquirer (a) to continue any discussions or negotiations with Target or (b) to pursue or enter into any transaction or relationship of any nature with Target.

3. Target shall not make or permit any disclosure to any person or entity regarding (a) the existence or terms of this letter agreement, (b) the existence of discussions or negotiations between Target and the Prospective Acquirer or (c) the existence or terms of any proposal regarding a Possible Transaction.

4. Target represents and warrants that neither the commencement nor the continuation of any discussions or negotiations with the Prospective Acquirer has resulted or will result in, and that neither the execution and delivery nor the performance of this letter agreement has resulted or will result in, (a) any breach of any agreement or obligation by which Target or any of Target's Representatives is bound, or (b) any violation of any law or regulation applicable to Target or any of Target's Representatives. Target will indemnify and hold harmless the Prospective Purchaser and the Prospective Purchaser's Representatives against and from any claims, demands, liabilities, losses, damages or

expenses arising directly or indirectly from or relating directly or indirectly to any breach of any of Target's representations, warranties, covenants or obligations set forth in this letter agreement.

5. Target acknowledges and agrees that, in addition to all other remedies available (at law or otherwise) to the Prospective Acquirer, the Prospective Acquirer shall be entitled to equitable relief (including injunction and specific performance) as a remedy for any breach or threatened breach of any provision of this letter agreement. Target further acknowledges and agrees that the Prospective Acquirer shall not be required to obtain, furnish or post any bond or similar instrument in connection with or as a condition to obtaining any remedy referred to in this paragraph 5, and Target waives any right it may have to require that the Prospective Acquirer obtain, furnish or post any such bond or similar instrument. If any action, suit or proceeding relating to this letter agreement or the enforcement of any provision of this letter agreement is brought against either party hereto, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs and disbursements (in addition to any other relief to which the prevailing party may be entitled).

6. This letter agreement shall be governed by and construed in accordance with the laws of the State of _________ (without giving effect to principles of conflicts of laws). Target: (a) irrevocably and unconditionally consents and submits to the jurisdiction of the state and federal courts located in the State of _________ for purposes of any action, suit or proceeding arising out of or relating to this letter agreement; (b) irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of or relating to this letter agreement in any state or federal court located in the State of _________; and (c) irrevocably and unconditionally waives the right to plead or claim, and irrevocably and unconditionally agrees not to plead or claim, that any action, suit or proceeding arising out of or relating to this letter agreement that is brought in any state or federal court located in the State of __________ has been brought in an inconvenient forum.

7. For purposes of this letter agreement:

(a) Target's "Representatives" shall include each person or entity that is or becomes (i) a subsidiary or other affiliate of Target or (ii) an officer, director, employee, partner, attorney, advisor, accountant, agent or representative of Target or of any of Target's subsidiaries or other affiliates.

(b) "Acquisition Transaction" shall mean any transaction directly or indirectly involving:

(i) the sale, license, disposition or acquisition of all or a material portion of the business or assets of Target or any direct or indirect subsidiary or division of Target;

(ii) the issuance, grant, disposition or acquisition of (A) any capital stock or other equity security of Target or any direct or indirect subsidiary of Target, (B) any option, call, warrant or right (whether or not immediately exercisable) to acquire any capital stock or other equity security of Target or any direct or indirect subsidiary of Target, or (C) any security, instrument or obligation that is or may become convertible into or exchangeable for any capital stock or other equity security of Target or any direct or indirect subsidiary of Target; or

(iii) any merger, consolidation, business combination, share exchange, recapitalization, reorganization or similar transaction involving Target or any direct or indirect subsidiary of Target;

provided, *however,* that (A) the grant of stock options by Target to its employees in the ordinary course of business will not be deemed to be an "Acquisition Transaction" if such grant is made pursuant to Target's existing stock option plan and is consistent with Target's past practices, and (B) the issuance of stock by Target to its employees upon the valid exercise of outstanding stock options will not be deemed to be an "Acquisition Transaction."

Very truly yours,

[PROSPECTIVE ACQUIRER CO.]

By:

ACKNOWLEDGED AND AGREED:

[TARGET CO.]

By:

APPENDIX D

TARGET COMPANY'S FORM OF EXCLUSIVITY AGREEMENT

____________, 20__

[Prospective Acquirer Co.]
____
____

Ladies and Gentlemen:

[Prospective Acquirer Co.] (the "Prospective Acquirer") and [Target Co.] ("Target") contemplate engaging in negotiations regarding the possible purchase by the Prospective Acquirer of all or substantially all of the stock or assets of Target (the "Possible Transaction"). In anticipation of these negotiations, the Prospective Acquirer and Target (collectively, the "Parties") agree as follows:

1. Subject to the other provisions contained in this letter agreement, during the Exclusivity Period (as defined in paragraph 6 of this letter agreement), Target will not permit any of its directors or officers who know about the Possible Transaction to solicit offers from, or to engage in substantive negotiations with, any third party (other than the Prospective Acquirer and its affiliates, representatives and advisors) contemplating the purchase by such third party of all or substantially all of the stock or assets of Target; *provided, however*, that notwithstanding anything to the contrary contained in this letter agreement or in the Confidentiality Agreement (as defined in paragraph 6 of this letter agreement), it will not be a breach of this letter agreement or the Confidentiality Agreement for Target or any of its directors, officers, representatives, advisors, affiliates, employees or agents (i) to take or permit the taking of any action otherwise prohibited by this letter agreement if Target's board of directors determines in good faith (after consultation with counsel) that the failure to do so would create a material risk of a breach by Target's board of directors of its fiduciary or other duties to Target's stockholders, or (ii) to disclose to a third party the existence or terms of this letter agreement.

2. If (a) Target commits a willful and material breach of its obligations under paragraph 1 of this letter agreement *and* (b) the Prospective Acquirer shall not have materially breached the Confidentiality Agreement, then Target will reimburse the Prospective

Acquirer for any reasonable and documented out-of-pocket expenses actually incurred by the Prospective Acquirer during the Exclusivity Period in connection with the Prospective Acquirer's negotiation of the Possible Transaction during the Exclusivity Period; *provided, however,* that in no event will the aggregate amount payable by Target pursuant to this paragraph 2 exceed $_______. The right to reimbursement contained in this paragraph 2 will be the Prospective Acquirer's sole and exclusive remedy with respect to any willful and material breach by Target of this letter agreement. Under no circumstances will Target have any liability for any breach of this letter agreement that is not willful or for any breach of this letter agreement that is not material.

3. Each Party acknowledges and agrees that no agreement providing for the Possible Transaction will be deemed to exist between the Parties unless and until a final, binding, definitive acquisition agreement with respect to the Possible Transaction has been executed and delivered by the Parties, and neither Party (and no affiliate of either Party) will be under any obligation to negotiate or enter into any such definitive acquisition agreement or transaction. The Parties also acknowledge and agree that, unless and until a final, binding, definitive acquisition agreement providing for the Possible Transaction has been executed and delivered by the Parties, neither Party (and no affiliate of either Party) will be under any legal obligation of any kind whatsoever with respect to the Possible Transaction by virtue of this letter agreement (except as expressly provided in this letter agreement).

4. This letter agreement and the Confidentiality Agreement set forth the entire understanding of the Parties relating to the subject matter hereof and thereof and supersede all prior agreements and understandings between the Parties relating to the subject matter hereof and thereof. Nothing contained in this letter agreement shall limit any of the rights of Target or any of its affiliates, or any of the obligations of the Prospective Acquirer, under the Confidentiality Agreement.

5. This letter agreement shall be governed in all respects by the internal laws of the State of __________, and no action or proceeding relating to this letter agreement may be brought or otherwise commenced in any court outside the State of _________.

6. For purposes of this letter agreement:

(a) “Confidentiality Agreement” means the Confidentiality Agreement dated as of _________, 20__ between the Parties.

(b) “Exclusivity Period” means the period commencing on the later of the date on which this letter agreement is executed on behalf of the Prospective Acquirer and the date this letter agreement is executed on behalf of Target and ending on the earliest of: (i) _________, 20__; (ii) the date on which the Prospective Acquirer breaches any provision of this letter agreement or the Confidentiality Agreement; and (iii) the date on which the Prospective Acquirer terminates negotiations with Target regarding the Possible Transaction.

Very truly yours,

[TARGET CO.]

By:

ACKNOWLEDGED AND AGREED:

[PROSPECTIVE ACQUIRER CO.]

By:

Date: _________, 20__

APPENDIX E

SAMPLE PROVISIONS RELATING TO TENDER OFFER CONDITIONS AND TENDER OFFER EXTENSIONS IN ACQUIRER'S FORM OF DEFINITIVE ACQUISITION AGREEMENT FOR A TWO-STEP CASH ACQUISITION OF TARGET COMPANY

[Note: It is assumed that the target company has no subsidiaries.]

ACQUISITION AGREEMENT

THIS ACQUISITION AGREEMENT (this "Agreement") is made and entered into as of __________, 20__, by and among: [Acquirer Co.], a Delaware corporation ("Acquirer"); [Acquisition Sub, Inc.], a Delaware corporation and a wholly owned subsidiary of Acquirer ("Acquisition Sub"); and [Target Co.], a Delaware corporation ("Target").

RECITALS

A. The boards of directors of Acquirer, Acquisition Sub and Target have determined that it is in the best interests of their respective stockholders for Acquirer to acquire Target upon the terms and subject to the conditions set forth in this Agreement.

B. In furtherance of the contemplated acquisition of Target by Acquirer, it is proposed: (a) that Acquisition Sub make a cash tender offer (such cash tender offer, as it may be amended from time to time, being referred to as the "Offer") to acquire all of the issued and outstanding shares of common stock of Target ("Target Common Stock") at a price of $____ per share (such dollar amount, or any greater dollar amount per share paid pursuant to the Offer, being referred to as the "Offer Price"), net to the seller in cash; and (b) that, after acquiring shares of Target Common Stock pursuant to the Offer, Acquisition Sub merge with and into Target upon the terms and subject to the conditions set forth in this Agreement (the merger of Acquisition Sub into Target being referred to as the "Merger").

C. In order to induce Acquirer and Acquisition Sub to enter into this Agreement and to consummate the transactions contemplated by this Agreement, concurrently with the execution and delivery of this

Agreement, certain stockholders of Target are executing Stockholder Agreements in favor of Acquirer and Acquisition Sub.

AGREEMENT

The parties to this Agreement, intending to be legally bound, agree as follows:

SECTION 1. THE OFFER

1.1 Conduct of the Offer.

(a) ***Commencement of Offer.*** Acquisition Sub shall commence the Offer as promptly as practicable after the date of this Agreement; *provided, however*, that Acquisition Sub shall not be required to commence the Offer if (i) any of the conditions set forth in clauses "(a)," "(b)," "(c)," "(h)," "(i)," "(j)," "(k)," "(l)" and "(m)" of Annex I shall not be satisfied, or (ii) an event shall have occurred or a circumstance shall exist that, in the reasonable judgment of Acquirer, would make any of the conditions set forth in Annex I incapable of being satisfied on or prior to the expiration date of the Offer.

(b) ***Offer Conditions.*** The obligation of Acquisition Sub to accept for payment, and to pay for, shares of Target Common Stock validly tendered (and not withdrawn) pursuant to the Offer shall be subject to (i) the condition that there shall be validly tendered (and not withdrawn) a number of shares of Target Common Stock that, together with any shares of Target Common Stock owned by Acquirer or Acquisition Sub immediately prior to the acceptance for payment of shares of Target Common Stock pursuant to the Offer, represents more than 50% of the Adjusted Outstanding Share Number (the "Minimum Condition") and (ii) the other conditions set forth in Annex I. The Minimum Condition and the other conditions set forth in Annex I are referred to collectively as the "Offer Conditions." For purposes of this Agreement, the "Adjusted Outstanding Share Number" shall be the sum of (1) the aggregate number of shares of Target Common Stock issued and outstanding immediately prior to the acceptance of shares of Target Common Stock for payment pursuant to the Offer, *plus* (2) the aggregate number of shares of Target Common Stock issuable upon the exercise of all options, warrants and other rights to acquire Target Common Stock (whether or not immediately exercisable) that are outstanding immediately prior to the acceptance of shares of Target Common Stock for payment pursuant to the Offer.

(c) *Changes to Offer.* Acquisition Sub expressly reserves the right, in its sole discretion, to increase the Offer Price and to waive or make any other changes to the terms and conditions of the Offer; *provided*, *however*, that without the prior written consent of Target: (i) the Minimum Condition may not be amended or waived; and (ii) no change may be made to the Offer that (A) changes the form of consideration to be delivered by Acquisition Sub pursuant to the Offer, (B) decreases the Offer Price or the number of shares of Target Common Stock sought to be purchased by Acquisition Sub in the Offer, (C) imposes conditions to the Offer in addition to the Offer Conditions, or (D) except as provided in Section 1.1(d), extends the expiration date of the Offer beyond the initial expiration date of the Offer. Subject to the terms and conditions of the Offer and this Agreement, Acquisition Sub shall accept for payment all shares of Target Common Stock validly tendered (and not withdrawn) pursuant to the Offer as soon as practicable after Acquisition Sub is permitted to do so under applicable laws, rules and regulations.

(d) *Expiration of Offer.* The Offer shall initially be scheduled to expire 20 business days following the date of the commencement thereof (calculated as set forth in Rule 14d-1(g)(3) and Rule 14e-1(a) under the Exchange Act). Notwithstanding anything to the contrary contained in this Agreement, but subject to the parties' respective termination rights under Section 8.1: (i) if, on any date as of which the Offer is scheduled to expire, any Offer Condition has not been satisfied or waived, Acquisition Sub may, in its discretion (and without the consent of Target or any other Person), extend the Offer from time to time for such period of time as Acquisition Sub reasonably determines to be necessary to permit such Offer Condition to be satisfied; (ii) Acquisition Sub may, in its discretion (and without the consent of Target or any other Person), extend the Offer from time to time for any period required by any rule or regulation of the SEC applicable to the Offer; (iii) [*mandatory extensions of Offer*]; and (iv) Acquisition Sub may, in its discretion (and without the consent of Target or any other Person), elect to provide for a subsequent offering period (and one or more extensions thereof) in accordance with Rule 14d-11 under the Exchange Act.

*** * * ***

ANNEX I

CONDITIONS TO THE OFFER

The obligation of Acquisition Sub to accept for payment and pay for shares of Target Common Stock validly tendered (and not withdrawn) pursuant to the Offer is subject to the satisfaction of the Minimum Condition and the additional conditions set forth in clauses "(a)" through "(m)" below. Accordingly, notwithstanding any other provision of the Offer or the Agreement, Acquisition Sub shall not be required to accept for payment or pay for, and may delay the acceptance for payment or the payment for, any tendered shares of Target Common Stock, and may terminate the Offer on any scheduled expiration date and not accept for payment any tendered shares of Target Common Stock, if (i) the Minimum Condition shall not be satisfied by 12:00 midnight, Eastern Time, on the expiration date of the Offer, or (ii) any of the following additional conditions shall not be satisfied by 12:00 midnight, Eastern Time, on the expiration date of the Offer:

> **(a)** each of the representations and warranties of Target contained in the Agreement shall have been accurate in all material respects as of the date of the Agreement and shall be accurate in all material respects as of the expiration date of the Offer (as it may have been extended) as if made on and as of such expiration date (it being understood that, for purposes of determining the accuracy of such representations and warranties, (i) all "Material Adverse Effect" qualifications and other materiality qualifications contained in such representations and warranties shall be disregarded and (ii) any update of or modification to the Disclosure Schedule made or purported to have been made on or after the date of the Agreement shall be disregarded);
>
> **(b)** each covenant or obligation that Target is required to comply with or to perform at or prior to the Acceptance Time shall have been complied with and performed in all material respects;
>
> **(c)** since the date of the Agreement, there shall not have been any Material Adverse Effect (as defined below), and no event shall have occurred or circumstance shall exist that, in combination with any other events or circumstances, could

reasonably be expected to have or result in a Material Adverse Effect;

(d) the waiting period applicable to the Offer under the HSR Act shall have expired or been terminated;

(e) any waiting period under any applicable foreign antitrust or competition law, rule or regulation shall have expired or been terminated, and any Consent required under any applicable foreign antitrust or competition law, rule or regulation shall have been obtained and shall be in full force and effect;

(f) all material Consents required to be obtained in connection with the Offer, the Merger and the other transactions contemplated by the Agreement (including the Consents identified in Part ___ of the Disclosure Schedule) shall have been obtained and shall be in full force and effect;

(g) Acquirer and Target shall have received a certificate executed by Target's Chief Executive Officer and Chief Financial Officer confirming that the conditions set forth in clauses "(a)," "(b)," "(c)" and "(f)" of this Annex I have been duly satisfied;

(h) no temporary restraining order, preliminary or permanent injunction or other order preventing the acceptance for payment or the acquisition of, or the payment for, shares of Target Common Stock pursuant to the Offer, or preventing consummation of the Merger or any of the other transactions contemplated by the Agreement, shall have been issued by any court of competent jurisdiction or other Governmental Body and remain in effect, and there shall not be any Legal Requirement enacted or deemed applicable to the Offer or the Merger or any of the other transactions contemplated by the Agreement that makes the acceptance for payment or the acquisition of, or payment for, shares of Target Common Stock pursuant to the Offer, or the consummation of the Merger or any of the other transactions contemplated by the Agreement, illegal;

(i) there shall not be pending or threatened any Legal Proceeding (i) challenging or seeking to restrain or prohibit (A) the acceptance for payment or the acquisition of, or the payment for, shares of Target Common Stock pursuant to the Offer or (B) the consummation of the Merger or any of the other transactions contemplated by the Agreement, (ii) relating to the Offer, the Merger or any of the other transactions contemplated by the Agreement and seeking to obtain from Acquirer, Acquisition Sub or Target any damages or other relief that may be material to Acquirer or Target, (iii) seeking to prohibit or limit in any material respect the right or ability of Acquirer or Acquisition Sub to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to shares of the stock of Target or the Surviving Corporation, (iv) that could materially and adversely affect the right or ability of Acquirer or Target to own any of the material assets or operate the business of Target, or (v) seeking to compel Acquirer, any of Acquirer's subsidiaries or Target to dispose of or hold separate any material assets as a result of the Offer, the Merger or any of the other transactions contemplated by the Agreement;

(j) since the date of the Agreement, there shall not have been a material adverse development in any Legal Proceeding pending against Target;

(k) there shall not have occurred (i) any general suspension of trading in securities on the New York Stock Exchange, (ii) any declaration by a Governmental Body of a banking moratorium in the United States or in any other jurisdiction in which Acquirer, any subsidiary of Acquirer or Target has material assets or operations, or any suspension of payments in respect of banks in the United States or in any other jurisdiction in which Acquirer, any subsidiary of Acquirer or Target has material assets or operations, or (iii) any war, armed hostilities, act of terrorism or other international or national calamity directly or indirectly involving the United States or any other jurisdiction in which Acquirer, any subsidiary of Acquirer or Target has material assets or operations;

(l) no Triggering Event (as defined below) shall have occurred; and

(m) the Agreement shall not have been terminated.

The foregoing conditions are for the sole benefit of Acquirer and Acquisition Sub and may be waived by Acquirer and Acquisition Sub, in whole or in part at any time and from time to time, in the sole discretion of Acquirer and Acquisition Sub.

For purposes of the Agreement (including Annex I):

(1) "Material Adverse Effect" means any effect, change, development, event or circumstance that, considered together with all other effects, changes, developments, events or circumstances, is or could reasonably be expected to be or to become materially adverse to, or has or could reasonably be expected to have or result in a material adverse effect on, (A) the business, condition (financial or otherwise), cash position, liquidity, working capital, capitalization, assets (tangible or intangible), liabilities (fixed, contingent or otherwise), operations, cash flow, financial performance or prospects of Target, (B) the ability of Target to consummate the Merger or any of the other transactions contemplated by the Agreement or to perform any of its obligations under the Agreement, (C) the right or ability of Acquirer or Acquisition Sub to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to shares of the stock of Target or the Surviving Corporation, or (D) the rights of Acquirer or Acquisition Sub under the Agreement or relating to the Offer, the Merger or any of the other transactions contemplated by the Agreement.

(2) A "Triggering Event" shall be deemed to have occurred if: (A) the board of directors of Target shall have (x) failed to unanimously recommend that Target's stockholders accept the Offer and tender their shares of Target Common Stock pursuant to the Offer or that Target's stockholders vote to adopt the Agreement, (y) withdrawn or modified in a manner adverse to Acquirer the Target Board Recommendation, or (z) taken any other action that is reasonably determined by Acquirer to suggest that the board of directors of Target might not unanimously support the Offer or the Merger or might not believe that the Offer and the Merger are in the best interests of Target's stockholders; (B) Target shall have failed to include in the Offer Documents the Target Board Recommendation or a statement to the effect that the board of directors of Target has determined and believes that the Offer and the Merger are in the best interests of Target's stockholders; (C) the board of directors of Target fails to reaffirm publicly the Target Board Recommendation, or fails to reaffirm publicly its determination that the Offer and the Merger are in the best interests of Target's stockholders, within five business days after Acquirer requests in writing that such recommendation or determination be reaffirmed publicly; (D) Target or the board of directors of Target shall have approved, endorsed or recommended any Acquisition Proposal; (E) Target shall have entered into any letter of intent or similar document or any agreement relating to any Acquisition Proposal; (F) a tender or exchange offer relating to securities of Target

shall have been commenced and Target shall not have sent to its security holders, within ten business days after the commencement of such tender or exchange offer, a statement disclosing that the board of directors of Target recommends rejection of such tender or exchange offer; (G) an Acquisition Proposal is publicly announced, and Target (x) fails to issue a press release announcing its opposition to such Acquisition Proposal within five business days after such Acquisition Proposal is publicly announced or (y) otherwise fails to actively oppose such Acquisition Proposal; (H) any Person or "group" (as defined in the Exchange Act and the rules thereunder) of Persons directly or indirectly acquires or agrees to acquire, or discloses an intention to acquire, beneficial or record ownership of securities representing more than 15% of the outstanding securities of any class of voting securities of Target; (I) Target or any Representative of Target shall have breached or taken any action inconsistent with any of the provisions set forth in Section 5.3 [the "No-Shop/No-Talk" provisions]; or (J) any stockholder of Target who has executed a Stockholder Agreement shall have materially breached such Stockholder Agreement.

APPENDIX F

EXCERPTS FROM SAMPLE RESPONSE BY TARGET COMPANY TO TENDER OFFER CONDITIONS AND EXTENSION PROVISIONS PROPOSED BY ACQUIRER

- Insert a provision in Section 1.1(d)(iii) requiring Acquisition Sub to extend the Offer at Target's request if the Minimum Condition or any other Offer Condition has not been satisfied as of the expiration of the Offer.

- Modify the "bring-down" condition (clause "(a)" of Annex I) (1) to eliminate the "accurate . . . as of the date of the Agreement" prong, and (2) to provide that this condition will be deemed satisfied notwithstanding the existence of inaccuracies in Target's representations and warranties so long as the inaccuracies do not have a "Material Adverse Effect."

- Modify the definition of "Material Adverse Effect" to read as follows:

  "'Material Adverse Effect' means a material adverse effect on the business, financial condition or results of operations of Target; *provided, however*, that none of the following shall be deemed (either alone or in combination) to constitute, and none of the following shall be taken into account in determining whether there has been or would be, such a material adverse effect:

  (i) any failure on the part of Target to meet internal or other estimates, predictions, projections or forecasts of revenue, net income or any other measure of financial performance;

  (ii) any adverse effect (including any litigation, loss of employees, cancellation of or delay in customer orders, reduction in revenue or net income or disruption of business relationships) arising from or attributable or relating to (A) the announcement or pendency of the Offer, the Merger or any of the other transactions contemplated by the Agreement, (B) conditions affecting the industry or any industry sector in which Target operates or participates, the U.S. economy or financial markets or any foreign economy or financial markets in any location where Target has material operations or sales, (C) any act of terrorism or war, or any armed hostilities, anywhere in the world, (D) legal, accounting, investment banking or other fees or expenses incurred in connection with the Offer, the Merger or any of the other transactions contemplated by the Agreement, (E) the payment of any amounts due to, or the provision of any other benefits to, any officers or other employees under employment contracts, non-competition agreements, employee benefit plans, severance arrangements or other arrangements in existence as of the date of the Agreement, (F) compliance with the terms of, or the taking of any action required by, the Agreement, (G) the taking of any action by Acquirer or any action approved or consented to by Acquirer, (H) any breach of the Agreement by Acquirer, (I) any change in accounting requirements or principles or any change in applicable laws, rules or regulations or the interpretation thereof, or (J) any action required to be taken under applicable laws, rules, regulations or agreements; or

(iii) any adverse effect that is temporary in nature."

- Modify the "litigation out" (clause "(i)" of Annex I) so that it applies only to litigation brought by a U.S. federal or state governmental body with respect to the Offer or the Merger.
- Eliminate clauses "(j)" and "(k)" of Annex I.
- Narrow the definition of "Triggering Event" (as used in clause "(l)" of Annex I) so that it refers only to withdrawals and adverse modifications of the Target Board Recommendation.

APPENDIX G

SAMPLE PROVISIONS REGARDING RECOMMENDATION OF TARGET COMPANY'S BOARD OF DIRECTORS IN ACQUIRER'S FORM OF DEFINITIVE ACQUISITION AGREEMENT FOR A TWO-STEP CASH ACQUISITION OF TARGET COMPANY

1.2 Target Board Recommendation.

(a) Target represents and warrants to Acquirer and Acquisition Sub that Target's board of directors, at a meeting duly called and held, has, by the unanimous vote of all directors of Target, resolved to recommend that the stockholders of Target accept the Offer and tender their shares of Target Common Stock pursuant to the Offer and (if required by applicable law in order to consummate the Merger) adopt this Agreement (the unanimous recommendation of Target's board of directors that the stockholders of Target accept the Offer and tender their shares of Target Common Stock pursuant to the Offer and (if required by applicable law in order to consummate the Merger) adopt this Agreement being referred to as the "Target Board Recommendation"). Subject to Section 1.2(b): (i) Target consents to the inclusion of Target Board Recommendation in the Offer Documents; and (ii) the Target Board Recommendation shall not be withdrawn or modified in a manner adverse to Acquirer or Acquisition Sub, and no resolution or proposal by the board of directors of Target or any committee thereof to withdraw the Target Board Recommendation or to modify the Target Board Recommendation in a manner adverse to Acquirer or Acquisition Sub shall be adopted or announced (it being understood that the Target Board Recommendation shall be deemed to have been modified in a manner adverse to Acquirer and Acquisition Sub if the Target Board Recommendation is no longer unanimous).

(b) Notwithstanding anything to the contrary contained in Section 1.2(a), at any time prior to the Acceptance Time, the Target Board Recommendation may be withdrawn or modified in a manner adverse to Acquirer or Acquisition Sub if: (i) an unsolicited, bona fide, written offer by a third party unaffiliated with Target to purchase all of the issued and outstanding shares of Target Common Stock is made to Target and is not withdrawn; (ii) Target provides Acquirer with at least three business days' prior notice of any meeting of Target's board of directors or any committee thereof at which Target's board of directors or such committee will consider such offer or determine whether such offer is a Superior Offer; (iii) Target'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 Offer; (iv) Target's board of directors determines in good faith, after having taken into account the advice of outside legal counsel, that, in light of such Superior Offer, the withdrawal of the Target Board Recommendation or the modification of the Target Board Recommendation in a manner adverse to Acquirer or Acquisition Sub is required in order for Target's board of directors to comply with its fiduciary obligations to the stockholders of Target under applicable law; (v) the Target Board Recommendation is not withdrawn or modified in a manner adverse to Acquirer or Acquisition Sub at any time within three business days after Acquirer receives written notice from Target confirming that Target's board of directors has determined that such offer is a Superior Offer; and (vi) neither Target nor any of its Representatives shall have breached or taken any action inconsistent with any of the provisions set forth in Section 5.3 [the "No-Shop/No-Talk" provisions].

APPENDIX H

EXCERPTS FROM SAMPLE RESPONSE BY TARGET COMPANY TO BOARD RECOMMENDATION PROVISIONS PROPOSED BY ACQUIRER

- Delete the language in parentheses at the end of the final sentence of Section 1.2(a) (in order to clarify that a single director's decision to withdraw his or her support of the Offer will not constitute a breach of the recommendation covenant, so long as a majority of the board continues to support the Offer).

- Modify the "fiduciary exception" (Section 1.2(b)) to read as follows:

  "Notwithstanding anything to the contrary contained in this Agreement: (i) the Target Board Recommendation may be withdrawn or modified in a manner adverse to Acquirer or Acquisition Sub if Target's board of directors determines in good faith, after consultation with counsel, that failing to withdraw or modify the Target Board Recommendation would create a material risk of a breach by Target's board of directors of its fiduciary duties under applicable law; and (ii) Target may make any disclosure that Target determines in good faith to be required by any applicable law, rule, regulation or duty."

APPENDIX I

EXCERPTS FROM SAMPLE PROVISION (PROPOSED BY ACQUIRER) PERMITTING CHANGE IN RECOMMENDATION OF TARGET COMPANY'S BOARD OF DIRECTORS AFTER AN "INTERVENING EVENT"

The Target Board Recommendation may also be withdrawn in a manner adverse to Acquirer or Acquisition Sub if: (i) an Intervening Event occurs; (ii) Target's board of directors determines in good faith, after having taken into account the advice of outside legal counsel and the advice of Target's financial advisor, that, in light of such Intervening Event, the withdrawal of the Target Board Recommendation or the modification of the Target Board Recommendation in a manner adverse to Acquirer or Acquisition Sub is required in order for Target's board of directors to comply with its fiduciary obligations to the stockholders of Target under applicable law; . . .

* * * *

"Intervening Event" means an event favorable to Target that occurs after the date of this Agreement and prior to the Acceptance Time and that was not foreseeable and could not be taken into account at the time the Target's board of directors made the Target Board Recommendation.

APPENDIX J

SAMPLE "NO-SHOP/NO-TALK" PROVISIONS IN ACQUIRER'S FORM OF DEFINITIVE ACQUISITION AGREEMENT FOR A TWO-STEP CASH ACQUISITION OF TARGET COMPANY

5.3 No Solicitation.

(a) Target shall not directly or indirectly, and shall ensure that its Representatives do not directly or indirectly, (i) solicit, initiate, encourage, induce or facilitate the making, submission or announcement of any Acquisition Proposal or Acquisition Inquiry, or take any action that could reasonably be expected to lead to an Acquisition Proposal or Acquisition Inquiry, (ii) furnish any information regarding Target to any Person in connection with or in response to an Acquisition Proposal or Acquisition Inquiry, (iii) engage in discussions or negotiations with any Person with respect to any Acquisition Proposal or Acquisition Inquiry, (iv) approve, endorse or recommend any Acquisition Proposal or (v) enter into any letter of intent or similar document or any agreement contemplating or otherwise relating to any Acquisition Transaction; *provided*, *however*, that prior to the Acceptance Time, this Section 5.3(a) shall not prohibit Target from furnishing nonpublic information regarding Target to, or entering into discussions with, any Person in response to a Superior Offer that is submitted to Target by such Person (and not withdrawn) if (1) neither Target nor any Representative of Target shall have breached or taken any action inconsistent with any of the provisions set forth in this Section 5.3, (2) the board of directors of Target concludes in good faith, after having taken into account the advice of outside legal counsel, that such action is required in order for Target's board of directors to comply with its fiduciary obligations to the stockholders of Target under applicable law, (3) at least two business days prior to furnishing any such nonpublic information to, or entering into discussions with, such Person, Target gives Acquirer written notice of the identity of such Person and of Target's intention to furnish nonpublic information to, or enter into discussions with, such Person, and Target receives from such Person an executed confidentiality agreement containing customary limitations on the use and disclosure of all nonpublic written and oral information furnished to such Person by or on behalf of Target and containing "standstill" provisions and other provisions at least as favorable to Target as those contained in the Confidentiality Agreement between Acquirer and Target dated ____________, 20__, and (4) at least two business days prior to furnishing any such nonpublic information to such Person, Target furnishes such nonpublic information to Acquirer (to the extent such nonpublic information has not been previously furnished by Target to Acquirer). Without limiting the generality of the foregoing, Target acknowledges and agrees that any action inconsistent with any of the provisions set forth in the preceding sentence by any Representative of Target, whether or not such Representative is purporting to act on behalf of Target, shall be deemed to constitute a breach of this Section 5.3 by Target.

(b) Target shall promptly (and in no event later than 24 hours after receipt of any Acquisition Proposal or Acquisition Inquiry) advise Acquirer orally and in writing of any Acquisition Proposal or Acquisition Inquiry (including the identity of the Person making or submitting such Acquisition Proposal or Acquisition Inquiry and the terms thereof). Target shall keep Acquirer fully informed with respect to the status of any such Acquisition Proposal or Acquisition Inquiry, and any modification or proposed modification thereto.

(c) Target shall immediately cease and cause to be terminated any existing discussions with any Person that relate to any Acquisition Proposal or Acquisition Inquiry.

(d) Target agrees not to release or permit the release of any Person from, or to waive or permit the waiver of any provision of, any confidentiality, "standstill" or similar agreement to which Target is a party or under which Target has any rights, and shall use its best efforts to enforce each such agreement to the extent requested by Acquirer. Target also shall promptly request each Person that has executed, on or after _____________, 20__, a confidentiality agreement in connection with its consideration of a possible Acquisition Transaction or equity investment in Target to return all confidential information heretofore furnished to such Person by or on behalf of Target, and Target shall use its best efforts to cause the return of such confidential information.

(e) For purposes of this Agreement:

(i) "Acquisition Inquiry" means any (A) request for nonpublic information relating to Target or (B) inquiry or expression of interest that could reasonably be expected to lead to any Acquisition Proposal or any request for nonpublic information relating to Target.

(ii) "Acquisition Proposal" means any offer or proposal (other than an offer or proposal made or submitted by Acquirer) contemplating or otherwise relating to any Acquisition Transaction.

(iii) "Acquisition Transaction" means any transaction or series of transactions involving:

> (A) any merger, consolidation, amalgamation, share exchange, business combination, issuance of securities, acquisition of securities, recapitalization, reorganization, tender offer, exchange offer or other similar transaction (i) in which Target or a subsidiary of Target is a constituent corporation, (ii) in which a Person or "group" (as defined in the Exchange Act and the rules thereunder) of Persons directly or indirectly acquires beneficial or record ownership of securities representing more than 5% of the issued and outstanding securities of any class of voting securities of Target, or (iii) in which Target issues securities representing more than 5% of the issued and outstanding securities of any class of voting securities of Target;
>
> (B) any sale, lease, exchange, transfer, license, acquisition or disposition of any business or businesses or assets that constitute or account for 5% or more of the net revenues, net income or assets of Target; or
>
> (C) any liquidation or dissolution of Target.

(iv) "Superior Offer" means an unsolicited, bona fide, written offer made by a third party unaffiliated with Target to purchase all of the issued and outstanding shares of Target Common Stock on terms that the board of directors of Target determines, in its reasonable judgment, based upon a written opinion of an independent financial advisor of nationally recognized reputation, to be more favorable to Target's stockholders than the terms of the Offer and the Merger.

APPENDIX K

SAMPLE RESPONSE BY TARGET COMPANY TO "NO-SHOP/NO-TALK" PROVISIONS PROPOSED BY ACQUIRER

5.3 No Solicitation.

(a) Target will not, and Target will use reasonable efforts to cause its Representatives not to: (i) solicit or knowingly encourage the submission of any proposal by a third party for a merger or consolidation involving Target and such third party or for any purchase by such third party of more than 20% of the assets or outstanding stock of Target (any such proposal being referred to as an "Acquisition Proposal"); or (ii) engage in any negotiations with a third party concerning, or provide any confidential information regarding Target to a third party in response to, an Acquisition Proposal made by such third party; *provided, however*, that, notwithstanding anything to the contrary contained in this Agreement, (A) Target and its Representatives may engage in any such negotiations and may provide any such confidential information if Target's board of directors determines in good faith, after consultation with counsel, that failure to do so would create a material risk of a breach by Target's board of directors of its fiduciary duties to Target's stockholders under applicable law, and (B) Target or its board of directors may accept an Acquisition Proposal and may enter into a definitive agreement relating to an Acquisition Proposal if Target's board of directors determines in good faith, after consultation with counsel and its financial advisor, that the terms of such Acquisition Proposal are more favorable to Target's stockholders than the terms of the Offer. Target will immediately cease and cause to be terminated any existing negotiations between Target and any third party relating to any pending Acquisition Proposal. Target will promptly notify Parent if any Acquisition Proposal is received by Target in writing from a third party.

(b) Nothing contained in this Section 5.3 or elsewhere in this Agreement shall prohibit Target or its board of directors from complying with Rule 14d-9 or Rule 14e-2 under the Exchange Act or from furnishing a copy or excerpts of this Agreement to any Person that makes an Acquisition Proposal or that makes an inquiry that could lead to an Acquisition Proposal.

APPENDIX L

SAMPLE TERMINATION AND "BREAK-UP" FEE PROVISIONS IN ACQUIRER'S FORM OF DEFINITIVE ACQUISITION AGREEMENT FOR A TWO-STEP CASH ACQUISITION OF TARGET COMPANY

SECTION 8. TERMINATION

8.1Termination. This Agreement may be terminated:

(a) by mutual written consent of Acquirer and Target at any time prior to the Effective Time;

(b) by either Acquirer or Target at any time prior to the Effective Time if a court of competent jurisdiction or other Governmental Body shall have issued a final and nonappealable order, decree or ruling, or shall have taken any other action, having the effect of (i) permanently restraining, enjoining or otherwise prohibiting (A) the acceptance for payment or the acquisition of, or the payment for, any shares of Target Common Stock pursuant to the Offer or (B) the consummation of the Merger or (ii) making the acceptance for payment or the acquisition of, or the payment for, any shares of Target Common Stock pursuant to Offer, or the consummation of the Merger, illegal;

(c) by either Acquirer or Target at any time prior to the Acceptance Time if the Offer shall have expired without the acceptance for payment of shares of Target Common Stock; *provided*, *however*, that: (i) a party shall not be permitted to terminate this Agreement pursuant to this Section 8.1(c) if the failure to accept shares of Target Common Stock for payment pursuant to the Offer is attributable to a failure on the part of such party to perform any covenant in this Agreement required to be performed by such party at or prior to the Acceptance Time; and (ii) Target shall not be permitted to terminate this Agreement pursuant to this Section 8.1(c) unless Target shall have made any payment required to be made to Acquirer pursuant to Section 8.3(a) and shall have paid to Acquirer any fee required to be paid to Acquirer pursuant to Section 8.3(c);

(d) by either Acquirer or Target at any time prior to the Acceptance Time if the acceptance of shares of Target Common

Stock for payment pursuant to the Offer shall not have occurred prior to the close of business on ____________, 20__; *provided, however*, that: (i) a party shall not be permitted to terminate this Agreement pursuant to this Section 8.1(d) if the failure to accept shares of Target Common Stock for payment pursuant to the Offer prior to the close of business on ____________, 20__ is attributable to a failure on the part of such party to perform any covenant in this Agreement required to be performed by such party at or prior to the Acceptance Time; and (ii) Target shall not be permitted to terminate this Agreement pursuant to this Section 8.1(d) unless Target shall have made any payment required to be made to Acquirer pursuant to Section 8.3(a) and shall have paid to Acquirer any fee required to be paid to Acquirer pursuant to Section 8.3(c);

(e) by Acquirer if a Triggering Event shall have occurred;

(f) by Acquirer if: (i) any of Target's representations and warranties contained in this Agreement shall be inaccurate as of the date of this Agreement or shall have become inaccurate as of a date subsequent to the date of this Agreement (as if made on such subsequent date), in either case such that the condition set forth in clause "(a)" of Annex I would not be satisfied (it being understood that, for purposes of determining the accuracy of such representations and warranties as of the date of this Agreement or as of any subsequent date, (A) all "Material Adverse Effect" qualifications and other materiality qualifications contained in such representations and warranties shall be disregarded and (B) any update of or modification to the Disclosure Schedule made or purported to have been made on or after the date of this Agreement shall be disregarded); or (ii) any of Target's covenants contained in this Agreement shall have been breached such that the condition set forth in clause "(b)" of Annex I would not be satisfied;

(g) by Target if (i) Acquirer shall have committed a material breach of Acquirer's material covenants contained in this Agreement, (ii) Target shall have delivered a written notice of such breach to Acquirer, and (iii) such breach shall not have been cured in all material respects within 30 days after the delivery by Target of such written notice to Acquirer; or

(h) by Acquirer if, since the date of this Agreement, (i) a Material Adverse Effect shall have occurred, or (ii) any event shall have occurred or circumstance shall have arisen that, in combination with any other events or circumstances, could reasonably be expected to have or result in a Material Adverse Effect.

8.2 Effect of Termination. In the event of the termination of this Agreement as provided in Section 8.1, this Agreement shall be of no further force or effect; *provided, however*, that (i) this Section 8.2, Section 8.3 and Section 9 shall survive the termination of this Agreement and shall remain in full force and effect, (ii) the termination of this Agreement shall not relieve any party from any liability for any breach of any representation, warranty, covenant, obligation or other provision contained in this Agreement, and (iii) no termination of this Agreement shall in any way affect any of the parties' rights or obligations with respect to any shares of Target Common Stock accepted for payment pursuant to the Offer prior to such termination.

8.3 Expenses; Termination Fees.

(a) Except as set forth in this Section 8.3, all fees and expenses incurred in connection with this Agreement and the Offer, the Merger and the other transactions contemplated by this Agreement shall be paid by the party incurring such expenses, whether or not any shares of Target Common Stock are purchased pursuant to the Offer and whether or not the Merger is consummated; *provided, however*, that:

(i) Acquirer and Target shall share equally (A) all fees and expenses, other than attorneys' fees, incurred in connection with the filing, printing and mailing of the Offer Documents and any amendments or supplements thereto, and (B) all fees relating to the filing by the parties to this Agreement of forms and other documents under the HSR Act and under any applicable foreign antitrust or competition law, rule or regulation; and

(ii) if this Agreement is terminated by Acquirer or Target pursuant to Section 8.1(c) or Section 8.1(d) and at or prior to the time of the termination of this Agreement an Acquisition Proposal shall have been disclosed, announced, commenced, submitted or made, or if this Agreement is terminated by Acquirer pursuant to Section 8.1(e), then (without limiting any obligation of Target to pay any fee payable pursuant to Section 8.3(c)), Target shall make a nonrefundable cash payment to

Acquirer, at the time specified in Section 8.3(b), in an amount equal to the aggregate amount of all fees and expenses (including all attorneys' fees, accountants' fees, financial advisory fees and filing fees) that have been paid and that are or may become payable by or on behalf of Acquirer in connection with the preparation and negotiation of this Agreement and otherwise in connection with the Offer, the Merger and the other transactions contemplated by this Agreement.

(b) In the case of termination of this Agreement by Target pursuant to Section 8.1(c) or Section 8.1(d), any nonrefundable payment required to be made pursuant to clause "(ii)" of the proviso to Section 8.3(a) shall be made by Target prior to the time of such termination; and in the case of termination of this Agreement by Acquirer pursuant to Section 8.1(c), Section 8.1(d) or Section 8.1(e), any nonrefundable payment required to be made pursuant to clause "(ii)" of the proviso to Section 8.3(a) shall be made by Target within two business days after such termination.

(c) If (i) this Agreement is terminated by Acquirer or Target pursuant to Section 8.1(c) or Section 8.1(d) and at or prior to the time of the termination of this Agreement an Acquisition Proposal shall have been disclosed, announced, commenced, submitted or made, or (ii) this Agreement is terminated by Acquirer pursuant to Section 8.1(e), then Target shall pay to Acquirer, in cash at the time specified in the next sentence (and in addition to the amounts payable pursuant to Section 8.3(a)), a nonrefundable fee in the amount of $___________. In the case of termination of this Agreement by Target pursuant to Section 8.1(c) or Section 8.1(d), the fee referred to in the preceding sentence shall be paid by Target prior to the time of such termination; and in the case of termination of this Agreement by Acquirer pursuant to Section 8.1(c), Section 8.1(d) or Section 8.1(e), the fee referred to in the preceding sentence shall be paid by Target within two business days after such termination.

(d) If Target fails to pay when due any amount payable under this Section 8.3, then (i) Target shall reimburse Acquirer for all costs and expenses (including fees and disbursements of counsel) incurred in connection with the collection of such overdue amount and the enforcement by Acquirer of its rights under this Section 8.3, and (ii) Target shall pay to Acquirer interest on such overdue amount (for the period commencing as of the date such overdue amount was originally required to be paid and ending on the date such overdue amount is actually paid to Acquirer in full) at a rate per annum three percentage points over the “prime rate” (as announced by ____________________ or any successor thereto) in effect on the date such overdue amount was originally required to be paid.

APPENDIX M

EXCERPTS FROM SAMPLE RESPONSE BY TARGET COMPANY TO TERMINATION AND "BREAK-UP" FEE PROVISIONS PROPOSED BY ACQUIRER

- Narrow the definition of "Triggering Event" (as used in Section 8.1(e)) so that it refers only to withdrawals and adverse modifications of the Target Board Recommendation.

- Add a clause permitting Target to terminate the Acquisition Agreement (upon payment of a "break-up" fee) in order to accept a Superior Offer.

- Modify Section 8.2 to clarify that the parties will remain liable only for their *willful* breaches after termination of the Acquisition Agreement.

- Increase the percentage threshold in the definition of Acquisition Proposal to 50% for purposes of Section 8.3.

- Modify Sections 8.3(a) and 8.3(c) to provide that Target will not be required to pay a "break-up" fee (or reimburse Acquirer's fees or expenses) if Acquirer shall have breached the Acquisition Agreement.

- Modify Sections 8.3(a) and 8.3(c) so that, in the situation where a third party makes a competing bid to acquire Target and Target's board of directors continues to support the Offer, but the Offer is ultimately unsuccessful, Target need not pay Acquirer a "break-up" fee (or reimburse Acquirer's fees and expenses) unless Target is actually acquired by another bidder within 180 days after the termination of the Acquisition Agreement.

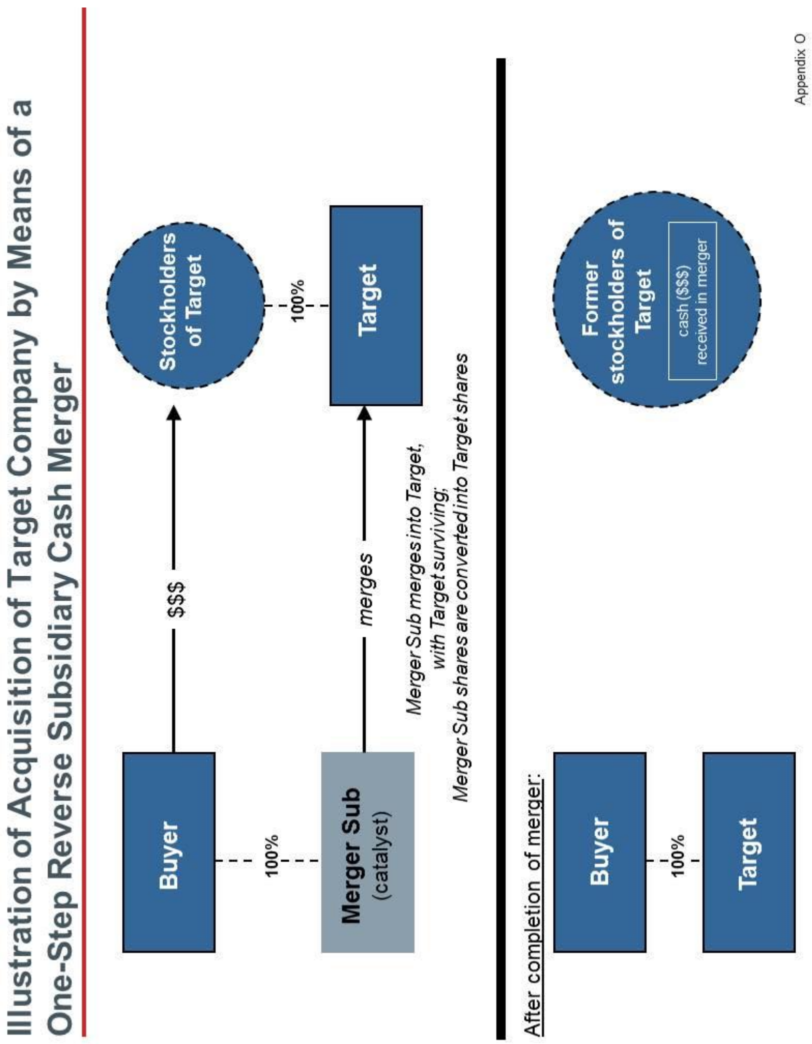
APPENDIX N

SAMPLE NON-RELIANCE PROVISION PROPOSED BY TARGET COMPANY

Acquirer and Acquisition Sub acknowledge and agree that: (a) Target has not made and is not making, and neither Acquirer nor Acquisition Sub has relied or is relying upon, any representations or warranties whatsoever, express or implied, regarding Target, regarding Target's business or capitalization, regarding Target's past or future performance or otherwise relating in any way to the subject matter of this Agreement, except as expressly provided in Section 3; and (b) no Representative of Target has made or is making any representations or warranties whatsoever, express or implied, regarding Target, regarding Target's business or capitalization, regarding Target's past or future performance or otherwise relating in any way to the subject matter of this Agreement. Without limiting the generality of the foregoing, Acquirer and Acquisition Sub acknowledge and agree that Target has not made and is not making, and neither Acquirer nor Acquisition Sub has relied or is relying upon, any representations or warranties whatsoever, express or implied, regarding the future revenues, future results of operations or future financial condition of Target or regarding any projections, forecasts, estimates or budgets discussed with, delivered to or made available to Acquirer or any of Acquirer's Representatives.

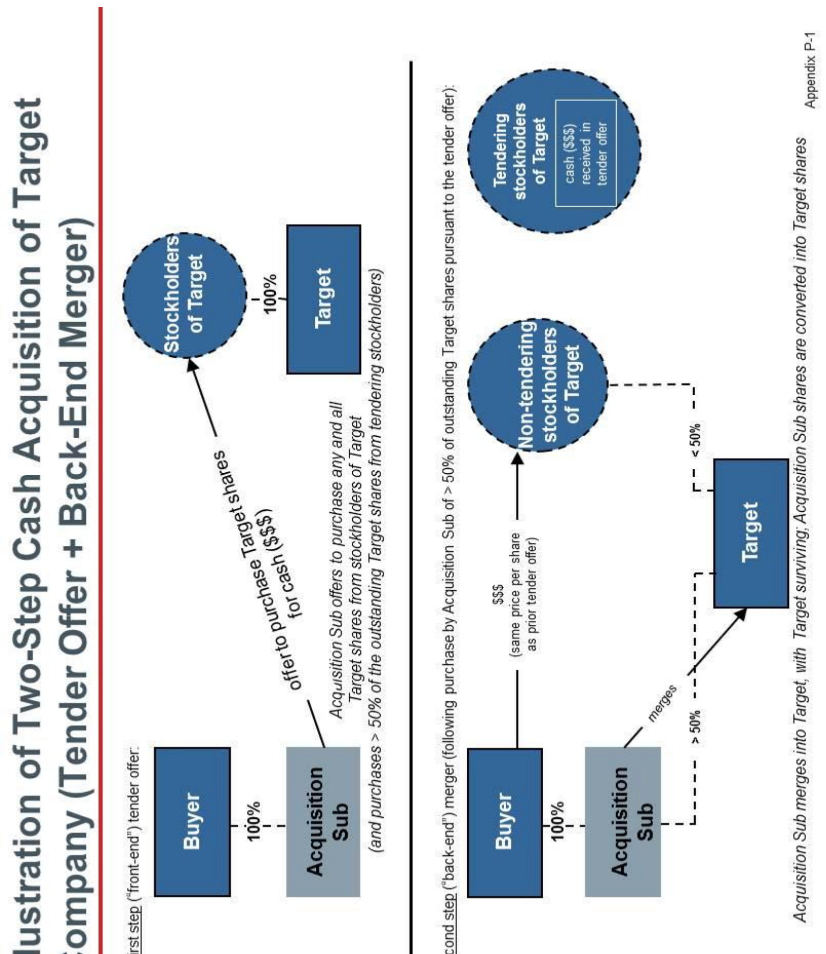
APPENDIX O

ILLUSTRATION OF ACQUISITION OF TARGET COMPANY BY MEANS OF A ONE-STEP REVERSE SUBSIDIARY CASH MERGER



APPENDIX P

ILLUSTRATION OF TWO-STEP CASH ACQUISITION OF TARGET COMPANY (TENDER OFFER + BACK-END MERGER)



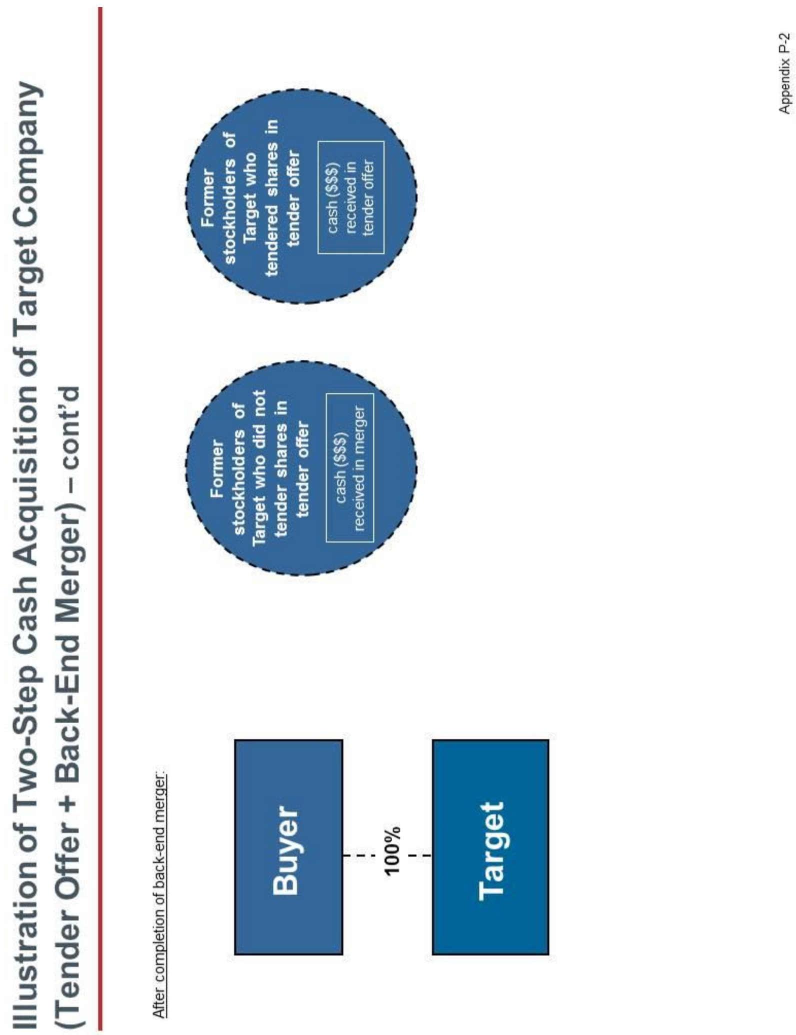


Illustration of Two-Step Cash Acquisition of Target Company
(Tender Offer + Back-End Merger) – cont'd
After completion of back-end merger:
Buyer
100%
Target
Former stockholders of Target who did not tender shares in tender offer
cash ($$$) received in merger
Former stockholders of Target who tendered shares in tender offer
cash ($$$) received in tender offer
Appendix P-2

APPENDIX Q*

SAMPLE CONDITIONS TO CLOSING OF BACK-END MERGER IN DEFINITIVE ACQUISITION AGREEMENT FOR A TWO-STEP CASH ACQUISITION

Excerpt from Agreement and Plan of Merger, dated as of July 14, 2011, among BHP Billiton Limited, BHP Billiton Petroleum (North America) Inc., North America Holdings II Inc. and Petrohawk Energy Corporation:

SECTION 8.01 **Conditions to Each Party's Obligation to Effect the Merger.** The respective obligation of each Party to effect the Merger is subject to the satisfaction or (to the extent permitted by Law) waiver by such Party on or prior to the Closing of the following conditions:

(a) Stockholder Approval. If required by applicable Law, the Target Stockholder Approval shall have been obtained.

(b) No Injunctions or Restraints. No Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any Law or Order or taken any other action that is in effect and makes illegal, restrains, enjoins or otherwise prohibits consummation of the Merger on the terms contemplated by this Agreement (any Law or Order which is in effect and makes illegal, restrains, enjoins or otherwise prohibits the Offer or the consummation of the Offer, the Merger or the other transactions contemplated hereby on the terms contemplated by this Agreement, collectively, "Restraining Orders").

(c) Purchase of Shares in the Offer. Acquisition Sub shall have accepted for payment and paid for all Shares validly tendered and not properly withdrawn pursuant to the Offer.

* Note: In order to make the terminology in this Appendix consistent with the terminology in other Appendices, each reference to "the Company" has been changed to "Target," and each reference to "Merger Sub" has been changed to "Acquisition Sub."

APPENDIX R*

SAMPLE TOP-UP OPTION PROVISION IN DEFINITIVE ACQUISITION AGREEMENT FOR A TWO-STEP CASH ACQUISITION

Excerpt from Agreement and Plan of Merger, dated as of July 14, 2011, among BHP Billiton Limited, BHP Billiton Petroleum (North America) Inc., North America Holdings II Inc. and Petrohawk Energy Corporation:

SECTION 1.04 Top-Up Option.

(a) <u>Top-Up Option Grant.</u> Target hereby grants to Acquisition Sub an irrevocable option (the "Top-Up Option") to purchase at a price per share equal to the Offer Price that number of shares of Common Stock (the "Top-Up Option Shares") equal to the lowest number of shares of Common Stock that, when added to the number of Shares owned by Parent and its Affiliates at the time of such exercise, shall constitute one share of Common Stock more than the number of Shares (the "Short-Form Threshold") necessary for Acquisition Sub to be merged into Target without a vote or consent of Target's stockholders in accordance with Section 253 of the Delaware General Corporation Law (the "DGCL"); provided, however, that in no event shall the Top-Up Option be exercisable (i) to the extent that the number of Top-Up Option Shares would exceed the number of Target's then authorized and unissued shares of Common Stock that are not otherwise reserved or committed to be issued; and (ii) unless, immediately after such exercise and the issuance of the Top-Up Option Shares pursuant thereto, the Short-Form Threshold would be reached (after giving effect to the issuance of the Top-Up Option Shares).

(b) <u>Exercise of Top-Up.</u> The Top-Up Option shall only be exercisable once in whole and not in part after the Acceptance Time and prior to the earlier of the Effective Time and the termination of this Agreement in accordance with Article IX. In the event Acquisition Sub wishes to exercise the Top-Up Option, Acquisition Sub shall so notify Target in writing, and shall set forth in such notice (i) the number of Shares owned by Parent and its Affiliates immediately preceding the exercise of the Top-Up Option and (ii) the place and time for the closing

* Note: In order to make the terminology in this Appendix consistent with the terminology in other Appendices, each reference to "the Company" has been changed to "Target," and each reference to "Merger Sub" has been changed to "Acquisition Sub."

of the exercise of the Top-Up Option (the "Top-Up Closing"). Target shall, as soon as practicable following receipt of such notice, notify Parent in writing of the number of Shares and the number of Top-Up Option Shares and, upon request of Parent, Target shall use its reasonable best efforts to cause its transfer agent to certify in writing to Acquisition Sub the number of Shares as of immediately prior to the exercise of the Top-Up Option. At the Top-Up Closing, Acquisition Sub shall cause Target to be paid the aggregate price required to be paid for the Top-Up Option Shares and Target shall cause to be issued to Acquisition Sub a certificate representing the Top-Up Option Shares. The purchase price owed by Acquisition Sub to Target to purchase the Top-Up Option Shares shall be paid to Target at the Top-Up Closing, at Acquisition Sub's option, (i) in cash, by wire transfer of same-day funds, or (ii) by (x) paying in cash, by wire transfer of same-day funds, an amount equal to not less than the aggregate par value of the Top-Up Option Shares and (y) executing and delivering to Target a promissory note having a principal amount equal to the aggregate purchase price for the Top-Up Option Shares less the amount paid in cash pursuant to the immediately preceding clause (x) (the "Promissory Note"). The Promissory Note (A) shall be due on the first anniversary of the Top-Up Closing, (B) shall bear simple interest of 5% per annum, (C) shall be full recourse to Acquisition Sub, (D) may be prepaid, in whole or in part, at any time without premium or penalty and (E) shall have no other material terms. For the avoidance of doubt, nothing herein shall be construed to obligate Acquisition Sub to exercise the Top-Up Option.

(c) Exemption from Registration. Parent and Acquisition Sub acknowledge that the Top-Up Option Shares that Acquisition Sub may acquire upon exercise of the Top-Up Option will not be registered under the U.S. Securities Act of 1933 and the rules and regulations promulgated thereunder, as amended (the "Securities Act"), and will be issued in reliance upon an applicable exemption from registration under the Securities Act for transactions not involving a public offering. Parent and Acquisition Sub hereby represent and warrant to Target that Acquisition Sub is, and will be upon the purchase of the Top-Up Option Shares, an "accredited investor," as defined in Rule 501 of Regulation D under the Securities Act. Acquisition Sub agrees that the Top-Up Option and the Top-Up Option Shares to be acquired upon exercise of the Top-Up Option are being and will be acquired by Acquisition Sub for the purpose of investment and not with a view to, or for resale in connection with, any distribution thereof (within the meaning of the Securities Act).

(d) No Effect on Appraisal Rights. Notwithstanding anything to the contrary contained herein, to the fullest extent permitted by applicable Law, each of the Parties agrees and acknowledges that in any appraisal proceeding under Section 262 of the DGCL with respect to the Dissenting Shares (as defined in Section 3.03(a)), the Surviving Corporation (as defined in Section 2.01) shall not assert that the Top-Up Option, the Top-Up Option Shares or any cash or the Promissory Note delivered to Target in payment for such Top-Up Option Shares should be considered in connection with the determination of the fair value of the Dissenting Shares in accordance with Section 262 of the DGCL.

(e) Assignment of Top-Up Option. Without the prior written consent of Target, the right to exercise the Top-Up Option granted pursuant to this Agreement shall not be assigned by Acquisition Sub other than to Parent or a direct or indirect wholly owned Subsidiary of Parent, including by operation of Law or otherwise, and any attempted assignment in violation of this Section 1.04(e) shall be null and void.