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# Panel on Negotiating Acquisitions of Public Companies

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## Panel on Negotiating Acquisitions of Public Companies

### **Authors**

Moderator Richard E. Climan, Counsel for the Acquiring Company Joel I. Greenberg, Counsel for the Target Company Lou R. Kling, Honorable E. Norman Veasey, Harvey A. Goldman, Dennis S. Hersch, and Samuel C. Thompson

# NEGOTIATING ACQUISITIONS OF PUBLIC COMPANIES<sup>1</sup>

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<sup>1</sup> An edited transcript of a panel presentation.

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## I. INTRODUCTION

HARVEY GOLDMAN: This should be a very interesting panel. Let me introduce our moderator, Rick Climan of Cooley Godward in California's Silicon Valley. Rick . . .

RICK CLIMAN:  
(Moderator) Thanks Harvey. Welcome to our session on negotiating public company acquisitions. As Harvey mentioned, my name is Rick Climan. I head the M&A Group at Cooley Godward in California and I'm going to be moderating the presentation this afternoon. Our other panelists are Lou Kling, a partner at Skadden Arps in New York City, and Joel Greenberg, who co-chairs the Corporate and Finance Department at Kaye Scholer, also in New York City. We are also extremely fortunate to have with us Chief Justice Norman Veasey of the Delaware Supreme Court.

Our panel will be focusing on a type of transaction that has become commonplace during the merger wave of the last five-plus years – a single-step, stock-for-stock merger involving two publicly-traded U.S. companies. We assume, for purposes of our hypothetical merger, that the two companies are of disparate size, so that there is an identifiable acquiror (the larger of the two companies) and an identifiable target company (the smaller of two companies). We also assume that this will be a stock-for-stock deal – a stock swap – so that the target company's stockholders will, pursuant to the merger, exchange their target company shares for shares of the acquiring company's stock.

I should mention that, notwithstanding our selection of a one-step, stock swap merger as the focus of our presentation today, many, if not

most, of the issues that we'll be discussing are also relevant in the context of other forms of public company acquisitions, including cash mergers and two-step acquisitions involving a first-step tender or exchange offer followed by a back-end merger.

The materials for our presentation<sup>9</sup> are included in the program binders. They consist of a series of excerpts from both the preliminary and the definitive documentation for a stock-for-stock merger. An index to these various excerpts appears at the beginning of the materials, and you might want to turn to that index now to get a sense for what we're going to be covering.

Our format this afternoon is going to be a modified mock negotiation, with Joel Greenberg generally playing the role of the acquiror's counsel and Lou Kling generally playing the role of the target company's counsel. I will be asking our negotiators to step out of character quite frequently in order to explain their negotiating positions, and I'll also be soliciting the commentary of Chief Justice Veasey on some of the Delaware law issues that arise in these negotiations.

## II. STANDSTILL PROVISION

RICK CLIMAN:  
(Moderator)

We begin today at the beginning – with the very first document that the parties typically negotiate and execute in an M&A deal. That document is, of course, the confidentiality agreement, the first draft of which is typically served up by counsel for the target company.

If you take a look at our materials, you'll see [in *Appendix A*] that here the confidentiality agreement proffered by the target company's counsel, in addition to including traditional

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<sup>9</sup> These materials are reproduced as appendices to this article.

restrictions on the use and disclosure of the target company's sensitive information, contains another provision – a so-called standstill provision. This provision prohibits the prospective acquiror – in this case for a period of three full years – from launching a hostile tender offer or proxy fight and from otherwise engaging in overtly coercive or hostile conduct with respect to the target. And if you take a close look at the standstill provision, you'll note that it goes even further. It also prohibits the prospective acquiror from engaging in less blatantly offensive but still potentially coercive conduct, such as simply *proposing a friendly deal*. Indeed, it even goes so far as to prohibit the prospective acquiror from asking the target for a waiver of the standstill provision.

Let me begin with a question for Lou Kling who proposed this standstill provision as counsel for the target company. Lou, what exactly is the rationale for including a provision like this in a confidentiality agreement? Why do you need something so remarkably broad?

LOU KLING:  
(Target Counsel)

The reason is that the prospective buyer is not committed to anything at this point. We're in the early days of the process, and while it may go somewhere, it may also not go anywhere at all. We're starting down a road where, from the target's perspective, we're trying to do a friendly, negotiated transaction. We want to make sure it stays that way. We're starting out on the assumption that it's going to be a friendly deal, so we're asking the prospective buyer essentially to commit that it won't go hostile on us – that it's going to stay friendly.

Beyond that, we don't know where this is going to go, but we need to manage the process. The target's board of directors needs to be in control of what's going to happen to the target. One way for the target's board to be able to remain in control is to have this prospective

buyer, along with any other prospective buyer we talk to, agree to be bound by a standstill provision. We'll decide when and if we want to get acquisition proposals from people and what form they have to be in. We don't want to create a free-for-all.

RICK CLIMAN:  
(Moderator)

Lou, do you take any comfort from the fact that you have a separate use provision (that we've reproduced as paragraph 2 of your form of confidentiality agreement [in *Appendix A*]) – a provision that contractually precludes the prospective acquiror from using the target company's sensitive information for anything other than a *negotiated* transaction? Doesn't your client, the target, get the protection it needs from a provision that precludes the prospective acquiror from using this information to formulate a *hostile* bid?

LOU KLING:  
(Target Counsel)

Well, I think it's of some benefit for the target to have that provision. However, as an evidentiary matter, it can get very difficult, particularly in the murky context of trying to enforce a confidentiality agreement to begin with, to show what particular information is being used by a bidder and what isn't being used. People just can't compartmentalize their minds that way. As counsel for the target, I would take the position that anybody affiliated with the prospective acquiror who has access to the target's confidential information would essentially taint the prospective acquiror. However, proving that in court is a different matter. So we need a broad, absolute standstill in addition to the more limited use restriction.

RICK CLIMAN:  
(Moderator)

So, Joel, let's have at it. You've included [in *Appendix B*] a summary of your objections to the standstill provision served up by Lou. What bothers you the most here as counsel for the prospective acquiror?

JOEL GREENBERG:  
(Acquiror Counsel)

What I want to do is to confine Lou's standstill provision to the purposes that Lou outlined. I'm willing to limit the ability of my client to go hostile against this target, but the provision goes much further than that as drafted. For example, the provision covers not only my client, the prospective buyer, but also all of its representatives, which include, for example, any financial advisor to the prospective buyer or any of its subsidiaries, whether or not the advisor is involved in this particular transaction. I don't think you need to sweep the world quite that broadly.

Similarly, the provision extends protection not only to the target, but also to the target's affiliates. I don't know why a publicly traded corporation that happens to be a 12% stockholder of the target – and therefore quite possibly an affiliate of the target – should suddenly get the benefit of my client not being able to go hostile against them just because my client has gotten information not about them, but about the target.

Finally, three years is awfully long for this kind of provision. It's one thing to manage a process to its natural conclusion and to place restrictions on a prospective buyer while the target's confidential information has some real value. But three years, as opposed to, say, six months, is an excessive period.

RICK CLIMAN:  
(Moderator)

Can we stop there for a second? What are you seeing these days with respect to the duration of these standstills, whether in the auction context or outside the auction context? Are you ever seeing standstills that stay in effect for two to three years, or are you normally seeing eighteen months, or a year, or even six months?

LOU KLING:  
(Target Counsel)

I would say two years is the outside, and one year is more common than two. It goes to what Joel said. First, how long is it going to take the



process that we're starting to play out? You expect most processes to be completed in six months to a year. And second, when does the information, particularly forward looking information, become stale or public and therefore no longer really of use?

RICK CLIMAN:  
(Moderator)

Joel, let's cut to the chase here and take a look at the fall away provision you're proposing to include as a limitation on Lou's standstill provision. This fall away provision [included in *Appendix B*] says that the standstill restrictions will terminate prematurely under certain circumstances. Why don't you explain why, as counsel for the prospective acquiror, you feel that this standstill provision should ever fall away – should ever terminate prematurely – before the end of the negotiated one to two-year term.

JOEL GREENBERG:  
(Acquiror Counsel)

It's because we're prepared to limit ourselves to the managed process only as long as it stays a managed process. But we don't want to be left standing at the gate if someone else goes hostile and suddenly the target company is the subject of a very public bidding war. In that case, the target's board hasn't achieved what it wanted to, which is a totally managed process, and my client – the potential buyer here – could be disadvantaged by having to stand on the sidelines while the target's board does whatever it's going to do.

RICK CLIMAN:  
(Moderator)

Lou, how do you react to Joel's request for a fall-away provision?

LOU KLING:  
(Target Counsel)

Well, a third-party hostile bidder coming in could represent a lot of different possible situations. The new bidder may be somebody that we're not particularly concerned about – someone we don't think has the financial resources to really consummate a transaction

with the target; and while we can't control that new third-party bidder, that doesn't mean we want this new bidder, whom we can essentially ignore, to touch off a free-for-all by freeing other prospective acquirors from their standstill obligations. And particularly in the case where the new third-party bidder does not have confidential information about the target, that third party is at a significant disadvantage vis-à-vis Joel's client in terms of what it could put on the table. So, we don't want to release Joel's client, which has the advantage of having confidential information, to join a situation and cause it to spiral out of control.

RICK CLIMAN:  
(MODERATOR)

Right. Obviously, one of the best defenses that the target has against a truly hostile bidder is the inability of the hostile bidder to do the kind of extensive due diligence that Joel and his client had the opportunity to do after signing a confidentiality agreement with the target. But there's another facet to what Joel has proffered here. The particular prong of Joel's fall-away provision that we've been discussing says that the standstill terminates if the target is put in play by virtue of a third-party hostile tender offer or proxy fight. But there's another prong – clause (iii) of Joel's fall-away provision [in *Appendix B*] – which says that if a definitive acquisition agreement is actually signed up by Lou's client, the target company, with a third party, then Joel's client is free to go ahead and launch something hostile. Presumably, Joel has proposed this recognizing that any signed definitive acquisition agreement with a third party will undoubtedly include break-up fee provisions and other deal protections with which Joel's client will need to contend if it still wishes to make a play for the target company. Lou, as counsel to the target company, how do you react to this additional prong of the fall-away provision?

LOU KLING:  
(Target Counsel)

I don't think it's a completely unfair clause, but at the end of the day, if my client, the target, signed up a deal with a third party, it's because the third party put more on the table than Joel's client did. If Joel's client knows that it has only one shot because it's going to be subject to an ironclad standstill, Joel's client will have to put its fullest price on the table now, up front, to avoid our signing up that definitive acquisition agreement with the third party. I don't want Joel's client to think that it could keep some money in its pocket and be free to come back later on and bid more then. I want Joel's client to make its best bid now. So, for that reason, I don't want the standstill to fall away automatically if my client signs up a definitive acquisition agreement with someone else.

RICK CLIMAN:  
(Moderator)

In my experience, this fall-away negotiation is often the most hotly contested negotiation at this stage of the proceedings. It almost always seems that the acquiring company's investment banker insists on a standard fall-away. Lou and Joel, is there such a thing? Where do you see things ending up on this issue?

LOU KLING:  
(Target Counsel)

My sense is that, both in auction type situations and in one-on-one negotiations, when the target gets a prospective buyer to agree to a standstill, the prospective buyer typically does not succeed in adding a fall-away qualification.

JOEL GREENBERG:  
(Acquiror Counsel)

But it's clearly easier for a prospective buyer to negotiate for a fall-away in a one-on-one negotiation than in a controlled auction.

RICK CLIMAN:  
(Moderator)

Lou, as counsel for a target company that has succeeded in getting a prospective acquiror to agree to a standstill provision, how much comfort do you take from the standstill provision? In other words, even if you succeed on behalf of your client in getting from the

prospective acquiror a standstill that's very tight, has no fall-away qualification and stays in effect for a substantial period of time, do you worry about its enforceability? What's a Delaware court likely to do when an unsolicited blow out offer comes in from a prospective acquiror who is bound by a standstill? Even though the making of the offer may be a blatant breach of the standstill provision, how easy is it going to be for the target to demonstrate that it has been damaged by the breach?

LOU KLING:  
(Target Counsel)

As a practical matter, it will be difficult. There are some cases out there that may be at least indirectly helpful to target companies on this point. But target companies still face an uphill battle.<sup>10</sup>

JOEL GREENBERG:  
(Acquiror Counsel)

Right. If you were to look at this issue after another deal were done and the target company had issued a proxy statement which is required to contain full disclosure, it would be very hard to argue that the target or its stockholders had been damaged by the violation of the standstill. However, I do believe you still get a fair amount of comfort from standstill agreements, because a professional acquiror that is in the market all the time is going to be reluctant to breach the standstill intentionally, given that its conduct will be remembered the next time it's trying to get into an auction. No acquiror wants that kind of reputation.

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<sup>10</sup> Cases involving standstill provisions include: *Crane Co. v. Coltec Indus., Inc.*, 171 F.3d 733 (2d Cir.1999); *Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 Del. Ch. LEXIS 100 (Del. Ch. 1996); *Crescott Inv. Ass. v. Davis*, 1989 Del. Ch. LEXIS 171 (Del. Ch. 1989); *In re J.P. Stevens & Co.*, 542 A.2d 770 (Del. Ch. 1988) *appeal refused*, 540 A.2d 1089 (Del. 1988); *Enterra Corp. v. SGS Ass.*, 600 F. Supp. 678 (E.D. Pa. 1985); *Gearhart Indus. v. Smith Int'l, Inc.*, 741 F.2d 707 (5th Cir. 1984); and *Mesa Partners v. Phillips Petroleum Co.*, 488 A.2d 107 (Del. Ch. 1984).

### III. EXCLUSIVITY/NO-SHOP AGREEMENT

RICK CLIMAN:  
(Moderator)

Joel, the final point in your list of responses to the proposed standstill agreement is a request that the prospective acquiror get an exclusivity agreement – a no-shop agreement – from the target in exchange for agreeing to be bound by the standstill agreement. Is it typical for a publicly-held target company to enter into this sort of stand-alone no-shop agreement (which, of course, must be distinguished from the no-solicitation provision in the subsequently executed definitive merger agreement)? How often do you request these stand-alone no-shop agreements when you're representing prospective acquirors?

JOEL GREENBERG:  
(Acquiror Counsel)

Of course, you won't see no-shop agreements as part of an organized auction because you know that the target company is dealing with multiple bidders. That's just part of the game you're playing. But you will see them requested in the pure one-on-one strategic deal where the prospective acquiror is going to invest time and money in investigating the target company. They tend to be very short in duration, though. And the target may well be willing to agree to limited exclusivity to induce the prospective acquiror to start the due diligence process. Of course, the target company knows that ultimately, if it doesn't like the outcome, it can just wait until the exclusivity period runs out and can thereafter pursue other opportunities. But again, the exclusivity period is typically pretty short.

RICK CLIMAN:  
(Moderator)

That's right, typically a few weeks at most. So Lou, suppose Joel proffers an agreement in the form [of *Appendix C*] on behalf of a prospective acquiror. This is a relatively straightforward two-and-a-half page exclusivity/no-shop

agreement that in effect says to the target company, we're not even going to invest the time and effort to do due diligence unless you give us this. We have to know you're dealing with us on an exclusive basis. Besides, you asked for a standstill and we agreed to that. As counsel to the target company, how do you react to this? What do you say?

LOU KLING:  
(Target Counsel)

Rick, if the duration of the exclusivity period is in the range that you mentioned – two, maybe three weeks – then, depending on what else is going on, I would have no trouble agreeing to it. However, I would want to limit the scope of the agreement in ways similar to the ways Joel sought to limit the standstill provision; for example, the definition of representatives is too broad in the version of the no-shop agreement proffered by Joel. If I'm in the middle of a process where my client is talking to two prospective buyers, I'm going to have to judge what my client is giving up by entering into this with one of them. Most of the time, I think that when people enter into exclusivity agreements, it's because they decide they're not really giving up anything much anyway – they're really talking to only one person, and by agreeing to continue talking only to that one person during the two or three-week exclusivity period they're really not giving anything up. But if you're in an active situation where there are two motivated and interested people simultaneously bidding and talking to you, then it becomes a lot harder to decide what to do.

RICK CLIMAN:  
(Moderator)

Lou, when you do advise your client to sign a relatively short-term exclusivity/no-shop agreement like this, do you ever ask for a fiduciary out? I see target counsel ask for this from time to time, and I'm always somewhat surprised when they do. I assume it means that they don't fully understand the distinction between a

stand-alone no-shop agreement with a short, fixed term and the no-solicitation covenant that appears in the definitive acquisition agreement, which is a very different animal.

LOU KLING:  
(Target Counsel)

I agree. Representing the target, I would not ask for a fiduciary out, because it really undercuts the whole purpose behind the exclusivity agreement. The agreement only lasts for a short period of time and at the end of the day the target isn't bound to anything one way or the other, so there's no real need for a fiduciary out.

#### IV. DEFINITIVE MERGER AGREEMENT – CLOSING CONDITIONS

RICK CLIMAN:  
(Moderator)

Why don't we turn to the definitive merger agreement itself and, in particular, to the closing conditions, which determine the parties' ability to walk away from the deal after the deal has been signed up and announced. The acquiring company's lawyer usually prepares the first draft of this definitive merger agreement, and we've included [in *Appendix D*] the portion of that draft containing the closing conditions proposed by the acquiring company's lawyer, Joel Greenberg. Joel, just to set the stage before we turn to the specific verbiage of these closing conditions, what's your mindset as you consider what these conditions should look like in the definitive agreement?

JOEL GREENBERG:  
(Acquiror Counsel)

Well, my mindset is getting my client, the acquiror, the benefit of its bargain. You want to define the closing conditions such that the acquiror doesn't have to close unless it's getting at the closing roughly what it expected to get – a target company that conforms to the representations and warranties that it made, a target company that hasn't had a material deterioration in its business, a target company whose key executives aren't poised to leave on the day of the closing and a target company

that's not facing any material legal challenge to the transaction that might impact the benefit of the bargain my client thought it negotiated for.

RICK CLIMAN:  
(Moderator)

And Lou, the target company's perspective?

LOU KLING:  
(Target Counsel)

The last thing the target wants is to sign up a deal and have the buyer walk from the deal on the eve of closing, because this turns the target into damaged goods. Not only would nobody else be interested in the target, but it would have done all kinds of things in terms of passing up opportunities, in terms of placing restrictions on how it runs its business and in terms of possibly losing valued employees as a result of the announcement of the deal. Because the last thing the target wants is a failed deal, we want to minimize the buyer's flexibility to walk away from the deal.

*A. Accuracy of Representations Condition*

RICK CLIMAN:  
(Moderator)

Against that backdrop, let's take a look at some specific conditions. Please turn to [*Appendix D*]. We begin with the accuracy of representations condition in Section 7.2(a) of the acquiror's draft. This condition basically provides that the acquiror need not go forward with the merger unless the target company's representations and warranties were accurate in all material respects as of the original signing date and continue to be accurate in all material respects as brought down to the closing date. Lou, what are your initial reactions to Joel's draft of the accuracy of representations condition? What do you want to change?

LOU KLING:  
(Target Counsel)

Well, the first thing I would ask the buyer is this: if my client's representations are correct when we get to the closing, why should it matter whether or not they were correct back



when we signed up? Why test the reps retroactively as of signing, if they're accurate at closing?

RICK CLIMAN:  
(Moderator)

Joel, how do you respond to that? Doesn't Lou make a pretty convincing argument when he suggests that a buyer receiving a pristine company – a company that conforms exactly to the target's reps and warranties – at closing shouldn't get a free walk right just because some representation happened to have been inaccurate two months earlier at the time of the signing? If the target cures the inaccuracy before the closing, where's the risk to the buyer?

JOEL GREENBERG:  
(Acquiror Counsel)

Rick, I knew you couldn't stay neutral very long. I would respond to that objection in two ways. First, there needs to be an incentive for the target to do its due diligence and make accurate representations going in. My client, the buyer, wants there to be a consequence, and a real one, if the target does a sloppy job. You want to deter the target from making inaccurate representations, hoping that it can fix things. Some targets are incurable optimists. They think they can fix any problem in the time period before the closing.

The second way in which I would respond to Lou's objection is this: If the target presses the objection, you begin to speculate as to why it cares that much, because if the target is doing its job and it's represented by someone like Lou, it's going to get the representations right at signing. If the process is done properly, the real risk isn't that the representations won't be right at the time they're made. The real risk is that something will change to make the representations incorrect as brought down to the closing.

RICK CLIMAN:  
(Moderator)

For what it's worth, a very unscientific survey of public company deals out there shows that in a fair number of the deals – maybe even approaching half – the representations are tested only at one point in time, at the closing. What can we conclude from this? Either acquirors are being a little more gentle than Joel in what they initially propose, or target companies are frequently winning this battle and having this condition include only a bring-down component and not a true-when-made component.

JOEL GREENBERG:  
(Acquiror Counsel)

Rick, if you did the same survey, though it's harder to do, in the private company acquisition arena, you would find that the double test is by far the predominant one.

RICK CLIMAN:  
(Moderator)

I agree. And yet, particularly in today's marketplace, where deals are cratering all over the place in part because of market gyrations and other related factors, giving a free walk right to the acquiror is something that most targets – public and private – are loathe to do.

Lou, what else merits comment here? I assume the materiality standard is the other big thing that you'd want to negotiate in the context of this particular closing condition.

LOU KLING:  
(Target Counsel)

Yes. As counsel for the target company I would like to make sure that the acquiror's walk right arising from inaccurate representations is appropriately qualified. The concept is this: whatever inaccuracies exist in the target's reps, they have to have a material adverse effect for this condition to be triggered. Now a lot of the representations themselves will have material adverse effect qualifiers built in, but there will be plenty of places where that qualifier won't appear. In those areas, my reaction would be that, whether a rep is false or even materially false shouldn't matter if the inaccuracy doesn't

have a material adverse effect on the target's business.

RICK CLIMAN:  
(Moderator)

Joel, are acquirors agreeing to include a global material adverse effect qualification in the accuracy of representations condition in just about every deal these days? Has it become the standard?

JOEL GREENBERG:  
(Acquiror Counsel)

Yes. Some form of material adverse effect qualification has become the standard in the public company arena. But I wouldn't be very happy with the formulation that's proposed here in the target's form [in the proviso to Section 7.2(a) in *Appendix E*], because this one tests every individual inaccuracy to see if it has a material adverse effect. As a buyer I would want an individually or in the aggregate test.

RICK CLIMAN:  
(Moderator)

And that's something the target undoubtedly would not object to.

#### B. *No Material Adverse Change Condition*

RICK CLIMAN:  
(Moderator)

Let's move to the no-material adverse change condition, the so-called MAC-out, which appears in Section 7.2(f) of the draft proffered by the acquiring company's lawyer [in *Appendix D*]. This condition allows the acquiror to walk, regardless of whether there's been any breach of a representation by the target company, if there has been any material adverse change in the business, condition, capitalization, assets, liabilities, operations, financial performance or prospects of the target since the signing date or if any event has occurred or any circumstance exists that could reasonably be expected to result in a material adverse change at some point in the future. Lou, is this pretty standard MAC language? Representing the target, when you see this, how do you react?

LOU KLING:  
(Target Counsel)

The primary problem I would have with this language is its forward-looking nature. This problem shows up in two places, one of which is a little more obvious than the other. The obvious place is the word prospects. As counsel for the target, I feel the buyer should recognize that it's buying a business now, and should make its own judgment about those future prospects. My client doesn't want to be responsible for ensuring that the buyer's vision of the future can be sustained.

The other, less obvious forward-looking aspect of Joel's language is events having occurred that could reasonably be expected to result in a future material adverse change. That too is forward-looking. It requires some event today, but the consequences could be way down the road.

JOEL GREENBERG:  
(Acquiror Counsel)

But the consequences could also be tomorrow.

LOU KLING:  
(Target Counsel)

Yes.

JOEL GREENBERG:  
(Acquiror Counsel)

And there's the tension. You could have, for example, a federal regulation that's going to take effect in a few days and shut down the target's entire business.

LOU KLING:  
(Target Counsel)

Or the key customer that cancels its big order for next year.

RICK CLIMAN:  
(Moderator)

So what do you do to compromise on this point, Joel? Do you usually insist on the forward-looking language as you've drafted it [*in Appendix D*]? I assume that it depends in part on the nature of the target company and its business.

JOEL GREENBERG:  
(Acquiror Counsel)

I think it depends a lot on just that. In some cases, you're in a pure prospects play, particularly in your part of the world, Rick – in the Silicon Valley where the target company may have nothing but technology and high expectations for the future.

RICK CLIMAN:  
(Moderator)

Yes, the classic example is a biotech company, with a pipeline of products awaiting governmental approval and a business that's not generating any revenue now. All the acquiror is buying, at least arguably, is future prospects.

JOEL GREENBERG:  
(Acquiror Counsel)

That's right. Ultimately, in cases not involving a pure prospects play, I think most buyers would be prepared to move away from a concept of purely undefined prospects, but would still try to get language that incorporates some concept of proximate future impact of events that have already occurred.

LOU KLING:  
(Target Counsel)

I agree with that.

RICK CLIMAN:  
(Moderator)

So, Lou, let's assume you've compromised on the forward-looking elements of the MAC-out. Let's talk about negotiated carve-outs from the definition of material adverse change. If we take a look at the response you've provided on behalf of the target company [in *Appendix E*] here, we'll see a definition of target material adverse effect. It says, 'target material adverse effect' means any change or effect that is materially adverse to the business, financial condition or results of operations of the target and its subsidiaries – no forward-looking language there – taken as a whole. Then the definition continues with a lengthy proviso: provided, however, that none of the following shall be deemed . . . to constitute . . . a target material adverse effect. The list of excluded items is a long one – changes in stock price, failure to

meet internal projections, conditions affecting the target's industry generally, conditions affecting the economy generally, things that arise from the announcement or pendency of the deal, actions required to be taken under applicable laws and regulations and changes in accounting principles. It's quite an impressive list of carve-outs. Lou, which of these do you actually propose with a straight face, and which of these are just sort of novelty items? *(Laughter)*

LOU KLING:  
(Target Counsel)

Well, I think what you seriously propose is carving out the things that affect the economy or the industry generally. And you need to give some serious thought to how that actually works in practice, particularly if there is an issue of defining the industry or there's an issue of whether something hits the target differently from other players in that industry. But basically you always look to get those two carve-outs.

The carve-out for things that result from the deal or the deal announcement is something that target companies should certainly try to get, again particularly if the target is in the high-tech sector where there are some obvious and potentially serious negative consequences that announcing a deal may very well have.

RICK CLIMAN:  
(Moderator)

Like nervous employees heading for the exits.

LOU KLING:  
(Target Counsel)

Right. To be honest, that's pretty much as far as I would go with a straight face.

RICK CLIMAN:  
(Moderator)

And, Joel, when a target proposes a carve-out from the MAC definition for things arising from the announcement or pendency of the deal, do you roll over on that one? Or is that a carve-out you find tough to give as counsel for the acquiror?

JOEL GREENBERG:  
(Acquiror Counsel)

Well, it's a carve-out that's given a lot, and you have to recognize that. But it has some real traps in it, which go to the practical application of the provision. It's tough enough for a buyer to determine whether any particular event has a material adverse effect on the target right before closing, when the buyer is trying to decide whether to walk from the deal. But you really put the buyer in a tough position if you have layered on top of that the notion that if, after the fact, someone can identify a causal connection, or at least argue one, between the pendency of the transaction and the adverse effect, the buyer's decision to walk can be challenged. Assume, for example, that the target loses a major customer between the signing and scheduled closing, and from my client's perspective as a buyer, it's not getting what it expected. If the announcement or pendency of the deal carve-out is in the definitive merger agreement, then the seller could argue, after the fact when we're in court, well, that customer only left because it doesn't like the buyer.

From the buyer's point of view, this adds further uncertainty to an already uncertain area. So I think this carve-out is something that's definitely worth talking about and trying to eliminate or narrow. Nonetheless, it often finds its way into the final agreement in some form.

RICK CLIMAN:  
(Moderator)

You can come up with plenty of other scenarios where the target company could use this carve-out to its advantage. For example, if the target company badly misses its earnings and revenue targets in the pre-closing period, the target company will always be able to say, well, that's because of the announcement of the deal. With the deal pending, our employees were distracted and concerned about their jobs and that's what led to the financial deterioration.

What we're sometimes seeing as a compromise on this point is language

attempting to tighten up the causal nexus that's required to bring the carve-out into play. You might see verbiage to the effect that an adverse change arising from the announcement of a deal won't be a MAC if it arises directly and proximately from the announcement. At least in the minds of some lawyers, that sort of language should make the carve-out more palatable to the buyer.

CHIEF JUSTICE VEASEY: Can I ask you a question?

RICK CLIMAN:  
(Moderator) Sure.

CHIEF JUSTICE VEASEY: It would seem to me that it's pretty dicey to advise your client to walk in a lot of these circumstances because of the open-ended contextual aspect of the issues. It seems to me that, litigation being so fact intensive, you're buying a lawsuit where the outcome is very, very hard to predict because it is all about facts and it all depends on how the issue comes up, what court it comes up in and who's the plaintiff and who's the defendant.

RICK CLIMAN:  
(Moderator) And Lou, isn't that exactly what you're trying to accomplish when you're representing the target company? Isn't it your job, as the target company's lawyer, to create enough in the way of issues and uncertainties to ensure that an acquiror will never have the guts to invoke the MAC-out, in light of the draconian liability that it will be facing if it ends up declaring a MAC to support its exercise of a walk right, only to have some court (which may not be as sophisticated as the Delaware Chancery Court or the Delaware Supreme Court) concluding, with the benefit of hindsight, that no MAC occurred. Isn't that really the name of the game: to paralyze and confuse the enemy – the acquiror – that way?



LOU KLING:  
(Target Counsel)

Yes, that's exactly right.

JOEL GREENBERG:  
(Acquiror Counsel)

And I think from the buyer's perspective you have to start from the proposition that even the unadorned MAC provision, without the exceptions, has a tendency to paralyze and confuse. One of the tasks for an acquiror's lawyer is to make the issue absolutely clear to his client, so that the client does not have an unrealistic expectation about what a MAC-out actually gives the client. That's why, in situations where there are known contingencies to worry about, the parties may try to negotiate specific remedies relating to those contingencies outside the MAC condition.

RICK CLIMAN:  
(Moderator)

Some of the case law in this area is scary. The decisions interpreting MAC clauses are all over the lot, and some of the cases were quite clearly decided by judges that are not familiar or comfortable with the finer points of M&A deals and acquisition agreements. Joel, I know you frequently talk about the Texas case relating to the radio station, which is remarkable....

JOEL GREENBERG:  
(Acquiror Counsel)

It really is remarkable. There is an appellate decision floating around out there in Texas which holds that a catastrophic decline in the ratings of a radio station was not a material adverse change because the station still had its license and was still transmitting.<sup>11</sup> The court

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<sup>11</sup> *Borders v. KLRB, Inc.*, 727 S.W.2d 57 (Tex.Civ.App. 1987). Other decisions interpreting MAC clauses and similar clauses include: *In re IBP S'holders Litig. v. Tyson Foods, Inc.*, Consol. C.A. No. 18373, Strine (Del. Ch. June 2001); *Pacheco v. Cambridge Tech. Partners (Mass.), Inc.*, 85 F. Supp. 2d 69 (D. Mass. 2000); *Allegheny Energy, Inc. v. DQE, Inc.*, 74 F. Supp. 2d 482 (W.D. Pa. 1999), *aff'd* 216 F.3d 1075 (3rd Cir. 2000); *Pine St. Creamery Co. v. Land-O-Sun Dairies, Inc.*, 1999 U.S. App. LEXIS 31529 (4th Cir. N.C. Dec. 2, 1999); *Georgia-Pacific v. GAF Roofing Mfg. Corp.*, 1997 U.S. Dist. LEXIS 5816 (S.D.N.Y. 1997); *Pan Am Corp. v. Delta Airlines, Inc.*, 175 B.R. 438 (S.D.N.Y. 1994); *Bear Stearns v. Jardine Strategic Holdings*, 161 A.D.2d 297 (S.C.N.Y. 1990); *Raskin v. Birmingham Steel Corp.*, 1990 Del. Ch. LEXIS 194 (1990); *Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp.*, 889 F.2d 621 (5th Cir. 1989); *Northern Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456 (1st Cir. 1988);

chose to overlook one small problem – nobody was listening. (*Laughter*)

LOU KLING:  
(Target Counsel)

What I tell my clients is that a MAC isn't equivalent to a do-over. A buyer may say, after learning about a problem with the target company on the eve of closing, I would have agreed to pay 10% less for this company if I had known about this problem. That may well be true, but that doesn't necessarily get you out under a MAC clause.

JOEL GREENBERG:  
(Acquiror Counsel)

And you'll also find that executives with financial, and in particular accounting, training will sometimes think that a MAC is the equivalent of something that would lead you to believe that financial statements aren't fairly presented. But it's far from that.

RICK CLIMAN:  
(Moderator)

I think we've all been in the uncomfortable situation of attempting to advise a client as to whether a particular development constitutes a MAC. At the end of the day, it's got to be something pretty close to catastrophic before you can comfortably advise a client to walk away and face the potentially horrendous liability associated with making the wrong call on that issue.

CHIEF JUSTICE VEASEY:

Rick, one quick question. Why do you think that lawyers for buyers don't try and draft more specifically? Why is it that they try and preserve this vagueness as opposed to saying, look, these five things will trigger a walk-away?

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Polycast Tech. Corp. v. Uniroyal, Inc., 792 F. Supp. 244 (S.D.N.Y. 1992); Katz v. NVF Co., 100 A.D.2d 470 (N.Y. App. Div. 1984); Gordon v. Dolin, 105 Ill. App. 3d 319 (1982); KLRA, Inc. v. Long, 6 Ark. App. 125 (1982); Peoria Sav. and Loan Assoc. v. American Sav. Assoc., 109 Ill. App. 3d 1043 (1982); Auble v. Sprosty, 1977 Ohio App. LEXIS 9304 (1977); Pittsburgh Coke & Chem. Co. v. Bollo, 421 F. Supp. 908 (E.D.N.Y. 1976); and Rudman v. Cowles Communications, Inc., 35 A.D.2d 213 (N.Y. App. Div. 1970).

RICK CLIMAN:  
(Moderator)

Good question. Representing buyers I often do just that. Certainly if you take a look at recent agreements, particularly in the technology arena, you will see buyers becoming increasingly precise in defining their walk rights, while still preserving the more general right to walk away for unforeseen and undefined catastrophic events. Obviously the target companies resist this tendency toward specificity because these carefully crafted walk rights create a much more objective standard and provide a much less risky opportunity for an acquiror to walk away under specified circumstances.

JOEL GREENBERG:  
(Acquiror Counsel)

Although I think, as a buyer, one thing I might worry about a little bit in defining what the triggering events are is whether I've totally put the nail in the coffin for any event I didn't list.

RICK CLIMAN:  
(Moderator)

These issues are tough ones, and our discussion today is particularly timely. There's a pending lawsuit, filed a couple of months ago, relating to the termination of the NorthPoint Communications/Verizon Communications deal, where Verizon called a MAC on NorthPoint and used that to justify walking away.<sup>12</sup> NorthPoint claimed that there was no MAC and that Verizon accordingly had no right to walk – hence the litigation. It will be interesting to see how that case shakes out.

You generally see an increase in deal terminations in the context of a volatile stock market like the one we've seen recently. I predict we'll see more litigation in this area over the next year or so. It will be very interesting to see what direction these cases take, particularly when sophisticated tribunals like the Delaware courts tackle them.<sup>13</sup>

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<sup>12</sup> NorthPoint Communications Group, Inc. v. Verizon Communications, Inc. (Cal. Super. Ct., Case No. 317249, complaint filed Dec. 8, 2000).

<sup>13</sup> *In re* IBP S'holders Litig. v. Tyson Foods, Inc., Consol. C.A. No. 18373, Strine (Del. Ch. June

Just two additional questions on MACs before we move on. First of all, Joel, I noticed in the acquiror's draft [in *Appendix D*], in Section 7.3, you've actually provided a MAC-out going in the other direction. You've provided, in clause (d) of Section 7.3, that the *target company* can walk if there is a material adverse change in the *acquiror's* business. Are you being overly generous here? Is this typical? Does it depend at all on the pricing formulation in the deal?

JOEL GREENBERG:  
(Acquiror Counsel)

It depends a lot on the pricing formulation and the nature of the consideration being paid by the buyer. Obviously, if the buyer is paying cash, there's not going to be a MAC-out in favor of the target. If it's paying in its stock as in our hypothetical example, it depends on the nature of the exchange ratio, and whether you've got other mechanisms to treat massive changes in the business of the buyer. For example, if you've got an uncollared fixed dollar value (floating) exchange ratio, so that the target's stockholders are going to get the same dollar value no matter how far the acquiror's business goes into the tank, I think as a buyer you've got a very strong argument that a MAC-out is not appropriate.

RICK CLIMAN:  
(Moderator)

One last questions on MACs. During the deal frenzy of the first half of 2000, when acquisition targets often possessed an extraordinary amount of negotiating leverage, I was fielding calls from some of my friends in the investment banking community asking can you get me some good examples of publicly announced hell or high water deals where the buyer doesn't have any MAC-out at all – in other words, deals where, once the definitive agreement is signed and

announced, the transaction is ultimately going to close, come hell or high water. And I was unable to find more than a small handful of such deals. Joel and Lou, were you regularly seeing deals like that last year? At least in situations where the acquiring company didn't have the deal locked up with voting agreements or other effectively preclusive lock-ups, did we ever get to the point where deals were routinely done without MAC-outs at all?

JOEL GREENBERG:  
(Acquiror Counsel)

I think historically those deals have been very rare, even as a quid pro quo for a lock-up.

LOU KLING:  
(Target Counsel)

I agree. They're very unusual.

### *C. No Litigation Condition*

RICK CLIMAN:  
(Moderator)

Let's move to the acquiror's litigation out in Section 7.2(g) of the acquiror's draft [*Appendix D*]. It gives the acquiror a walk right in the event of pending or threatened litigation relating to the proposed deal. Joel, as a threshold matter, why does the acquiror need a separate litigation out at all? Why doesn't the acquiror get the protection it needs from the bring-down of the target company's litigation representation – the rep that says there's no pending or threatened litigation against the target company?

JOEL GREENBERG:  
(Acquiror Counsel)

Well, it really depends on what that representation says, and we haven't reproduced it here. But typically the representation that you would get from a target would simply relate to litigation against the target itself. It would not, for example, include deal-related litigation against the *acquiror*, and that's why the acquiror wants a separate litigation condition. The acquiror needs a right to walk if it gets sued over the deal – by the antitrust authorities for

example – even if the target isn't named in the suit.

RICK CLIMAN:  
(Moderator)

Lou, representing the target, how do you react to this litigation out, assuming that we're not dealing with a hell-or-high-water deal in which you have the business leverage to eliminate the condition in its entirety? Joel has served up a broad litigation out that covers both pending and threatened litigation by any party – governmental or private – challenging the deal. How do you attempt to cut it back?

LOU KLING:  
(Target Counsel)

Well, the most important thing that I would try to do to this would be to limit it to litigation brought by a governmental agency. In other words I would try to eliminate from the condition private party litigation, so my client wouldn't have to worry about strike suits brought by the plaintiffs' bar. We all know that litigation challenging deals is a fact of life, so that's something that I'm not going to want to have trigger a walk right for the buyer, whether it's merely threatened or actually out there. So the first thing I'm going to do is to try to limit the coverage of this condition to litigation brought by governmental authorities.

I'm probably also going to try to limit the condition's coverage to actual pending litigation and exclude mere threats, on the theory that threats are very hard to police and a threat may or may not be serious. I'd rather have a bright-line test that there actually be litigation filed and commenced.

The last thing I'd probably do is try to tighten up some of the consequences that are listed here by adding materiality qualifiers. And, particularly in a one-step deal like the hypothetical deal we're discussing, I probably wouldn't want the buyer to walk unless the pending governmental litigation in question has a material adverse effect. I might even take a

shot at redrafting the condition to provide that any material adverse effect determination is made by reference to the combined business of both companies together. But that might be pushing things a bit too far.

RICK CLIMAN:  
(Moderator)

I see you've done a very good job on all fronts in Section 7.2(f) of the target company's response [in *Appendix E*]. There shall not be *pending* – no reference to *threatened* – against the acquiror, *before any U.S. federal or state court...*, any suit, action or proceeding challenging the merger *commenced by any U.S. federal or state governmental body* in which there is a *reasonable likelihood* of a judgment against the acquiror providing for an award of damages or other relief that would have an *acquiror* material adverse effect. So you've built in multiple layers of protection for the target here. Joel, what's the buyer's reaction?

JOEL GREENBERG:  
(Acquiror Counsel)

While I would have a great deal of sympathy for some of Lou's points, I think Lou's response goes a little too far. I do agree with Lou in that I honestly find it hard to argue that *threatened* or even *pending private* litigation should give my client an out. As Lou said, litigation is a way of life in this country. However, as far as *threatened* government litigation is concerned, I don't know how many of us would be prepared to force the Antitrust Division to actually *commence* a lawsuit, as opposed to merely telling the parties they're going to do it. I think most of us would view that as a sufficiently credible threat that a buyer should be able to reassess the deal at that point.

I also have some concern about how to measure and define the consequences of the litigation. I'm glad Lou was willing to acknowledge that measuring the materiality of the litigation by reference to the size of the buyer in addition to the target is a bit much.

You have to look at the consequences in a very context-driven way. If you're looking to buy the entire business of the target, almost any level of divestiture, for example, would be a consequence that troubles you.

The reasonable likelihood standard built into Lou's provision [in *Appendix E*] is also problematic, because at the time we have to assess this, all there will be to evaluate is a complaint. There will have been no motion practice, no discovery. There will merely be a complaint that seeks a remedy, and by definition it must have been filed by a U.S. governmental body.

LOU KLING:  
(Target Counsel)

And that ought to be enough?

JOEL GREENBERG:  
(Acquiror Counsel)

And that ought to be enough. I do think you have to be very careful, on both sides, in defining what particular governmental bodies count. Lou's draft [in *Appendix E*] says *U.S. federal or state* governmental body, which may make sense in a purely domestic deal. But in a multinational transaction, a target can't so readily insist on that limitation. In many deals, a challenge by the European Union would be of concern. On the other hand, I don't think a buyer should be able to walk because some governmental authority in a country in which the parties do one-tenth of 1% of their sales volume tries to attack the transaction.

RICK CLIMAN:  
(Moderator)

Right. There's a certain trade-off between this issue and the materiality issue. Once the target gives up on a materiality standard, so that *any* governmental litigation – no matter how insignificant – can trigger the buyer's walk right, the target is going to want to define jurisdictionally, perhaps geographically, the types of litigation that are going to be deemed significant enough to allow the acquiror a way out.



PROFESSOR THOMPSON: Rick, can I just ask you a quick question?

RICK CLIMAN: Sure.  
(Moderator)

PROFESSOR THOMPSON: What's the relationship between Section 7.2(f) and the general accuracy of representations condition in Section 7.2(a), which generally will bring down the target's no-litigation representation?

RICK CLIMAN: Sam, what you have to bear in mind – and Joel alluded to this earlier – is that the typical litigation representation made by the target company covers only litigation *against the target company itself*. But the acquiror may well want the right to walk if there is a lawsuit challenging the deal that names the *acquiror* as the defendant but doesn't also name the target company. The bring-down of the target's litigation rep, at least if it's a standard litigation rep, won't cover litigation against the acquiring company.

LOU KLING: Actually, a lot of the time when we're advising the target, we try to exclude *deal-related* litigation against the target from the target's litigation rep, on the theory that, at the time we're making the representation there isn't going to be any deal-related litigation and, for purposes of a closing, this type of litigation will be dealt with in a separate closing condition. We don't want to muddy up the waters by having to worry about the litigation representation covering this separately when it gets brought down to the closing.

JOEL GREENBERG: Lou's point is very important because he could have, for example, negotiated a closing condition that talks only about *government* litigation, and then have to argue about whether *private*, deal-related litigation against the target gives the

buyer a separate walk right by virtue of the bring-down of the target's litigation rep.

CHIEF JUSTICE VEASEY: I have a stupid question.

RICK CLIMAN:  
(Moderator) I doubt it's stupid.

CHIEF JUSTICE VEASEY: You're talking a lot about deal-related litigation. How about other litigation? Does that fall under material adverse consequences? Suppose the target company's crown jewel is some proprietary patent and there's meritorious litigation challenging the validity of the patent?

RICK CLIMAN:  
(Moderator) Because that litigation will be brought against the target, it will be covered by the bring-down of the target company's litigation representation. That representation will say that there is no material pending or threatened litigation against the target company. Pursuant to Section 7.2(a), the accuracy of representations condition, that's going to get tested at the closing. So if there's been material patent litigation brought against the target between signing and closing, and it's still pending at the time of closing, the buyer may be able to kill the deal by invoking Section 7.2(a), the bring-down condition. Of course, if Lou has his way, to invoke that condition the buyer will have to overcome a material adverse effect hurdle or some other comparably high materiality hurdle.

JOEL GREENBERG:  
(Acquiror Counsel) And, if Lou really has his way, the target's litigation rep will be dated, so that it doesn't get brought down at all.

CHIEF JUSTICE VEASEY: Rick and Lou, let me ask you this question. This is a public company negotiation, which involves the directors' duty of care. In how much detail do you take the board through the

conditions section of the definitive acquisition agreement?

RICK CLIMAN:  
(Moderator)

Let me set the stage for responding to that question, and then I'll turn it over to Lou. In a public company stock-for-stock merger, where there is never any post-closing indemnification, issues relating to walk rights are among the most important issues in the deal, along with price and deal protection issues. Regardless of whether I'm on the buy side or on the target side, I tend to spend – and I assume most lawyers who deal regularly with public company boards likewise tend to spend – a good amount of time in the board meetings talking specifically about the parties' walk rights.

Most target company boards recognize that an acquiror who finds a way to walk is going to leave the target company high and dry – as damaged goods, with employees and customers poised to jump ship or at least very nervous, and with dim prospects of returning any time soon to the position it was in before the deal was announced. What I emphasize in my presentations to the target company's board is that you have to look ahead and assume that the acquiring company may decide to walk for a reason that's unrelated to the particular condition it's invoking. During the period between signing and closing, an acquiring company can develop an entirely new agenda – it can become disenchanted with a target company for reasons having nothing to do with the target company itself, and can be looking for an excuse to walk away. So it's not enough for a target company's board to convince itself, "oh, they would never walk away because of some trivial piece of litigation threatened in some far-off jurisdiction." You have to assume that the acquiring company may be in a position of wanting to walk away for some entirely independent reason and turning its litigators

loose to look for holes in the acquisition agreement.

LOU KLING:  
(Target Counsel)

I couldn't agree more. Generally, discussions with the board these days focus first on potential third party bids and related deal protection matters, and second on walk rights. Those two things account for 90% of what you talk about in those board meetings.

## V. DEFINITIVE MERGER AGREEMENT – DEAL PROTECTION

RICK CLIMAN:  
(Moderator)

Let's turn now to some of the deal protection measures in the definitive acquisition agreement. These are the provisions that come into play if a third party makes a competing, or topping, bid to acquire the target company between signing and closing. And, of course, the acquiror's intent in including these deal protection provisions is to discourage third parties from making such competing bids in the first instance.

### A. *No-Solicitation/No-Talk Covenant*

RICK CLIMAN:  
(Moderator)

The first deal protection provision we'll focus on today is the target company's no-solicitation/no-talk covenant in the definitive merger agreement. Remember, this is different from the stand-alone exclusivity agreement that we discussed earlier. That agreement is a stand-alone document with a short, finite term that is put into place several days or weeks before the definitive merger agreement is hammered out. By contrast, what we're going to be focusing on now is a covenant that doesn't go into effect until the final, definitive merger agreement is actually signed.

If you take a look at [*Appendix F*], you'll see that the acquiror's form of no-solicitation/no-talk covenant appears in Section 6.3 of the definitive merger agreement. Joel, why don't

you walk us through this covenant and tell us how it works. In particular, why do you feel compelled to offer up a fiduciary exception to the no-talk prong of this provision?

JOEL GREENBERG:  
(Acquiror Counsel)

First of all, the way the provision works is that there is a very short and absolute statement of an operative ban – it's the first part of Section 6.3(a) – which basically obligates the target in very strong terms not to try to stir up or encourage any competing transaction. That's followed by a series of exceptions and definitions and some procedural rules. The big exception is the fiduciary out which occupies about two-thirds of paragraph (a), and permits the target board to conclude, after going through some procedures, including obtaining advice of counsel, that it would be a breach of its fiduciary duty to fail to respond to a superior proposal. If the board reaches that conclusion, it can furnish information to the third party that made the superior proposal, so long as certain conditions are satisfied. These conditions include obtaining confidentiality agreements and satisfying a notification and continuing updating requirement contained in paragraph (b).

You asked why an acquiror would proffer a fiduciary out in its first draft. I think the reason is two-fold. First, it's going to wind up there anyway, because any target is going to ask for it and it's common practice to give it in some form; and I'd prefer to start negotiating from a form of fiduciary out that I like, not the target's overbroad form. Second, I'm not sure as a buyer I particularly like the idea of having a no-solicitation/no-talk provision without a fiduciary out, because then the courts are going to create their own fiduciary out for the target. At least this way you have some hope that you can confine the court's discretion.

RICK CLIMAN:  
(Moderator)

Lou, you've provided the target's company's re-write of this provision [in *Appendix G*]. What are the hot issues?

LOU KLING:  
(Target Counsel)

I think every lawyer would probably rank these a little differently. But the most important one in my view is this: What is it that a third party must do to get my client, the target company, out from under this tough set of restrictions. In Joel's formulation [in *Appendix F*], the third party must have made a superior proposal. In the target's formulation [in *Appendix G*], I've changed that to something which is *reasonably likely to result in* a superior proposal. To my mind, that's the most important change. Looking at it from the target's perspective, how can somebody actually make a superior proposal without getting the information they need to make it? So Joel's formulation creates a situation where you hamstring the third party to an inappropriate degree. The third party needs information to come up with its proposal, which may ultimately be a better proposal. But until the third party comes up with a better proposal, the target isn't permitted to give the third party any information or talk to the third party, according to Joel's circular provision. We need to fix that provision.

RICK CLIMAN:  
(Moderator)

But Lou, isn't a sophisticated prospective acquiror going to know how to play the game? Won't it simply put together a written proposal that has the right numbers in it and the right language in it, all subject, of course, to conducting a satisfactory due diligence investigation, which makes the proposal completely non-binding? This could still be a superior proposal even under Joel's narrow definition. Why do you really need to fight about those words when a third-party interloper that knows what it's doing can get your client where it wants to get?

LOU KLING:  
(Target Counsel)

There are two reasons, and I think that they are both very important from the target's perspective. The first is that a large number of acquirors might not be willing to do that. Acquirors don't like putting proposals on the table and then walking away from them; it hurts their reputation and it hurts their credibility in their next deal. Remember, all of this is being played out in a fairly public arena. So I don't think it's necessarily true that a lot of potential buyers will, in fact, put a high number on the table subject to due diligence just to get in the door and look at information.

The second reason is that the language could have subtle implications for purposes of the buyer's termination right and right to receive a break-up fee. If the target's board has concluded that something is actually a superior proposal, that may in fact trigger all kinds of termination rights and fees at a point where the target doesn't have any firm deal with the third party – at a point where the target hasn't even given the third party any information. If on the other hand my client's board can give the third party information without reaching that conclusion, but rather by merely reaching a conclusion that the board thinks there is a reasonable shot at a superior proposal, that in most instances is not going to trigger any of the buyer's termination rights or rights to receive fees.

RICK CLIMAN:  
(Moderator)

Joel, do you give in on this one easily?

JOEL GREENBERG:  
(Acquiror Counsel)

Ultimately, yes, because I don't think you're going to be able to tie the target up so tightly that it can't respond in some way to unsolicited inquiries that seem to be credible. And if you write it in the tighter form [as in *Appendix F*], you're encouraging either outright evasion or the games that you talked about from the

competing bidder. Of course, as a buyer you do need to focus on the break-up fee triggers for the reasons Lou indicated.

RICK CLIMAN:  
(Moderator)

Lou, what else do you fight about here?

LOU KLING:  
(Target Counsel)

Well, you fight about, for example, whether the target is going to have an absolute obligation to make its employees and investment bankers behave themselves or whether it's just going to be required to use its reasonable efforts to keep them in line. You also fight over whether the board has to make its decision about invoking the fiduciary exception *based on* the advice of counsel, as opposed to *after receipt of* advice from counsel, as opposed to *based on an opinion* from counsel, as opposed to *based on a written opinion* from counsel.

RICK CLIMAN:  
(Moderator)

Why don't we stop there for a second. Even the buyer-oriented language initially proffered by Joel [in *Appendix F*], as counsel to the acquiror, doesn't actually require a written opinion or any opinion at all for that matter. It just says that the board's determination that its fiduciary duties require it to start talking to another bidder has to be based on advice from outside counsel.

CHIEF JUSTICE VEASEY:

Doesn't that relate to the *Capital Re*<sup>14</sup> case where Vice Chancellor Strine observed that a *based upon* standard could be problematic in certain litigation contexts? Is that an important issue from an economic point of view now, or do buyers just cave on that and go with the more lenient after receipt of advice standard proposed by the target company [in *Appendix G*]?

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<sup>14</sup> Ace Ltd. v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999).



- LOU KLING:  
(Target Counsel) I don't think it is economically important, and after *Capital Re* I would worry about requiring that the board's decision be based upon outside legal advice, because I think the Vice Chancellor suggested that could be an abdication of the board's fiduciary duty to make its own decisions.
- CHIEF JUSTICE VEASEY: That may or may not be a correct decision, but it is something to think about.
- RICK CLIMAN:  
(Moderator) And it is indeed worth taking a close look at that *Capital Re* decision, which was issued only last year. Vice Chancellor Strine suggested that the narrowly drawn language, "based on the written advice of its outside legal counsel," does not preclude the board of directors from concluding that it must deal with a potential third party bidder, even if outside counsel equivocates and gives qualified advice.
- CHIEF JUSTICE VEASEY: And counsel did equivocate in that case.
- RICK CLIMAN:  
(Moderator) As a more general matter, does the specific language used in this provision really matter? In addition to requesting that the words based on be changed to after receipt of, Lou is requesting other language changes [in *Appendix G*] that might look trivial to an outside observer. For example, Lou is looking to change the required showing from "would result in" to "creates a reasonable possibility of constituting" a breach of fiduciary duty. To what extent does this language even matter in light of a case like *Capital Re*? Can you just assume that no matter what language you put in here, it will get construed in a way that doesn't have the board improperly abdicating its fiduciary duties? Do you really need to fight about this stuff?

JOEL GREENBERG:  
(Acquiror Counsel)

I think the law is sufficiently unsettled that to some extent you don't know today whether it makes a difference. We got some guidance from Vice Chancellor Strine on the specific issue of the nature of the legal advice that has to be given, but we have no judicial guidance on some of these other determinations. We just don't know.

CHIEF JUSTICE VEASEY:

I think when you're dealing with an area where the law is unsettled, as in this area, you have to start in your analysis from the point of the worst-case scenario. Let's assume that the court will conduct a searching inquiry. What then?

JOEL GREENBERG:  
(Acquiror Counsel)

These cases often come up in the worst possible context for the acquiror. It won't be someone challenging the language in a vacuum, but a real third party out there who wants to give the target company's stockholders more value. You're going to be faced with the unenviable prospect of trying to convince a judge that this contract should be construed in a way that prevents the board from responding to that third party's overtures.

#### B. *Recommendation Covenant*

RICK CLIMAN:  
(Moderator)

Against that backdrop, let's take a quick look at another, related deal protection provision included in the definitive merger agreement. That's the covenant of the target company's board of directors to recommend the contemplated merger to the target company's stockholders. If you look at [*Appendix H*], you'll see the acquiror's form of recommendation covenant. This is a fairly strong covenant that requires the acquired company's board of directors to recommend and continue to recommend this deal unless – and this is a limited fiduciary exception that looks something like

the exception we just discussed – a superior proposal, as narrowly defined, comes along.

Lou, as counsel for the target company, what reaction do you have to the recommendation covenant proffered by Joel? I noticed in your response in [Appendix I], you've deleted entirely the superior proposal requirement in the fiduciary exception. You've in effect said, look, if the board determines for any reason that its fiduciary duties require it to pull its recommendation and to recommend against doing this merger, the board ought to have the flexibility to do that, whether or not there's a 'superior proposal' on the table.

Why don't you begin by giving some examples of situations where there is no superior proposal on the table, but where the target company's board might nonetheless determine that its fiduciary duties require it to withdraw its recommendation of the original deal.

LOU KLING:  
(Target Counsel)

Well, the best example gets back to the material adverse change situation we talked about before. You can have a situation where the exchange ratio in the merger is fixed, and there's been an adverse change in the acquiring company's business that really drives down the dollar value of the deal to the target's stockholders, who will be receiving stock of the acquiror in the merger. As the target's counsel you may not feel sufficiently comfortable that this is actually a material adverse change for purposes of triggering a walk right, and your client may not wish to take the liability risk of declaring a MAC and walking. At the same time, the board may no longer believe the deal as originally priced makes sense. That's a perfect example of a situation where I would find it very hard to tell a board of directors, Even though you don't believe in this deal any more, you have to mail out a proxy statement that says you're still

recommending it. I don't even know how you get up and say that to the board and expect to get hired again. (*Laughter*) If they don't believe in it, they don't believe in it.

RICK CLIMAN:  
(Moderator)

Although there is a way technically to get around that problem that's been tried before. . . .

JOEL GREENBERG:  
(Acquiror Counsel)

That's the Zions Bancorp situation, where the board sent out a supplement to its proxy statement which on its face didn't do anything to undercut its recommendation of the deal, but basically said our financial advisor has now concluded that this is a terrible deal for stockholders (*Laughter*) – Goldman Sachs having been nice enough to pull its fairness opinion – and then proceeded to explain in great detail why the deal was so terrible, as I think they were required to do by the proxy rules and their duty of candor.<sup>15</sup>

RICK CLIMAN:  
(Moderator)

Isn't that the real problem here, that this particular provision implicates one of the broadest and most fundamental of the fiduciary duties of directors – the duty of candor, the duty to make full disclosure? As a director, it's very tough to be put into a situation where you're contractually forced to continue recommending a deal that you think is a bad deal, unless you're prepared to make public disclosures that completely vitiate the recommendation.

CHIEF JUSTICE VEASEY:

And the statute changed and changed the whole atmosphere there, I suppose. Section 251 of the DGCL says you *can* pull your recommendation.

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<sup>15</sup> Zions Bancorporation proxy statement supplement dated March. 15, 2000 to proxy statement/prospectus dated February 17, 2000.

RICK CLIMAN:  
(Moderator)

And in the several years since Section 251 of the Delaware General Corporation Law has been amended to allow a merger to be brought to stockholders for a vote even in the face of a negative board recommendation, we've seen so-called force-the-vote provisions become quite prevalent in stock-for-stock merger agreements. We'll have more to say about that a little later.

JOEL GREENBERG:  
(Acquiror Counsel)

Rick, I think that's one of the reasons why the action has shifted away from the precise nature of the recommendation covenant, since it's always been subject to a duty of candor as well as a duty of disclosure under the federal proxy rules, to a question of whether you can force the target to take the deal to the stockholders even if the board changes its mind.

RICK CLIMAN:  
(Moderator)

But just to get some calibration on current practice, Lou, in the recommendation covenant in the definitive merger agreement, to what extent are you typically seeing a fiduciary exception conditioned on an actual superior proposal having been made [as in *Appendix H*], as opposed to a more general and broader fiduciary out [as in *Appendix I*] that would permit a change of recommendation without a competing bid on the table – in the context of striking gold on the target's property or a material adverse change to the acquiring company's business, for example.

LOU KLING:  
(Target Counsel)

I would say that in the larger transactions, I tend to see the board's right to withdraw its recommendation more often still tied to a superior proposal, although what I said before is actually what I personally believe — that the superior proposal requirement is not the right formulation. But it's still the most common. I think the least common formulation is kind of cutting the baby, which allows the target board to pull its recommendation if they believe

there's been a material adverse development in the acquiror's business. That formulation does not cover the situation where there's been a positive development in the target's own business – the striking gold scenario you mentioned. And the target generally wants to provide for that.

The second most common formulation is the way we have it in [*Appendix I*] – a very broad fiduciary exception that contractually allows the board to pull its recommendation if its fiduciary duty requires it to pull it, whether it's because of something bad in the acquiror's business, something good in the target's own business or a third party coming along and making an attractive competing bid.

### C. Break-Up Fees

RICK CLIMAN:  
(Moderator)

Let's move from the recommendation covenant to the acquiror's form of termination and break-up fee provisions, included in [*Appendix J*]. Joel, why don't you walk us through your draft of these buyer-oriented termination provisions and break-up fee provisions.

JOEL GREENBERG:  
(Acquiror Counsel)

Sure. We've obviously included only a few of the termination provisions you generally see, but the ones we've included implicate deal protection issues of the kind we've been talking about. The first of the termination clauses that we've included provides for a drop-dead date. If the transaction doesn't close by the specified date, for any reason, either party can walk. The second provides that, if you go to the target's stockholders and they don't approve the transaction – they vote it down – at that point either party can terminate. And the third one, and the one which is the most controversial of the three we've highlighted, provides a termination right that's unilateral to the acquiror, giving the acquiror the right to walk

away if any triggering event has occurred. Triggering event is defined very broadly [in *Appendix J*] to include any lack of enthusiasm on the part of the target board for the deal, no matter how manifested. And in this acquiror-favorable formulation, that lack of enthusiasm gives the acquiror, but not the target, the ability to make a choice: Do we want to go forward and force the deal to be considered and voted upon by the target's stockholders, or do we want to walk at this point and collect a break-up fee?

RICK CLIMAN:  
(Moderator)

So, just to be crystal clear on this: if you take a look at Section 8.1(e) [in *Appendix J*], it says that this agreement can be terminated by the acquiror if there is a triggering event, which is an event that shows a lack of support for the deal on the part of the target's board of directors. It is a *unilateral* walk right, effectively providing the acquiror with a force-the-vote option. The target, even if it satisfies the requirements for having its board of directors withdraw its recommendation of the deal, cannot terminate the deal at this point. It has to take the deal to a vote of its stockholders, if the acquiror so chooses.

In some deals, the acquiror's walk right is not unilateral, and the agreement includes a comparable termination provision allowing the *target* to walk. You'll see this in the target's response [in *Appendix K*], where Section 8.1(e) is a *bilateral* termination right – either party can invoke it. The target's termination right in this context is sometimes referred to as a fiduciary termination right, and deals that incorporate that provision don't give the acquiror the ability to force the vote.

The particular provisions we're looking at [in *Appendix J*] are drafted from an acquiror's perspective and they provide for the classic force-the-vote scenario. This has become, in

my experience, fairly typical in stock-for-stock deals, even in stock-for-stock deals where only a very small portion of the target's stock is locked up by the acquiror with stockholder voting agreements. Joel, just to make sure everyone understands how this provision operates, why don't you take us through what happens under your form of agreement [in *Appendix J*] if a third party comes in and makes a clearly superior offer to acquire the target company. Can the target company simply accept the offer at that point?

JOEL GREENBERG:  
(Acquiror Counsel)

No, it can't. The way this agreement is constructed, the target really doesn't have that option. The board may be able to pull its recommendation of the initial deal, as we noted before. Certainly the target has to be candid with its stockholders in telling them about the competing offer. But the target's options are very limited. It's the acquiror that has options. It can decide, we're taking our deal to the target's stockholders anyway; we want them to vote on it and only if they vote it down (which is an event that triggers the payment to us of a break-up fee) can the target go and try to make a deal with the third party that lobbed in the competing offer. As an acquiror, what you're trying to get here is the benefit of the uncertainty faced by the target and its stockholders. Specifically, the target's stockholders will be faced with a situation in which they have to vote on your deal, not knowing at the time the vote is taken whether the target is ultimately going to be able to get a definitive contract from the third party that made the competing offer.

RICK CLIMAN:  
(Moderator)

So basically the acquiror has two choices. One, cut it off right now and collect its termination fee – 4% of the deal value, cash on the barrel-head right then and there; or two, take it to a vote of the target's stockholders – if the stock-



holders vote it up, great, deal's done; if the stockholders vote it down, terminate the deal then and collect the full 4% break-up fee then.

Joel, what happens if the third party's competing bid is not clearly superior and, in fact, the target company's board of directors continues to support the original deal, the deal covered by this merger agreement? What then?

JOEL GREENBERG:  
(Acquiror Counsel)

Well, at that point, unless one of the other events that constitutes a triggering event occurs, such as the third party going out and buying stock in the target company and going over the threshold specified in the triggering event definition, there isn't a right to terminate the merger agreement on the part of either party. So the original deal will still go to the target's stockholders, but there again we do have a provision stating that the acquiror gets its full break-up fee if the stockholders vote the deal down after a competing deal has been announced.

RICK CLIMAN:  
(Moderator)

A full 4%, payable immediately in cash. And indeed, Joel, doesn't your draft also provide that even if you don't get to a stockholder vote before reaching the drop-dead date, as long as there's a competing bid out there when you hit that drop-dead date, the acquiring company gets its full break-up fee?

JOEL GREENBERG:  
(Acquiror Counsel)

That's right, because the assumption is that the reason you didn't get the deal done before the drop-dead date is that the target was stalling – waiting for time to expire on the original deal – so it could accept the competing offer.

CHIEF JUSTICE VEASEY:

I have a question. In your practical experience, you're using this leverage and going up to the brink and so forth. How many of these competing offers that you get on the threshold

of the stockholders voting on a deal actually end up in some new deal, some newly negotiated transaction?

JOEL GREENBERG:  
(Acquiror Counsel)

My own experience would be that, if a serious, superior competing bid emerges, usually the acquiror in the original deal won't force that original deal to a vote, absent a voting lockup from a significant stockholder. If the competing bid is clearly superior, it becomes evident to everybody after a while that it's going to be an exercise in futility to force the vote on the original deal. That's what happened with Warner-Lambert and American Home Products when Pfizer came in. At some point the 20 billion dollar difference in price mattered to the market and –

CHIEF JUSTICE VEASEY: It wasn't just walking around money.

JOEL GREENBERG:  
(Acquiror Counsel)

– and the parties realized that the Warner/AHP deal could not happen, so it never got to the point where it was forced to a vote even though the merger agreement permitted AHP to do just that.

RICK CLIMAN:  
(Moderator)

So one last question then, Joel, about how this all fits together under your acquiror-favorable provision in [*Appendix J*]. Suppose there's no competing bid at all, but for one reason or another the target company's stockholders don't approve the deal. Maybe, in our hypothetical, stock-for-stock deal with a fixed exchange ratio, the acquiring company's stock price has gone into the tank because there's been an adverse change to the acquiring company's business, and therefore the deal isn't worth so much to the target company's stockholders anymore. Or maybe gold has been discovered on the target company's property. But for some reason, with no third-party competing bid out there, the

target company's stockholders just vote the deal down. What happens?

JOEL GREENBERG:  
(Acquiror Counsel)

Let's assume that the target board continued to support the deal so that the stockholders acted contrary to the advice of their board when they voted the deal down. In this formulation we provide for the payment by the target of a lower break-up fee to the acquiror. In this case it's 1% of the transaction value instead of 4%.

RICK CLIMAN:  
(Moderator)

This situation is often referred to as the *naked no-vote* situation because there's been a negative vote by the target's stockholders without any competing bid affecting their voting decision. Joel, why do you provide for a lower break-up fee here? Why don't you allow the acquiror to collect the full 4% in this naked no-vote situation?

JOEL GREENBERG:  
(Acquiror Counsel)

I think there's a concern about enforceability if you go for the full 4% in a naked no-vote situation.

CHIEF JUSTICE VEASEY:

I would think so, in that context, although 4% is close to the 2% to 3½% that's normally given in other contexts.

RICK CLIMAN:  
(Moderator)

Deal lawyers have been talking a lot about the Delaware jurisprudence bearing on naked no-vote break-up fees. There are some lawyers who construe the *Brazen*<sup>16</sup> case, decided a few years back, as actually permitting fully-loaded naked no-vote fees. But, there was another recent decision, *McMillan v. Intercargo*,<sup>17</sup> handed

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<sup>16</sup> *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43 (Del. 1997).

<sup>17</sup> *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. April 20, 2000) ([T]he termination fee was structured so as to be payable only in the event that the Intercargo stockholders rejected the XL merger and were benefited by a more favorable strategic transaction . . . . This structure ensured that the Intercargo stockholders would not cast their vote in fear that a no vote alone would trigger the fee . . . .).

down this past April, in which Vice Chancellor Strine made a statement that could be construed to cast doubt on the viability of a sizable naked no-vote fee.

JOEL GREENBERG:  
(Acquiror Counsel)

I also think you've got to recognize the realities of negotiating this type of fee. A target is presumably going to be very resistant to paying any fee at all on a naked no-vote. It is going to argue that this isn't the situation break-up fees are designed to address. Break-up fees are typically designed to compensate the first acquiror when it served as a stalking horse to get a better deal for the target's stockholders.

DENNIS HERSCH:

Rick, let me throw one at you. Since Delaware law was changed to say that a transaction can go to the target's stockholders even if it's no longer supported by the target's board of directors, we've seen force-the-vote provisions in some of the largest stock-for-stock mergers. But there is also an additional provision that sometimes sneaks in there that goes even further. It's a provision that says that, if the deal gets voted down by the target company's stockholders, then the target company's board will not submit any other deal to its stockholders for a year. How do you guys feel about that?

LOU KLING:  
(Target Counsel)

Well, I'm not crazy about it. (*Laughter*) I've never liked these tail provisions, either in voting agreements or in merger agreements.

RICK CLIMAN:  
(Moderator)

And you sometimes do see these provisions in stockholder voting agreements. But from a fiduciary perspective, there's a difference between what you can agree to as a stockholder and what a board can agree to.<sup>18</sup>

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<sup>18</sup> A tail (lock-out) provision was voided in *First Union Corp. v. Suntrust Banks* (N. Car. Gen. Ct. of Justice, Super. Ct. Div., July 20, 2001).

Before we conclude our presentation, I'd like to spend just a minute talking about the size of the break-up fees payable in these deals. Is 4% too high? What is the maximum size, and does the maximum size change depending on whether or not you're in *Revlon*<sup>19</sup> mode? We've had Chancellor Chandler suggest in the *Phelps Dodge*<sup>20</sup> case that 6.3% may be too high in a non-*Revlon* stock swap. We've had Vice Chancellor Strine say in the *Intercargo*<sup>21</sup> case that 3.5% is at the high end of what the Delaware courts have approved, but still within the range that is generally considered reasonable. We don't have time to discuss these issues today, but they are issues you have to confront when negotiating these deals.

We've run out of time. Obviously we've only had the opportunity to scratch the surface today; we've touched on just a handful of the dozens of tricky issues that arise in public company acquisition negotiations. Thanks for your attention.

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<sup>19</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

<sup>20</sup> *Phelps Dodge Corp. v. Cypress Amax Minerals Co.* Del. Ch., C.A. Nos. 17398, 17383, 17427, 1999 WL 1054255, Chandler, C. (Sept. 27, 1999). *But cf.* *First Union Corp v. Suntrust Banks*, *supra* note 18 (stock option effectively equivalent to a break-up fee of approximately 5.8% upheld).

<sup>21</sup> *McMillan*, 786 A.2d 492. *See also In re Pennaco Energy, Inc. S'holders Litigation* (Del. Ch. Feb. 5, 2001) (3% termination fee upheld).

## APPENDIX A

*Excerpts From Target Company's Form of Confidentiality Agreement  
(Including Standstill Provision)*

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

**8. STANDSTILL PROVISION.** The Prospective Acquiror agrees that, during the three-year period commencing on the date of this agreement (the Standstill Period), neither the Prospective Acquiror nor any of the Prospective Acquiror's Representatives will, in any manner, directly or indirectly:

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

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

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

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

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

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

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

(h) request or propose that the Target or any of the Target's Representatives amend, waive or consider the amendment or waiver of any provision set forth in this section 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 Acquiring Company 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, a third party: (i) commences a tender offer for at least 50% of the outstanding capital stock of the Target, (ii) commences a proxy contest with respect to the election of any directors of the Target, or (iii) enters into an agreement with the Target contemplating the acquisition (by way of merger, tender offer or otherwise) of at least 50% of the outstanding capital stock of the Target or all or substantially all of the Target's assets, 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.

- Provide the Prospective Acquiror with a 30-day exclusivity (no-shop) agreement executed on behalf of the Target (see Appendix C), in exchange for the Prospective Acquiror's agreement to the inclusion of a standstill provision



## APPENDIX C

*Acquiring Company's Form of Exclusivity (No-Shop) Agreement*

[Target]

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, 20\_\_

**Re: Possible Transaction Involving [Prospective Acquiror]  
and [Target]**

Ladies and Gentlemen:

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

1. The Target acknowledges and agrees that, until the earlier of \_\_\_\_\_, 2001 or the date on which the Prospective Acquiror advises the Target in writing that the Prospective Acquiror is terminating all negotiations regarding a Possible Transaction, the Target will not, and will not authorize or permit any of its Representatives (as defined in section 6 below) to, directly or indirectly:

- (a) solicit or encourage the initiation or submission of any expression of interest, inquiry, proposal or offer from any person or entity (other than the Prospective Acquiror) relating to a possible Acquisition Transaction (as defined in section 6 below);
- (b) participate in any discussions or negotiations or enter into any agreement with, or provide any non-public information to, any person or entity (other than the Prospective Acquiror) 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 Acquiror) relating to a possible Acquisition Transaction.

The 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 Acquiror) relating to a possible Acquisition Transaction, and shall promptly provide the Prospective Acquiror with 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 the Target or by any of the Target's Representatives from any person or entity (other than the Prospective Acquiror) on or prior to \_\_\_\_\_, 2001.

2. The 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 Acquiror (a) to continue any discussions or negotiations with the Target, or (b) to pursue or enter into any transaction or relationship of any nature with the Target.

3. The 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 the Target and the Prospective Acquiror, or (c) the existence or terms of any proposal regarding a Possible Transaction.

4. The Target acknowledges and agrees that, in addition to all other remedies available (at law or otherwise) to the Prospective Acquiror, the Prospective Acquiror 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. The Target further acknowledges and agrees that the Prospective Acquiror 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 section 4, and the Target waives any right it may have to require that the Prospective Acquiror obtain, furnish or post any such bond or similar instrument.

5. 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). The 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) agrees that service of any process, summons, notice or document by U.S. mail addressed to the Target at the address set forth at the beginning of this letter agreement shall be deemed to constitute effective service thereof for purposes of any action, suit or proceeding arising out of or relating to this letter agreement; (c) 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 (d)

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.

6. For purposes of this letter agreement:

(a) The Target's Representatives shall include its officers, directors, employees, affiliates, attorneys, advisors, accountants, agents and representatives.

(b) Acquisition Transaction shall mean any transaction involving:

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

(ii) the issuance, grant, disposition or acquisition of: (A) any capital stock or other equity security of the Target or any direct or indirect subsidiary of the Target, (B) any option, call, warrant or right (whether or not immediately exercisable) to acquire any capital stock or other equity security of the Target or any direct or indirect subsidiary of the 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 the Target or any direct or indirect subsidiary of the Target; or

(iii) any merger, consolidation, business combination, share exchange, reorganization or similar transaction involving the Target or any direct or indirect subsidiary of the Target; *provided, however,* that (A) the grant of stock options by the 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 the Target's existing stock option plans and is consistent with the Target's past practices, and (B) the issuance of stock by the Target to its employees upon the exercise of outstanding stock options will not be deemed to be an Acquisition Transaction.

Very truly yours,

[Prospective Acquiror]

By: \_\_\_\_\_

ACKNOWLEDGED AND AGREED:

[Target]

By: \_\_\_\_\_

## APPENDIX D

*Sample Closing Conditions in Acquiring Company's Form of  
Merger Agreement for a Stock-for-Stock Merger  
Involving Two Publicly Traded Companies*

### ARTICLE VII: CONDITIONS TO MERGER

**7.1 CONDITIONS TO OBLIGATION OF EACH PARTY.** The obligation of each party to effect the Merger is subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) *Effectiveness of Registration Statement.* The Registration Statement shall have become effective in accordance with the provisions of the Securities Act; no stop order suspending the effectiveness of the Registration Statement shall have been issued by the SEC; and no proceeding shall have been initiated or threatened in writing by the SEC for the purpose of seeking or obtaining such a stop order.

(b) *Stockholder Approval.* This Agreement shall have been duly adopted by the Required Target Stockholder Vote.

(c) *HSR Act.* The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been terminated.

(d) *NYSE Listing.* The shares of Acquiror Common Stock to be issued in the Merger shall have been approved for listing (subject to notice of issuance) on the NYSE.

(e) *No Restraints.* No temporary restraining order, preliminary or permanent injunction or other order preventing the consummation of the Merger shall have been issued by any court of competent jurisdiction or any other Governmental Body and shall remain in effect; and no federal, state, local, municipal, foreign or other law, statute, rule, regulation or decree that makes consummation of the Merger illegal shall have been enacted, adopted or deemed applicable to the Merger and shall remain in effect.

**7.2 CONDITIONS TO OBLIGATIONS OF ACQUIROR AND MERGER SUB.** The obligations of the Acquiror and Merger Sub to effect the Merger are subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) *Accuracy of Representations.* Those representations and warranties of the Target set forth in this Agreement that contain materiality qualifications shall have been accurate in all respects as of the date of this Agreement and shall be accurate in all respects as of the Closing Date as if made on the Closing Date; and those representations and warranties

of the Target set forth in this Agreement that do not contain materiality qualifications shall have been accurate in all material respects as of the date of this Agreement and shall be accurate in all material respects as of the Closing Date as if made on the Closing Date.

(b) *Performance of Covenants.* Each of the covenants and obligations that the Target is required to comply with or to perform at or prior to the Closing shall have been complied with or performed in all material respects.

(c) *Consents.* All material consents, approvals, authorizations, filings and notices required to be obtained, made or given in connection with the Merger and the other transactions contemplated by this Agreement (including those consents, approvals, authorizations, filings and notices identified in Part 7.2(c) of the Target Disclosure Schedule) shall have been obtained, made or given and shall be in full force and effect.

(d) *Agreements and Documents.* The following agreements and documents shall have been delivered to the Acquiror, and shall be in full force and effect:

- (i) Affiliate Agreements in the form of Exhibit \_\_\_\_, executed by each Person who could reasonably be deemed to be an affiliate of the Target (as that term is used in Rule 145 under the Securities Act);
- (ii) Noncompetition Agreements in the form of Exhibit \_\_\_\_, executed by the individuals identified on Exhibit \_\_\_\_;
- (iii) a letter from [the Target's independent accountant], dated as of the Closing Date and addressed to the Acquiror, reasonably satisfactory in form and substance to the Acquiror, addressing such matters as are customarily addressed in comfort letters delivered by accountants in connection with registration statements similar to the Registration Statement;
- (iv) a legal opinion of [the Acquiror's legal counsel], dated as of the Closing Date and addressed to the Acquiror, to the effect that the Merger will constitute a reorganization within the meaning of Section 368 of the Code (it being understood that (A) in rendering such opinion, [the Acquiror's legal counsel] may rely upon the tax representation letters referred to in Section \_\_\_\_, and (B) if [the Acquiror's legal counsel] does not render such opinion, the condition set forth in this Section 7.2(d)(iv) shall nonetheless be deemed to be satisfied if [the Target's legal counsel] renders such opinion to the Acquiror);

(v) a legal opinion of [the Target 's legal counsel], dated as of the Closing Date and addressed to the Acquiror, in the form of Exhibit \_\_\_;

(vi) a certificate, executed on behalf of the Target by an executive officer of the Target, confirming that the conditions set forth in paragraphs (a), (b), (c), (e) and (f) of this Section 7.2 have been duly satisfied; and

(vii) the written resignations of all officers and directors of the Target, effective as of the Effective Time.

(e) *Employees.* None of the individuals identified on Exhibit \_\_\_ shall have ceased to be employed by the Target, or shall have expressed an intention to terminate his or her employment with the Target or to decline to accept employment with the Acquiror.

(f) *No Material Adverse Change.* There shall have been no material adverse change in the business, condition, capitalization, assets, liabilities, operations, financial performance or prospects of the Target since the date of this Agreement, and no event shall have occurred or circumstance shall exist that could reasonably be expected to result in such a material adverse change.

(g) *No Litigation.* There shall not be pending or threatened any material suit, action, proceeding or investigation: (i) challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other transactions contemplated by this Agreement; (ii) relating to the Merger and seeking to obtain from the Acquiror or any of its subsidiaries any damages that are material to the Acquiror; (iii) seeking to prohibit or limit in any material respect the Acquiror's ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to the stock of the Surviving Corporation; or (iv) which, if adversely determined, would have a material adverse effect on the business, condition, capitalization, assets, liabilities, operations, financial performance or prospects of the Target or the Acquiror.

**7.3 CONDITIONS TO OBLIGATION OF TARGET.** The obligation of the Target to effect the Merger is subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) *Accuracy of Representations.* Those representations and warranties of the Acquiror and Merger Sub set forth in this Agreement that contain materiality qualifications shall have been accurate in all respects as of the date of this Agreement and shall be accurate in all respects as of the Closing Date as if made on the Closing Date; and those representations and warranties of the Acquiror and Merger Sub set forth in this Agreement that do not contain materiality qualifications shall have been accurate in all

material respects as of the date of this Agreement and shall be accurate in all material respects as of the Closing Date as if made on the Closing Date.

(b) *Performance of Covenants.* Each of the covenants and obligations that the Acquiror or Merger Sub is required to comply with or to perform at or prior to the Closing shall have been complied with or performed in all material respects.

(c) *Documents.* The following documents shall have been delivered to the Target, and shall be in full force and effect:

(i) a legal opinion of [the Target's legal counsel], dated as of the Closing Date and addressed to the Target, to the effect that the Merger will constitute a reorganization within the meaning of Section 368 of the Code (it being understood that, (A) in rendering such opinion, [the Target's legal counsel] may rely upon the tax representation letters referred to in Section \_\_\_\_, and (B) if [the Target's legal counsel] does not render such opinion, the condition set forth in this Section 7.3(c)(i) shall nonetheless be deemed to be satisfied if [the Acquiror's legal counsel] renders such opinion to the Target); and

(ii) a certificate, executed on behalf of the Acquiror by an executive officer of the Acquiror, confirming that the conditions set forth in paragraphs (a), (b) and (d) of this Section 7.3 have been duly satisfied.

(d) *No Material Adverse Change.* There shall have been no material adverse change in the business, condition, assets, liabilities, operations, financial performance or prospects of the Acquiror since the date of this Agreement, and no event shall have occurred or circumstance shall exist that could reasonably be expected to result in such a material adverse change (it being understood that a decline in the Acquiror's stock price shall not constitute a material adverse change for purposes of this Section 7.3(d)).

## APPENDIX E

*Sample Response by Target Company to Closing Conditions  
Proposed by Acquiring Company*

### ARTICLE VII: CONDITIONS TO MERGER

**7.1 CONDITIONS TO OBLIGATION OF EACH PARTY.** The obligation of each party to effect the Merger is subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) *Effectiveness of Registration Statement.* The Registration Statement shall have become effective in accordance with the provisions of the Securities Act; no stop order suspending the effectiveness of the Registration Statement shall have been issued by the SEC; and no proceeding shall have been initiated or threatened in writing by the SEC for the purpose of seeking or obtaining such a stop order.

(b) *Stockholder Approval.* This Agreement shall have been duly adopted by the Required Target Stockholder Vote.

(c) *HSR Act.* The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been terminated.

(d) *NYSE Listing.* The shares of Acquiror Common Stock to be issued in the Merger shall have been approved for listing (subject to notice of issuance) on the NYSE.

(e) *No Restraints.* No temporary restraining order, preliminary or permanent injunction or other order preventing the consummation of the Merger shall have been issued since the date of this Agreement by any U.S. federal or state court of competent jurisdiction and shall remain in effect; and no U.S. federal or state law, statute, rule, regulation or decree that makes consummation of the Merger illegal shall have been enacted or adopted since the date of this Agreement and shall remain in effect.

**7.2 CONDITIONS TO OBLIGATIONS OF ACQUIROR AND MERGER SUB.** The obligations of the Acquiror and Merger Sub to effect the Merger are subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) *Accuracy of Representations.* The representations and warranties of the Target set forth in this Agreement (except for any representation or warranty of the Target that refers specifically to the date of this Agreement or to any other date other than the Closing Date) shall be accurate in all respects as of the Closing Date as if made on the Closing Date, and each representation or warranty of the Target that refers specifically to the date of this Agreement or to any other date other than the Closing Date shall have been accurate in



all respects as of the date referred to in such representation or warranty; *provided, however*, that for purposes of determining the accuracy of the representations and warranties of the Target set forth in this Agreement, any inaccuracy that does not have a Target Material Adverse Effect shall be disregarded.

(b) *Performance of Covenants*. Each of the covenants and obligations that the Target is required to comply with or to perform at or prior to the Closing shall have been complied with or performed in all material respects.

(c) *Consents*. All consents, approvals, authorizations, filings and notices identified in Part 7.2(c) of the Target Disclosure Schedule shall have been obtained, made or given and shall be in full force and effect, except where the failure to obtain, make or give such consents, approvals, authorizations, filings and notices would not have a Target Material Adverse Effect.

(d) *Agreements and Documents*. The following agreements and documents shall have been delivered to the Acquiror, and shall be in full force and effect:

(i) Affiliate Agreements in the form of Exhibit \_\_\_\_, executed by each Person who could reasonably be deemed to be an affiliate of the Target (as that term is used in Rule 145 under the Securities Act);

(ii) a legal opinion of [the Acquiror's legal counsel], dated as of the Closing Date and addressed to the Acquiror, to the effect that the Merger will constitute a reorganization within the meaning of Section 368 of the Code (it being understood that (A) in rendering such opinion, [the Acquiror's legal counsel] may rely upon the tax representation letters referred to in Section \_\_\_\_, and (B) if [the Acquiror's legal counsel] does not render such opinion, the condition set forth in this Section 7.2(d)(ii) shall nonetheless be deemed to be satisfied if [the Target's legal counsel] renders such opinion to the Acquiror); and

(iii) a certificate, executed on behalf of the Target by an executive officer of the Target, confirming that the conditions set forth in paragraphs (a), (b), (c) and (e) of this Section 7.2 have been duly satisfied.

(e) *No Material Adverse Effect*. Since the date of this Agreement, there shall not have occurred a Target Material Adverse Effect.

(f) *No Governmental Litigation*. There shall not be pending against the Acquiror, before any U.S. federal or state court of competent jurisdiction, any suit, action or proceeding challenging the Merger commenced by any U.S. federal or state Governmental Body in which there is a reasonable

likelihood of a judgment against the Acquiror providing for an award of damages or other relief that would have an Acquiror Material Adverse Effect.

**7.3 CONDITIONS TO OBLIGATION OF TARGET.** The obligation of the Target to effect the Merger is subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) *Accuracy of Representations.* The representations and warranties of the Acquiror and Merger Sub set forth in this Agreement (except for any representation or warranty of the Acquiror or Merger Sub that refers specifically to the date of this Agreement or to any other date other than the Closing Date) shall be accurate in all respects as of the Closing Date as if made on the Closing Date, and each representation or warranty of the Acquiror or Merger Sub that refers specifically to the date of this Agreement or to any other date other than the Closing Date shall have been accurate in all respects as of the date referred to in such representation or warranty; *provided, however,* that for purposes of determining the accuracy of the representations and warranties of the Acquiror and Merger Sub set forth in this Agreement, any inaccuracy that does not have an Acquiror Material Adverse Effect shall be disregarded.

(b) *Performance of Covenants.* Each of the covenants and obligations that the Acquiror or Merger Sub is required to comply with or to perform at or prior to the Closing shall have been complied with or performed in all material respects.

(c) *Documents.* The following documents shall have been delivered to the Target, and shall be in full force and effect:

- (i) a legal opinion of [the Target's legal counsel], dated as of the Closing Date and addressed to the Target, to the effect that the Merger will constitute a reorganization within the meaning of Section 368 of the Code (it being understood that (A) in rendering such opinion, [the Target's legal counsel] may rely upon the tax representation letters referred to in Section \_\_\_\_, and (B) if [the Target's legal counsel] does not render such opinion, the condition set forth in this Section 7.3(c)(i) shall nonetheless be deemed to be satisfied if [the Acquiror's legal counsel] renders such opinion to the Target); and
- (ii) a certificate, executed on behalf of the Acquiror by an executive officer of the Acquiror, confirming that the conditions set forth in paragraphs (a), (b) and (d) of this Section 7.3 have been duly satisfied.

(d) *No Material Adverse Effect*. Since the date of this Agreement, there shall not have occurred an Acquiror Material Adverse Effect.

**7.4 FRUSTRATION OF CONDITIONS.** No party may rely on the failure of any condition set forth in this Article VII to be satisfied if such failure was caused by such party's failure to comply with or perform any of its covenants or obligations set forth in this Agreement.

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For purposes of this Agreement:

**Target Material Adverse Effect** means any change or effect that is materially adverse to the business, financial condition or results of operations of the Target and its subsidiaries taken as a whole; *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 will be, a Target Material Adverse Effect:

- (a) any change in the market price or trading volume of the Target's stock;
- (b) any failure by the Target to meet internal projections or forecasts or published revenue or earnings predictions; or
- (c) any adverse change or effect (including any litigation, loss of employees, cancellation of or delay in customer orders, reduction in revenues or income or disruption of business relationships) arising from or attributable or relating to:
  - (i) the announcement or pendency of the Merger,
  - (ii) conditions affecting the industry or industry sector in which the Target or any of its subsidiaries participates, the U.S. economy as a whole or any foreign economy in any location where the Target or any of its subsidiaries has material operations or sales,
  - (iii) legal, accounting, investment banking or other fees or expenses incurred in connection with the transactions contemplated by this Agreement,
  - (iv) the payment of any amounts due to, or the provision of any other benefits to, any officers or employees under employment contracts, non-competition agreements, employee benefit plans, severance arrangements or other arrangements in existence as of the date of this Agreement,
  - (v) compliance with the terms of, or the taking of any action required by, this Agreement,

- (vi) the taking of any action approved or consented to by the Acquiror,
- (vii) any change in accounting requirements or principles or any change in applicable laws, rules or regulations or the interpretation thereof, or
- (viii) any action required to be taken under applicable laws, rules, regulations or agreements.

***Acquiror Material Adverse Effect*** means any change or effect that is materially adverse to the business, financial condition or results of operations of the Acquiror and its subsidiaries taken as a whole; *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 will be, an Acquiror Material Adverse Effect:

1. any change in the market price or trading volume of the Acquiror's stock;
2. any failure by the Acquiror to meet internal projections or forecasts or published revenue or earnings predictions; or
3. any adverse change or effect (including any litigation, loss of employees, cancellation of or delay in customer orders, reduction in revenues or income or disruption of business relationships) arising from or attributable or relating to:
  - (i) the announcement or pendency of the Merger,
  - (ii) conditions affecting the industry or industry sector in which the Acquiror or any of its subsidiaries participates, the U.S. economy as a whole or any foreign economy in any location where the Acquiror or any of its subsidiaries has material operations or sales,
  - (iii) legal, accounting, investment banking or other fees or expenses incurred in connection with the transactions contemplated by this Agreement,
  - (iv) the payment of any amounts due to, or the provision of any other benefits to, any officers or employees under employment contracts, non-competition agreements, employee benefit plans, severance arrangements or other arrangements in existence as of the date of this Agreement,
  - (v) compliance with the terms of, or the taking of any action required by, this Agreement,
  - (vi) the taking of any action approved or consented to by the Target,

(vii) any change in accounting requirements or principles or any change in applicable laws, rules or regulations or the interpretation thereof, or

(viii) any action required to be taken under applicable laws, rules, regulations or agreements.

## APPENDIX F

### *Sample No Solicitation (and No-Talk) Provisions in Acquiring Company's Form of Merger Agreement for a Stock-for-Stock Merger Involving Two Publicly Traded Companies*

#### 6.3 NO SOLICITATION

(a) The Target shall not, nor shall it permit any of its subsidiaries nor shall it authorize or permit any of its directors or employees or any investment banker, financial advisor, attorney, accountant or other representative retained by it or any of its subsidiaries to, directly or indirectly,

(i) solicit, initiate or encourage (including by way of furnishing information), or take any other action designed to facilitate, any Alternative Transaction (as defined in Section 6.3(c)), or

(ii) participate in any negotiations or discussions regarding any Alternative Transaction; *provided, however*, that if, at any time prior to the adoption of this Agreement by the stockholders of the Target, the Board of Directors of the Target determines in good faith, based on advice from outside counsel, that the failure to provide such information or participate in such negotiations or discussions would result in the breach of the fiduciary duties of the Board of Directors of the Target to the Target's stockholders under applicable law, then the Target may, in response to any such written proposal that has been determined by it to be a Superior Proposal (as defined in Section 6.4(c)) that was not solicited by it and subject to the Target giving the Acquiror at least two business days written notice of its intention to do so, (x) furnish information with respect to the Target and its subsidiaries to any Person pursuant to a customary confidentiality agreement containing terms no less restrictive than the terms of the confidentiality agreement entered into between the Target and the Acquiror, provided that a copy of all such information is delivered simultaneously to the Acquiror, and (y) participate in discussions regarding such proposal.

(b) Upon receiving a Superior Proposal, the Target shall promptly (and in no event later than 24 hours after receipt of any Superior Proposal) notify the Acquiror orally and in writing of any request for information or of any proposal in connection with an Alternative Transaction, the material terms and conditions of such request or proposal (including a copy thereof, if in writing, and all other documentation and any related correspondence) and

the identity of the Person making such request or proposal. The Target will keep the Acquiror informed of the status and details (including amendments or proposed amendments) of such request or proposal on a continuing basis. The Target shall immediately cease and terminate any existing solicitation, initiation, encouragement, activity, discussion or negotiation with any Person conducted heretofore by the Target or its representatives with respect to the foregoing. The Target agrees not to release any Third Party (as defined in Section 6.3(c)) from, or waive any provision of, or fail to enforce, any standstill agreement or similar agreement to which it is a party related to, or which could affect, an Alternative Transaction and agrees that the Acquiror shall be entitled to enforce the Target's rights and remedies under and in connection with such agreements.

(c) For purposes of this Agreement, Alternative Transaction means, whether in the form of a proposal or intended proposal, a signed agreement or completed action, as the case may be, any of the following:

- (i) a transaction or series of transactions pursuant to which any Person (or group of Persons) other than the Acquiror and its subsidiaries (a Third Party) acquires or would acquire, directly or indirectly, beneficial ownership (as defined in Rule 13d-3 under the Exchange Act) of more than 15% of the outstanding shares of the Target, whether from the Target or pursuant to a tender offer or exchange offer or otherwise;
- (ii) any acquisition or proposed acquisition of, or business combination with, the Target or any of its Significant Subsidiaries, as the case may be, by a merger or other business combination (including any so-called merger-of-equals and whether or not the Target or any of its Significant Subsidiaries is the entity surviving any such merger or business combination);
- (iii) any other transaction pursuant to which any Third Party acquires or would acquire, directly or indirectly, control of assets (including for this purpose the outstanding equity securities of subsidiaries of the Target, and any entity surviving any merger or business combination including any of them) of the Target or any of its subsidiaries, for consideration equal to 15% or more of the fair market value of all of the outstanding shares of Target Common Stock on the date of this Agreement; or
- (iv) any merger, consolidation, sale of assets or other similar transaction by or involving a Third Party if, after giving effect thereto, the stockholders of the Target prior thereto beneficially

own less than 85% of the outstanding voting stock, common stock or participating stock of the combined or on-going entity.



**APPENDIX G**

*Sample Response by Target Company to No-Solicitation  
(and No-Talk) Provisions  
Proposed by Acquiring Company*

**6.3 NO-SOLICITATION**

(a) The Target shall not, nor shall it permit any of its subsidiaries (and it shall use its reasonable efforts to cause its directors and employees and any investment banker, financial advisor, attorney, accountant or other representative retained by it or any of its subsidiaries not to), directly or indirectly:

- (i) solicit, initiate or encourage (including by way of furnishing information), or take any other action designed to facilitate, any Alternative Transaction (as defined in Section 6.3(c)), or
- (ii) participate in any negotiations regarding any Alternative Transaction; *provided, however*, that if, at any time prior to the consummation of the Merger, the Board of Directors of the Target determines in good faith, after receipt of advice from outside counsel, that the failure to provide such information or participate in such negotiations creates a reasonable possibility of constituting a breach of the fiduciary duties of the Board of Directors of the Target to the Target's stockholders under applicable law, then the Target may, in response to any such written proposal or indication of interest relating to an Alternative Transaction which the Target believes has a reasonable possibility of resulting in a Superior Proposal (as defined in Section 6.4(c)), (x) furnish information with respect to the Target and its subsidiaries to any Person pursuant to a customary confidentiality agreement, and (y) participate in negotiations regarding such proposal or indication of interest.

(b) Upon receiving a proposal or indication of interest with respect to an Alternative Transaction, the Target shall, subject to the fiduciary duties of the Board of Directors of the Target, promptly notify the Acquiror of any request for information or of such proposal or indication of interest including the material terms thereof and the identity of the Person making such request, proposal or indication of interest. The Target shall immediately cease and terminate any existing solicitation, initiation, encouragement, activity, discussion or negotiation with any Person

conducted heretofore by the Target or its representatives with respect to the foregoing.

(c) For purposes of this Agreement, Alternative Transaction means, whether in the form of a proposal or intended proposal, a signed agreement or completed action, as the case may be, any of the following:

(i) a transaction or series of transactions pursuant to which any Person (or group of Persons) other than the Acquiror and its subsidiaries (a Third Party) acquires or would acquire, directly or indirectly, beneficial ownership (as defined in Rule 13d-3 under the Exchange Act) of more than 35% of the outstanding shares of the Target, whether from the Target or pursuant to a tender offer or exchange offer or otherwise;

(ii) any acquisition or proposed acquisition of, or business combination with, the Target or any of its Significant Subsidiaries, as the case may be, by a merger or other business combination (including any so-called merger-of-equals and whether or not the Target or any of its Significant Subsidiaries is the entity surviving any such merger or business combination);

(iii) any other transaction pursuant to which any Third Party acquires or would acquire, directly or indirectly, control of assets (including for this purpose the outstanding equity securities of subsidiaries of the Target, and any entity surviving any merger or business combination including any of them) of the Target or any of its subsidiaries, for consideration equal to 35% or more of the fair market value of all of the outstanding shares of Target Common Stock on the date of this Agreement; or (iv) any merger, consolidation, sale of assets or other similar transaction by or involving a Third Party if, after giving effect thereto, the stockholders of the Target prior thereto beneficially own less than 65% of the outstanding voting stock, common stock or participating stock of the combined or on-going entity.

## APPENDIX H

*Sample Provisions Relating to Target Company's Stockholders' Meeting  
(Including Provisions Relating to Recommendation of Merger)  
in Acquiring Company's Form of Merger Agreement for a  
Stock-for-Stock Merger Involving Two Publicly Traded Companies*

### 6.4 TARGET STOCKHOLDERS' MEETING

(a) *Covenant to Hold Meeting and Recommend Adoption of Agreement.* As promptly as practicable after the Registration Statement is declared effective under the Securities Act (which in turn shall occur as promptly as practicable after the date hereof), the Target:

- (i) shall duly give notice of, convene and hold the Target Stockholders' Meeting in accordance with the DGCL for the purpose of obtaining the Required Target Stockholder Vote with respect to the adoption of this Agreement and
- (ii) shall, through its Board of Directors, recommend to its stockholders adoption of this Agreement by such stockholders.

(b) *Withdrawal of Recommendation.* Neither the Board of Directors of the Target nor any committee thereof shall:

- (i) withdraw, qualify or modify, or propose to withdraw, qualify or modify, in a manner adverse to the Acquiror, its recommendation of the adoption of this Agreement,
- (ii) approve or recommend, or propose to approve or recommend, any Alternative Transaction or
- (iii) cause the Target to enter into any letter of intent, agreement in principle, acquisition agreement or other similar agreement related to any Alternative Transaction; *provided, however*, that if the Board of Directors of the Target determines in good faith, after it has received a Superior Proposal (as defined in Section 6.4(c)) and based on the advice of outside counsel, that the failure to do so would result in a breach of the fiduciary duties of the Board of Directors of the Target to the Target's stockholders under applicable law, then the Board of Directors of the Target may (subject to this and the following sentences) inform the Target's stockholders that it no longer believes that this Agreement is advisable and no longer recommends adoption of this Agreement (a Target Subsequent Determination), but only at a time that is after the fifth business day following the

Acquiror's receipt of written notice advising the Acquiror that the Board of Directors of the Target has received a Superior Proposal, specifying the material terms and conditions of such Superior Proposal (and including a copy thereof with all accompanying documentation, if in writing), identifying the Person making such Superior Proposal and stating that it intends to make a Target Subsequent Determination. After providing such notice, the Target shall provide a reasonable opportunity to the Acquiror to make such adjustments in the terms and conditions of this Agreement as would enable the Target to proceed with its recommendation to its stockholders without a Target Subsequent Determination; *provided, however*, that any such adjustment shall be at the discretion of the parties at the time. Notwithstanding any other provision of this Agreement, the Target shall submit this Agreement to its stockholders whether or not the Board of Directors of the Target makes a Target Subsequent Determination.

(c) *Superior Proposal.* For purposes of this Agreement, a Superior Proposal means any bona fide written proposal (on its most recently amended or modified terms, if amended or modified) made by a Third Party to enter into an Alternative Transaction, the effect of which would be that stockholders of the Target would beneficially own less than 40% of the voting stock, common stock and participating stock of the combined or ongoing entity, and which the Board of Directors of the Target determines in its good faith judgment (based on, among other things, the advice of a financial advisor of nationally recognized reputation) to be more favorable to the Target's stockholders from a financial point of view than the Merger, taking into account all relevant factors (including whether, in the good faith judgment of the Board of Directors of the Target, after obtaining the advice of a financial advisor of nationally recognized reputation, the Third Party is reasonably able to finance the transaction, and any proposed changes to this Agreement that may be proposed by the Acquiror in response to such Alternative Transaction).

**APPENDIX I**

*Sample Response by Target Company to Provisions Proposed by  
Acquiring Company Regarding Stockholders' Meeting  
(and Recommendation of Merger)*

**6.4 TARGET STOCKHOLDERS' MEETING**

(a) *Covenant to Hold Meeting and Recommend Adoption of Agreement.* Subject to Section 6.4(b), as promptly as practicable after the Registration Statement is declared effective under the Securities Act, the Target:

- (i) shall duly give notice of, convene and hold the Target Stockholders' Meeting in accordance with the DGCL for the purpose of obtaining the Required Target Stockholder Vote with respect to the adoption of this Agreement, and
- (ii) shall, through its Board of Directors, recommend to its stockholders adoption of this Agreement by such stockholders.

(b) *Withdrawal of Recommendation.* Neither the Board of Directors of the Target nor any committee thereof shall:

- (i) withdraw, qualify or modify, or adopt resolutions to withdraw, qualify or modify, in a manner adverse to the Acquiror, its recommendation of the adoption of this Agreement,
- (ii) approve or recommend, or adopt resolutions to approve or recommend, any Alternative Transaction or
- (iii) cause the Target to enter into any letter of intent, agreement in principle, acquisition agreement or other similar agreement related to any Alternative Transaction; *provided, however,* that (x) if the Board of Directors of the Target determines, in good faith and after receipt of the advice of outside counsel, that the failure to do so creates a reasonable possibility of constituting a breach of the fiduciary duties of the Board of Directors of the Target to the Target's stockholders under applicable law, then the Board of Directors of the Target may (subject to this and the following sentences) inform the Target's stockholders that it no longer believes that this Agreement is advisable and no longer recommends adoption of this Agreement (a Target Subsequent Determination), and (y) notwithstanding anything in Section 6.3 to the contrary and notwithstanding the foregoing clause (iii) of this Section 6.4(b), the Target may enter into any agreement otherwise prohibited by Section 6.3 or such

clause (iii) in connection with the termination of this Agreement and the concurrent payment of any applicable termination fee, in accordance with the terms of this Agreement. Notwithstanding any other provision of this Agreement, unless this Agreement shall have been terminated, the Target shall submit this Agreement to its stockholders whether or not the Board of Directors of the Target makes a Target Subsequent Determination.

(c) *Superior Proposal.* For purposes of this Agreement, a Superior Proposal means any bona fide written proposal (on its most recently amended or modified terms, if amended or modified) made by a Third Party to enter into an Alternative Transaction, the effect of which would be that stockholders of the Target would beneficially own less than 50% of the voting stock, common stock and participating stock of the combined or on-going entity, and which the Board of Directors of the Target determines in its good faith judgment (based on, among other things, the advice of a financial advisor of nationally recognized reputation) to be more favorable to the Target's stockholders than the Merger, taking into account all relevant factors (including whether, in the good faith judgment of the Board of Directors of the Target, after obtaining the advice of a financial advisor of nationally recognized reputation, the Third Party is reasonably able to finance the transaction, and any proposed changes to this Agreement that may be proposed by the Acquiror in response to such Alternative Transaction).

## APPENDIX J

*Excerpts From Sample Termination and Break-Up Fee Provisions in  
Acquiring Company's Form of Merger Agreement for a Stock-for-Stock Merger  
Involving Two Publicly Traded Companies*

## ARTICLE VIII: TERMINATION; TERMINATION FEE

**8.1 TERMINATION.** This Agreement may be terminated prior to the Effective Time (whether before or after the adoption of this Agreement by the Required Target Stockholder Vote):

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(c) *Drop-Dead Date* – by either the Acquiror or the Target if the Merger shall not have been consummated by \_\_\_\_\_, 2001 (unless the failure to consummate the Merger is attributable to a failure on the part of the party seeking to terminate this Agreement to perform any covenant or obligation required to be performed by such party at or prior to the Effective Time);  
(d) *Failure to Obtain Target Stockholder Approval* – by either the Acquiror or the Target if the Target Stockholders' Meeting (including any adjournments and postponements thereof) shall have been held and this Agreement shall not have been adopted by the Required Target Stockholder Vote; *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 have this Agreement adopted by the Required Target Stockholder Vote is attributable to a failure on the part of such party to perform any covenant or obligation required to be performed by such party and

(ii) the Target shall not be permitted to terminate this Agreement pursuant to this Section 8.1(d) unless the Target shall have made the payment required to be made to the Acquiror pursuant to Section 8.3(a) and shall have paid to the Acquiror the fee required to be paid to the Acquiror pursuant to Section 8.3(b) or 8.3(d);

(e) *Withdrawal of Support by Target Board* – by the Acquiror (at any time prior to the adoption of this Agreement by the Required Target Stockholder Vote) if a Triggering Event shall have occurred;

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For purposes of this Section 8.1, a *Triggering Event* shall be deemed to have occurred if:

- (i) the Board of Directors of the Target shall have: (A) failed to recommend that the Target's stockholders vote to adopt this Agreement, (B) made a Target Subsequent Determination or otherwise withdrawn, qualified or modified, in a manner adverse to the Acquiror, its recommendation of the adoption of this Agreement, or (C) taken any other action that would reasonably be construed to demonstrate that the Board of Directors of the Target does not support the Merger or does not believe that the Merger is in the best interests of the Target's stockholders;
- (ii) the Target shall have failed to include in the Proxy Statement its recommendation of the adoption of this Agreement or a statement to the effect that the Board of Directors of the Target has determined and believes that the Merger is in the best interests of the Target's stockholders;
- (iii) the Board of Directors of the Target fails to reaffirm its recommendation of the adoption of this Agreement, or fails to reaffirm its determination that the Merger is in the best interests of the Target's stockholders, within five business days after the Acquiror requests in writing that such recommendation or determination be reaffirmed;
- (iv) the Board of Directors of the Target shall have approved, endorsed or recommended any Alternative Transaction;
- (v) the Target shall have entered into any letter of intent, agreement in principle, acquisition agreement or other similar agreement related to any Alternative Transaction;
- (vi) the Target shall have failed to hold the Target Stockholders' Meeting as promptly as practicable and in any event within 45 days after the Registration Statement is declared effective under the Securities Act;
- (vii) a tender or exchange offer relating to securities of the Target shall have been commenced and the Target shall not have sent to its securityholders, within ten business days after the commencement of such tender or exchange offer, a statement disclosing that the Target recommends rejection of such tender or exchange offer;
- (viii) any Person (or group of Persons) acquires beneficial ownership (as defined in Rule 13d-3 under the Exchange Act) of more than 10% of the outstanding shares of the Target; or
- (ix) the Target shall have breached any of the provisions set forth in Section 6.3 [*No Solicitation*] or 6.4 [*Target Stockholders' Meeting*].



\* \* \* \*

### 8.3 EXPENSES; TERMINATION FEES

(a) *Expenses.* Except as set forth in this Section 8.3, all fees and expenses incurred in connection with this Agreement and the transactions contemplated by this Agreement shall be paid by the party incurring such expenses, whether or not the Merger is consummated; *provided, however,* that:

(i) the Acquiror and the Target shall share equally all fees and expenses, other than attorneys' fees, incurred in connection with (A) the filing, printing and mailing of the Registration Statement and the Proxy Statement/Prospectus and any amendments or supplements thereto and (B) the filing by the parties hereto of the premerger notification and report forms relating to the Merger under the HSR Act and the filing of any notice or other document under any applicable foreign antitrust law or regulation; and

(ii) if this Agreement is terminated by the Acquiror or the Target pursuant to Section 8.1(c) [*Drop-Dead Date*] and at or prior to the time of the termination of this Agreement an Alternative Transaction or a proposal therefor shall have been disclosed, announced, commenced, submitted or made, or if this Agreement is terminated by the Acquiror or the Target pursuant to Section 8.1(d) [*Failure to Obtain Target Stockholder Approval*] or by the Acquiror pursuant to Section 8.1(e) [*Withdrawal of Support by Target Board*], then (without limiting any obligation of the Target to pay any fee payable pursuant to Section 8.3(b) or Section 8.3(d)) the Target shall make a nonrefundable cash payment to the Acquiror, at the time specified in Section 8.3(c), 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 or that may become payable by or on behalf of the Acquiror in connection with the preparation and negotiation of this Agreement and otherwise in connection with the Merger.

(b) *Termination Fee Payable by Target After Naked No Vote.* If this Agreement is terminated by the Acquiror or the Target pursuant to Section 8.1(d) [*Failure to Obtain Target Stockholder Approval*], then (unless the Acquiror is then entitled to receive a fee pursuant to Section 8.3(d)) the Target shall pay to the Acquiror, in cash at the time specified in Section 8.3(c) (and in addition to the amounts payable by the Target pursuant to Section 8.3(a)) a nonrefundable fee in an amount equal to \$ \_\_\_\_\_ [1% of aggregate transaction value].

(c) *Time of Payment.* In the case of termination of this Agreement by the Target pursuant to Section 8.1(c) [*Drop-Dead Date*] or 8.1(d) [*Failure to Obtain Target Stockholder Approval*], any nonrefundable payment required to be made pursuant to clause (ii) of the proviso to Section 8.3(a) shall be made, and any fee payable pursuant to Section 8.3(b) shall be paid, by the Target prior to the time of such termination; and in the case of termination of this Agreement by the Acquiror pursuant to Section 8.1(b) [*Drop-Dead Date*], 8.1(d) [*Failure to Obtain Target Stockholder Approval*] or 8.1(e) [*Withdrawal of Support by Target Board*], any nonrefundable payment required to be made pursuant to clause (ii) of the proviso to Section 8.3(a) shall be made, and any fee payable pursuant to Section 8.3(b) shall be paid, by the Target within two business days after such termination.

(d) *Termination Fee Payable by Target after Triggering Event or Competing Bid.* If (i) this Agreement is terminated by the Acquiror or the Target pursuant to Section 8.1(c) [*Drop-Dead Date*] or 8.1(d) [*Failure to Obtain Target Stockholder Approval*], and at or prior to the time of the termination of this Agreement an Alternative Transaction or a proposal therefor shall have been disclosed, announced, commenced, submitted or made, or (ii) this Agreement is terminated by the Acquiror pursuant to Section 8.1(e) [*Withdrawal of Support by Target Board*], then the Target shall pay to the Acquiror, 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 an amount equal to \$ \_\_\_\_\_ [4% of the aggregate transaction value]. In the case of termination of this Agreement by the Target pursuant to Section 8.1(c) [*Drop-Dead Date*] or 8.1(d) [*Failure to Obtain Target Stockholder Approval*], the fee referred to in the preceding sentence shall be paid by the Target prior to the time of such termination; and in the case of termination of this Agreement by the Acquiror pursuant to Section 8.1(c) [*Drop-Dead Date*], 8.1(d) [*Failure to Obtain Target Stockholder Approval*] or 8.1(e) [*Withdrawal of Support by Target Board*], the fee referred to in the preceding sentence shall be paid by the Target within two business days after such termination.

(e) *Remedies for Delinquent Payments.* If the Target fails to pay when due any amount payable under this Section 8.3, then (i) the Target shall reimburse the Acquiror 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 the Acquiror of its rights under this Section 8.3, and (ii) the Target shall pay to the Acquiror 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 the Acquiror in full) at an annual rate three percentage points above 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 K

*Sample Response by Target Company to Termination and Break-Up Fee Provisions  
Proposed by Acquiring Company*

ARTICLE VIII: TERMINATION; TERMINATION FEE

**8.1 TERMINATION.** This Agreement may be terminated prior to the Effective Time (whether before or after the adoption of this Agreement by the Required Target Stockholder Vote):

★ ★ ★ ★

(c) *Drop-Dead Date* – by either the Acquiror or the Target if the Merger shall not have been consummated by \_\_\_\_\_, 2001 (unless the failure to consummate the Merger is attributable to a failure on the part of the party seeking to terminate this Agreement to perform any covenant or obligation required to be performed by such party at or prior to the Effective Time);

(d) *Failure to Obtain Target Stockholder Approval* – by either the Acquiror or the Target if the Target Stockholders' Meeting (including any adjournments and postponements thereof) shall have been held and this Agreement shall not have been adopted by the Required Target Stockholder Vote;

(e) *Withdrawal of Support by Target Board* – by either the Acquiror or the Target if the Board of Directors of the Target shall have (i) made and announced a Target Subsequent Determination or otherwise withheld, withdrawn or qualified or modified in a manner adverse to the Acquiror the recommendation of such Board of Directors that the Target's stockholders adopt this Agreement, or (ii) approved or recommended any Superior Proposal.

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**8.3 TERMINATION FEE.**

★ ★ ★ ★

(a) *Failure to Obtain Target Stockholder Approval While a Competing Bid Was Pending* - If:

(i) prior to the time of the Target Stockholders' Meeting at which a vote is taken by the Target's stockholders on a proposal to adopt this Agreement, there shall have been publicly announced by a third party a proposal contemplating an Alternative Transaction,

(ii) such proposal shall have been pending at the time of such Target Stockholders' Meeting and shall not have been publicly withdrawn,

(iii) this Agreement shall not have been adopted at such Target Stockholders' Meeting,

(iv) this Agreement shall have been validly terminated by the Acquiror or the Target pursuant to Section 8.1(d) [*Failure to Obtain Target Stockholder Approval*],

(v) the Acquiror shall not have materially breached any provision of this Agreement at or prior to the time of the termination of this Agreement,

(vi) no Acquiror Material Adverse Effect shall have occurred since the date of this Agreement and no event shall have occurred or circumstance shall exist that could reasonably be expected to have an Acquiror Material Adverse Effect, and

(vii) within 270 days after the termination of this Agreement, the Alternative Transaction contemplated by the proposal that was pending at the time of such Target Stockholders' Meeting shall have been consummated by the Target, then the Target shall pay to the Acquiror the sum of \$\_\_\_\_\_ [*1% of aggregate transaction value*] within five business days after the consummation of such transaction.

(b) *Withdrawal of Support by Target Board.* If:

(i) this Agreement shall have been validly terminated by the Acquiror or the Target pursuant to Section 8.1(e) [*Withdrawal of Support by Target Board*],

(ii) the Acquiror shall not have materially breached any provision of this Agreement at or prior to the time of the termination of this Agreement, and

(iii) no Acquiror Material Adverse Effect shall have occurred since the date of this Agreement and no event shall have occurred or circumstance shall exist that could reasonably be expected to have an Acquiror Material Adverse Effect, then the Target shall pay to the Acquiror the sum of \$\_\_\_\_\_ [*1% of aggregate transaction value*] within five business days after the termination of this Agreement.

