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Lock-Up Creep

Steven M. Davidoff*
Christina M. Sautter*

ABSTRACT

In recent years, the number and type of merger agreement lock-ups have significantly increased, a phenomenon we term “lock-up creep”. Not only have new lock-ups arisen, but the terms of these lock-ups have become ever-more negotiated, intricate, and varied. This Article analyzes the causes of lock-up creep and assesses lock-up creep’s effect on the takeover market.

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I. INTRODUCTION

If you have regularly read merger agreements over the past decade, you may have had a creeping feeling. The number and type of merger agreement lock-ups have materially increased, a phenomenon that this Article terms “lock-up creep.” Not only have new lock-ups arisen, but the terms of these lock-ups have become more varied as attorneys negotiate ever-more intricate terms. The result is that the provisions of merger agreements addressing lock-ups now go on for multiple pages and are the main focus of attorney negotiations.

Lock-ups are contractual devices that buyers and sellers negotiate in an acquisition

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agreement. A lock-up theoretically compensates a buyer for its investment costs in making an initial bid for a target by making a second, competing bid more costly. The theory is that without such compensation, an initial bidder would be unwilling to expend its resources to bid, knowing that others might free-ride on the initial bidder's efforts. But while academics generally agree on the theory that lock-ups can be incentivizing, there has been a continuing, unresolved debate over whether lock-ups can be preclusive and otherwise destroy wealth and deter bids.¹

Lock-ups are also ubiquitous in merger agreements. Common types of lock-ups include termination fees and shareholder voting agreements.² However, there are other types of lock-ups, such as a crown jewel lock-up, which permits a buyer to purchase a key asset of the target upon the target accepting another bid.³ Lock-ups existed in many forms for decades, but in recent years, new lock-ups have appeared or been widely adopted, such as matching rights, which give a bidder the right to match a competing offer,⁴ as well as don't ask, don't waive standstills, which prevent losing bidders from making a competing bid or even requesting that a target waive such a requirement.⁵ The

1. The literature on this issue is thick and varies in its conclusions. See *inter-alia* Shmuel Leshem, *A Signaling Theory of Lock-ups*, 47 WAKE FOREST L. REV. 45 (2012); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899 (2003); John C. Coates, IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000); Kermit Roosevelt III, *Understanding Lock-ups: Effects in Bankruptcy and the Market for Corporate Control*, 17 YALE J. REG. 93 (2000); Marcel Kahan & Michael Klausner, *Lockups and the Market for Corporate Control*, 48 STAN. L. REV. 1539 (1996); David A. Skeel, Jr., *A Reliance Damages Approach to Corporate Lockups*, 90 NW. U. L. REV. 564 (1995); Steven M. Bainbridge, *Exclusive Merger Agreements and Lock-Ups in Negotiated Acquisitions*, 75 MINN. L. REV. 239 (1994); Stephen Fraidin & Jon Hansen, *Toward Unlocking Lock-ups*, 103 YALE L. J. 1739 (1994); Ian Ayres, *Analyzing Stock Lockups: Do Target Treasury Sales Foreclose or Facilitate Takeover Auctions?*, 90 COLUM. L. REV. 682 (1990); Jennifer J. Johnson & Mary Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, 136 U. PA. L. REV. 315 (1987). See generally Alan Schwartz, *Search Theory and the Tender Offer Auction*, 2 J. L. & ECON. ORG. 229, 238 (1986) (discussing auction theory and its application to the sale of the firm).

2. For a review of the various types of lock-ups, see generally MERGER & ACQUISITIONS COMM., ABA, MODEL MERGER AGREEMENT FOR THE ACQUISITION OF A PUBLIC COMPANY (2011) [hereinafter ABA MODEL MERGER AGREEMENT].

3. See LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS 111 (2000). See also Robert W. Rodriguez, *Hostile Takeover Contests: The Rise and Fall of Lock-up Options*, 1987 COLUM. BUS. L. REV. 193, 200 (1987).

4. This is a narrow definition of matching rights. Others have given it a broader scope to include information rights and notice requirements. Brian JM Quinn, *Re-Evaluating the Emerging Standard of Review for Matching Rights in Control Transactions*, 36 DEL. J. CORP. L. 1011, 1015 (2011).

5. See Christina M. Sautter, *Promises Made to Be Broken? Standstill Agreements in Change of Control Transactions*, 37 DEL. J. CORP. L. 929, 987-92 (2013) [hereinafter Sautter, *Promises Made to Be Broken?*] (postulating how Delaware courts are likely to treat don't ask, don't waive standstills); Christina M. Sautter, *Auction Theory and Standstills: Dealing with Friends and Foes in a Sale of Corporate Control*, CASE W. RES. L. REV. (forthcoming 2013) (manuscript at 75-79), available at <http://ssrn.com/abstract=2207693> (applying auction theory to don't ask, don't waive standstills, and arguing such standstills may aid in shareholder wealth maximization); Quinn, *supra* note 4, at 1015-18 (describing the emergence, scope, and use of matching rights). See also Diane Holt Frankle, *Don't Ask, Don't Waive After Ancestry.com*, KAYE SCHOLER M&A AND CORPORATE GOVERNANCE NEWSLETTER (Winter 2013), http://www.kayescholer.com/news/client_alerts/MA-and-Corporate-Governance-Newsletter-Winter2013/_res/id=sa_File1/MACGN-Winter2013.pdf (discussing the role of don't ask, don't waive provisions in merger agreements).

end result is that merger agreements contain increasingly scripted procedures for how and when a board should deal with competing bids.

Attorneys for buyers and targets are also negotiating increasingly intricate lock-ups. For example, information rights can require that the target provide the buyer all oral and written communications received, any written communications, or any written offers.⁶ Matching rights have rapidly evolved into reset matching rights that apply each time a competing bid is made, single-trigger matching rights that give an initial bidder only one right to match a bid, or something in-between.⁷ Provisions concerning recommendation changes now are often bifurcated to address competing bids, as well as so-called intervening events, which are unexpected occurrences that may require the target board to reconsider their recommendation in favor of a transaction.⁸

What is the consequence of lock-up creep? Definitive conclusions are difficult because of an identification problem. More specifically, it is difficult, if not impossible, to isolate the influence or wealth effects of individual lock-ups.⁹ Nonetheless, in the past decade neither bid rates nor premiums appear to have changed significantly.¹⁰ This and other evidence indicates that lock-up creep has had little aggregate effect on the acquisition market. However, despite the lack of evidence of aggregate market effect, there are some clear examples where lock-up creep, and individual lock-ups, have influenced the outcome of individual transactions.

We, ironically enough, attribute lock-up creep to events following the Delaware Supreme Court's decision in *Omnicare, Inc. v. NCS Healthcare, Inc.*,¹¹ a case which was thought at the time to require more enhanced scrutiny of lock-ups.¹² The Delaware Court of Chancery in a series of cases after *Omnicare* and perhaps in response, adopted deferential standards of scrutiny for lock-ups. To be sure certain types of preclusive lock-ups remained *per se* invalid, but beyond these confined categories, these decisions opened up space for lock-up creep to occur.¹³

While the Delaware courts cleared the way for lock-up creep, its causes can be attributed to perhaps over-lapping explanations. The first explanation is that lock-up creep is simply the evolution of merger agreements in response to market forces. More

6. For a discussion of the difference, see *In re Compellent Techs., Inc. S'holder Litig.*, No. 6084-VCL, 2011 WL 6382523, at *21 (Del. Ch. Dec. 9, 2011).

7. See Quinn, *supra* note 4, at 1015-18 (discussing the various types of matching rights in merger agreements). See also Guhan Subramanian, *Matching Rights: A Boon to Both Sides*, HARVARD BUS. REV. (Dec. 1, 2005).

8. See ABA MODEL MERGER AGREEMENT, *supra* note 2, § 4.6, 470-71.

9. See *infra* notes 65-68 and accompanying text for a further discussion of this issue.

10. See *infra* Part II.

11. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).

12. Sean J. Griffith, *The Omnipresent Specter of Omnicare*, 39 J. Corp. L. 753, 759 (2013).

13. *E.g.*, *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, Nos. 17398, 17383, 17427, 1999 WL 1054255, at *5 (Del. Ch. Sept. 27, 1999) ("No-talk provisions . . . are troubling precisely because they prevent a board from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party."); *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 109 (Del. Ch. 1999) (stating that a no-talk provision in the merger agreement at-hand was of "quite dubious validity" and citing *Phelps Dodge*). Since these cases, practitioners have categorically avoided no-talks.

specifically, lock-up creep is a response to a changing market and the requirement that initial bidders be compensated to a greater amount for their bidding costs. Second, lock-up creep may be attributable to sell-side agency costs in the form of management taking advantage of these shifts to rent seek and create more entrenching lock-ups. Finally, lock-up creep may be a consequence of agency costs on the buy-side. Attorneys, looking to show value to clients, have been negotiating increasingly new and byzantine lock-ups.¹⁴ We believe that we are the first to point to these attorney agency costs as driving lock-up negotiations.

We examine the various explanations for lock-up creep and are unable to make a definitive conclusion as to its cause. We do find that market forces may act in certain circumstances to influence the scope and effect of lock-ups in individual cases. Nonetheless, given the weight of the evidence, we do conclude that lock-up creep appears to be more likely a result of attorney transaction costs.

The limited evidence leads to two conclusions. First is the less than satisfying one that we need more empirical study of lock-up creep to ascertain its effects. However, this may be difficult due to identification issues. Second is how the Delaware courts should deal with lock-up creep. Given the evidence and uncertainty, we do not recommend a holistic remedy. Instead, we modestly suggest that in light of lock-up creep, Delaware courts should analyze the effect of lock-ups more broadly rather than continuing their prior focus on only a few types of lock-ups. This review appears particularly appropriate in situations where it is likely to make a difference, namely competitive bidding situations.

Part I of this Article briefly explores and identifies the issue of lock-up creep. Part II examines lock-up creep's effect on the takeover market. Part III identifies possible causes and the Delaware courts' shifting doctrinal approach to lock-ups, and Part IV concludes with recommendations for the courts.

II. IDENTIFYING LOCK-UP CREEP

An apt illustration of lock-up creep and its many facets can be found by comparing the agreement for Yahoo's \$3.6 billion acquisition of GeoCities in 1999, to the agreement for Oracle's \$1.9 billion acquisition of Taleo in 2012, excerpts of which are set forth at Appendix A. Yahoo's agreement spends 1,874 words detailing its transaction lock-ups, or more specifically, the procedures the GeoCities board is to follow if a competing bid is made or proposed. The Yahoo-GeoCities acquisition agreement contains a no-solicit, a no-talk, a fiduciary-out applicable in cases of a superior proposal, information rights, and a termination fee set at 2.8% of the transaction value.¹⁵ Typical of the time, the transaction also included a stock option agreement permitting Yahoo to buy up to 19.99%

14. See Claire A. Hill, *Why Contracts Are Written in "Legalese"*, 77 CHI-KENT L. REV. 59, 70-73 (2002) (discussing the incentives and drivers of attorneys in negotiating complex contracts). See also Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481, 518-22 (2009) (discussing the incentives and drivers of attorneys negotiating private equity acquisition contracts).

15. GeoCities, *Agreements and Plan of Merger By and Among Yahoo! Inc. Home Page Acquisition Corp. and GeoCities* (Preliminary Schedule 14A), § 5.4, A-27 (Jan. 27, 1999), available at <http://www.sec.gov/Archives/edgar/data/1062777/0001047469-99-007461.txt>.

of GeoCities stock in circumstances where GeoCities terminated the agreement to accept a competing transaction.¹⁶

In comparison, the Oracle–Taleo acquisition agreement uses 3,993 words to set forth the parties' agreed lock-ups.¹⁷ The agreement contains the same lock-ups as the Yahoo–GeoCities deal, except for the stock option, but these lock-ups have also changed to become more extensive and detailed.¹⁸ The no-solicitation clause now includes a fiduciary-out, which limits waivers of standstill rights and requires that any competing bidder execute a confidentiality agreement no less favorable to Taleo than the one with Oracle.¹⁹ Oracle's information rights also require Taleo to provide Oracle with all information provided to a third party bidder whether it is transmitted in written or oral form.²⁰ In addition, the termination fee is set at 3.46% of the transaction value, higher than the termination fee in Yahoo–Geocities.²¹ Not only are the lock-ups more complex, but there are new lock-ups which do not appear in the Yahoo–GeoCities agreement. This includes a non-waiver requirement for Delaware's anti-takeover statute, reset matching rights, information parity rights, intervening event requirements, and a reaffirmation requirement.²² There is also a voting agreement for the company's major stockholders, officers, and directors.²³

The Oracle–Taleo acquisition agreement is not atypical and contains lock-ups that are quite common in today's acquisition agreements.²⁴ Factset Mergermetrics tracks

16. *Id.* § 5.14, A–31. The Yahoo–GeoCities transaction was a stock-for-stock one, so it arguably was subject to lower review standards. However, the agreement was standard at the time for transactions also subject to the so-called *Unocal* standard. See *Viacom Inc., Agreement and Plan of Merger Between Viacom Inc. and CBS Corp.* (Form S-4), § 6.05, 40–41 (Sept. 6, 1999), available at <http://www.sec.gov/Archives/edgar/data/813828/000094018099001184/0000940180-99-001184.txt> (using 1,115 words to describe lock-ups which include a no-talk, no-solicit, information rights, fiduciary out for recommendation change and force-the-vote).

17. Taleo Corp., Agreement and Plan of Merger Dated as of February 8, 2012 Among Taleo Corp., OC Acquisition LLC, Tiger Acquisition Corp., and Oracle Corp., § 6.03, 40–41 (Feb. 8, 2012), available at <http://www.sec.gov/Archives/edgar/data/1134203/000119312512049576/d298155dex21.htm>. [hereinafter Taleo–Oracle Merger Agreement].

18. Stock options like the one in Yahoo/GeoCities are no longer widely utilized due to changes in accounting rules. At the time of the Yahoo/Geocities deal, the exercise of this option would arguably eliminate the ability of a subsequent bidder to use pooling accounting. Pooling accounting treatment was eliminated as of June 30, 2001, limiting the effectiveness of the option. See *Say Goodbye to Pooling and Goodwill Amortization*, <http://www.journalofaccountancy.com/Issues/2001/Sep/SayGoodByeToPoolingAndGoodwillAmortization.htm> (As of June 30, 2001, . . . [c]ompanies no longer may use the pooling-of-interests accounting method for business combinations).

19. Taleo–Oracle Merger Agreement, § 6.03(b), 40.

20. *Id.* § 9.04, 53–54.

21. *Id.* § 6.03, 40–41.

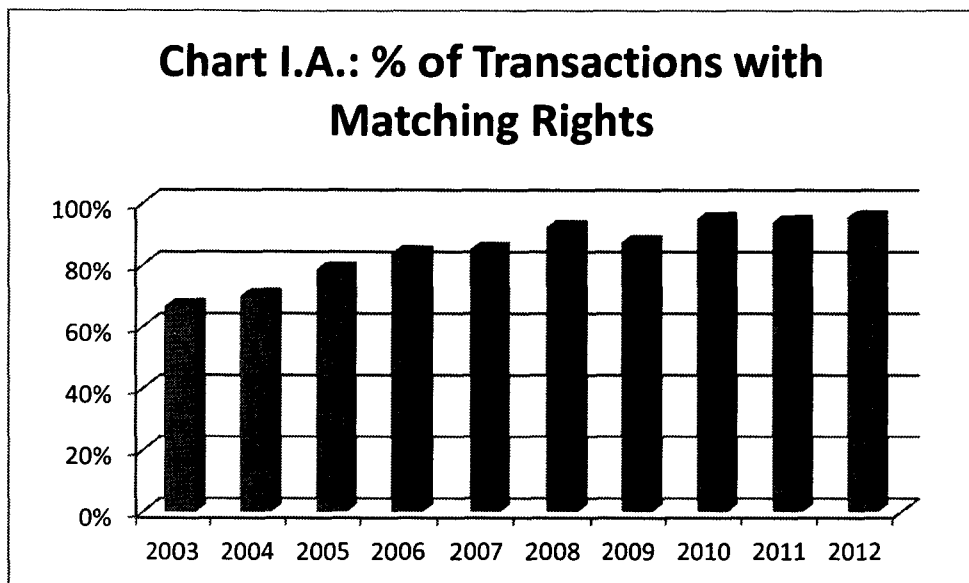
22. *Id.*

23. See generally Taleo–Oracle Merger Agreement, § 6.03, 40–41.

24. We do not distinguish here between lock-ups in change of control transactions which are generally subject to heightened review under *Revlon* and all-stock transactions which are generally only subject to *Unocal* review. Moreover, as we discuss in Part IV.A., *supra*, the Chancery Court does not seem to distinguish between the *Revlon* or *Unocal* standards in reviewing lock-ups. The overwhelming majority of Delaware cases we discuss in Part IV and summarize in Appendix B are change of control transactions subject to *Revlon*. Of the

these provisions for data collection purposes and currently has 25 different categories of lock-ups.²⁵ The ABA model public acquisition agreement's section on lock-ups goes on for 37 pages to explain the various forms and types of lock-ups.²⁶ It includes over 30 different types of lock-ups.²⁷

As the Oracle–Taleo agreement shows, it is not just that parties are using the same lock-ups as a decade ago. In recent years, there has been the introduction of a number of new types of lock-ups, the most prominent example being that of matching rights. Matching rights first appeared in transactions in the early part of the new millennium. However, as Chart I.A shows, their use increased substantially over the past decade.²⁸



Source: MERGERMETRICS DATABASE

Today, matching rights are nearly ubiquitous and in 2012 were utilized in 96% of transactions.²⁹ The rise of matching rights also illustrates a second phenomenon of lock-up creep: the increasingly heterogeneous nature of lock-ups. In the case of matching rights, there is no single formulation that predominates. The period during which

cases summarized in Appendix B, only three did not involve change of control transactions (*In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012); *Louisiana Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007); and *Orman v. Cullman*, No. Civ.A. 18039 2004 WL 2348395 (Del. Ch. 2004)).

25. See FACTSET MERGERS, <http://www.mergermetrics.com/> (last visited July 12, 2013) [hereinafter MERGERMETRICS DATABASE].

26. See ABA MODEL MERGER AGREEMENT, *supra* note 2, §§ 4.4, 4.6, 148–65, 169–89.

27. *Id.*

28. By 2005, in *In re Toys "R" Us S'holder Litig.*, 877 A.2d 975, 1017 (Del. Ch. 2005), then-Vice Chancellor Strine remarked that they were "a common contractual feature."

29. MERGERMETRICS DATABASE, *supra* note 25.

matching rights can be exercised varies from transaction to transaction, being anywhere from one to ten days, or longer.³⁰ Matching rights also can be single-trigger matching rights, which can only be used once or once on each competing bid.³¹ Matching rights can be in the form of reset matching rights, which can be used repeatedly no matter how many times a competing bidder raises its offer.³² A third variant eliminates matching rights beyond one time if the buyer bids above a certain threshold amount.³³

While matching rights are the most prominent, new example, other recently introduced lock-ups include ask, don't tell standstills and the so-called Burger King structure, which involves a dual tender offer-merger process in order to ensure the transaction closes as quickly as possible.³⁴

In the world of mergers and acquisitions, where legal practice is concentrated and market-based, these new innovations spread rapidly. For example, in recent years transactional attorneys have created new and varied fiduciary-out provisions, the contract terms which govern when the board can recommend another, competing offer or otherwise terminate the agreement. Chart I.B sets forth the differing types of "outs" in acquisition agreements from 2004-2011 and their evolution (as gathered from the American Bar Association's Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Studies)³⁵:

30. Quinn, *supra* note 4, at 1050-52.

31. See, e.g., Agreement and Plan of Merger by and among Denali Holding Inc., Denali Intermediate Inc., Denali Acquiror Inc., and Dell Inc., at 45 (Feb. 5, 2013), available at <http://www.sec.gov/Archives/edgar/data/826083/000119312513041273/d480506dex21.htm>.

32. See, e.g., Agreement and Plan of Merger by and among Dell Inc., Dell Trinity Holdings Corp. and 3Par Inc., at 62 (Aug. 15, 2010), available at <http://www.sec.gov/Archives/edgar/data/1408501/000119312510189426/dex21.htm>.

33. See Agreement and Plan of Merger among Ivy Holdings Inc., Ivy Merger Sub Corp. and Prospect Medical Holdings, Inc., at 44 (Aug. 16, 2010), available at <http://www.sec.gov/Archives/edgar/data/1063561/000095012310077684/v57052exv2w1.htm>. See also Steven M. Davidoff, *How Innovations Spread in Deal-Making*, N.Y. TIMES DEALBOOK (Aug. 18, 2010, 10:00 AM), available at <http://dealbook.nytimes.com/2010/08/18/how-innovations-spread-in-deal-making> (describing an agreement providing that if jumping bidder topped by at least 10% then the matching right disappeared).

34. See generally Sautter, *Promises Made To Be Broken?*, *supra* note 5 (explaining standstills in depth); Kirkland & Ellis Client Memo, *Burger King Deal Structure Still Has Sizzle*, (Oct. 10, 2012), available at <http://www.kirkland.com/sitecontent.cfm?contentID=230&itemId=10424> (detailing the origination, development, and use of the Burger King structure).

35. PowerPoint, Mergers & Acquisitions Market Trends Subcomm. of the Mergers & Acquisitions Comm. of the ABA Bus. Law Section, *2012 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study (For Transactions Announced in 2011)*, at 54, <http://apps.americanbar.org/dch/committee.cfm?com=CL560003> [hereinafter *2012 Deal Points Study*]; PowerPoint, Mergers & Acquisitions Market Trends Subcomm. of the Mergers & Acquisitions Comm. of the ABA Bus. Law Section, *2011 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study (For Transactions Announced in 2010)*, at 55, <http://apps.americanbar.org/dch/committee.cfm?com=CL560003> [hereinafter *2011 Deal Points Study*]; PowerPoint, Mergers & Acquisitions Market Trends Subcomm. of the Mergers & Acquisitions Comm. of the ABA Bus. Law Section, *2010 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study (For Transactions Announced in 2009)*, at 59, <http://apps.americanbar.org/dch/committee.cfm?com=CL560003> [hereinafter *2010 Deal Points Study*]; PowerPoint, Mergers & Acquisitions Market Trends Subcomm. of the Mergers & Acquisitions Comm. of the ABA Bus. Law Section, *2009 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study (For Transactions Announced in 2008)*, at 59 (Sept. 10, 2009), <http://blogs.law.harvard.edu/>

Chart I.B. Fiduciary-Out Provisions in Merger Agreements

Recommendation Out	2011	2010	2009	2008	2007	2006 & 2005	2004
If Fiduciary Duties Require	22%	28%	43%	55%	45%	52%	59%
Superior Offer Only	14%	18%	12%	23%	48%	48%	41%
Superior Offer or Intervening Event	28%	32%	27%	13%	6%		
Superior Offer or Intervening Event, but allows distribution of information if required by fiduciary duties	34%	21%	17%	8%			
Intervening Event Only	2%	1%	1%	1%	1%		

Source: Data from ABA's 2012, 2009, 2008, and 2007 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Studies. The 2007 Study included data for both 2006 and 2005 as well as a comparison to 2004 data.

In summarizing the 2004 data, the American Bar Association divided the recommendation out into two standards: a board could terminate an agreement or recommend an offer only for a superior offer or for something other than a superior offer (generally this is understood to be the same as when a board's fiduciary duties required such a recommendation change).³⁶ In 2004, 59% of agreements contained the fiduciary duties standard,³⁷ a number which fell to 22% by 2011.³⁸ Similarly, 41% of agreements in 2004 had a superior offer only requirement,³⁹ a number which fell to 14% by 2011.⁴⁰ In its place, three other standards have arisen, and the most common approach now, at 34% of transactions, up from 8% in 2008, is to require boards to separately take into account competing bids and intervening events involving other circumstances.⁴¹

Termination fees or expense reimbursement provisions have also rapidly evolved and become more costly in recent years. For example, Chart I.C. shows that over the period from 2004 through 2011, there has been an increase in termination fees or expense reimbursements that become payable upon a "naked no vote," or a rejection by shareholders absent a competing offer.

corp.gov/files/2009/10/Deal-Point-Study-9-10-09.pdf [hereinafter *2009 Deal Points Study*]; PowerPoint, Mergers & Acquisitions Market Trends Subcomm. of the Comm. on Negotiated Acquisition the ABA Bus. Law Section, *2008 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study (For Transactions Announced in 2007)*, at 51 (Nov. 13, 2008), http://www.cooley.com/files/tbl_s28Resources/FileUpload178/1538/2008%20Public%20Company%20Deal%20Point%20Study%20-%20PPT.pdf [hereinafter *2008 Deal Points Study*]; PowerPoint, Mergers & Acquisitions Market Trends Subcomm. of the Comm. on Negotiated Acquisition the ABA Bus. Law Section, *Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study (For Transactions Announced in 2005 and 2006)*, at 48 (Nov. 5, 2009), <http://blogs.law.harvard.edu/corp.gov/files/2007/12/20071203-strategic-buyer-deal-points-study.pdf> [hereinafter *2007 Deal Points Study*] (also contains a comparison to 2004 data).

36. *2007 Deal Points Study*, *supra* note 35.

37. *Id.*

38. *2012 Deal Points Study*, *supra* note 35.

39. *2007 Deal Points Study*, *supra* note 35.

40. *2012 Deal Points Study*, *supra* note 35.

41. *See 2009 Deal Points Study*, *supra* note 35 (noting the data for 2008).

Chart I.C.: Merger Agreements with Naked No-Vote Provisions and Circumstances When Payable⁴²

Naked No Vote Trigger	2011	2010	2009	2008	2007	2006 & 2005	2004
Expense or Fee Triggered	29%	26%	37%	34%	21%	9%	13%
No Expense or Fee Triggered	71%	74%	63%	66%	79%	91%	87%
Expense Reimbursement Triggered	75%	73.91%	78.95%	80.95%	83.33%	94.44%	N/A
Full Termination Fee Triggered	25%	21.74%	10.53%	9.50%	12.50%	5.56%	N/A

Source: 2012, 2011, 2010, 2009, 2008, and 2007 ABA Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Studies. The 2007 Study contains data for 2006, 2005, and 2004.

In 2011, 29% of strategic transactions included a naked no vote fee or reimbursement trigger,⁴³ which was more than double and more than triple the number of transactions in 2004 and 2005/2006, respectively, with such a trigger.⁴⁴ There has also been a shift from naked no votes triggering expense reimbursement provisions to the full agreement termination fee. In 2005 and 2006, a naked no vote triggered an expense reimbursement in 94.4% of transactions and the full termination fee in only 5.6% of transactions.⁴⁵ Fast forward to 2011, and a naked no vote triggered an expense reimbursement provision in only 75% of transactions, but a full termination fee in 25% of transactions.⁴⁶ Naked no votes are not the only shift in termination fee triggers that have occurred over the past few years. There has also been an increase in merger agreements that trigger payment of the full termination fee after the target has received an alternative acquisition proposal.⁴⁷ In 2004, only 53% of transactions included a termination fee trigger for an acquisition proposal,⁴⁸ but by 2011, 80% of transactions included such a trigger.⁴⁹

It is not just new lock-ups and variants of existing ones that have rapidly spread. Old lock-ups have been reinvented as well. As a recent client memo from the law firm Kirkland & Ellis LLP aptly illustrates: “The ‘crown jewel’ lock-up, a staple of high-stakes dealmaking technology in the 1980s takeover boom, has been showing some signs of life in the contemporary deal landscape, albeit often in creative new forms.”⁵⁰

42. 2012 Deal Points Study, *supra* note 35, at slide 62; 2011 Deal Points Study, *supra* note 35, at slide 62; 2010 Deal Points Study, *supra* note 35, at slide 66; 2009 Deal Points Study, *supra* note 35, at slide 66; 2008 Deal Points Study, *supra* note 35, at slide 57; 2007 Deal Points Study, *supra* note 35, at slide 52. The percentages appearing in the “Expense Reimbursement Triggered” and “Full Termination Fee Triggered” categories were calculated by the authors based on the numbers provided on each slide.

43. 2012 Deal Points Study, *supra* note 35, at slide 62.

44. 2007 Deal Points Study, *supra* note 35, at slide 57.

45. *Id.*

46. 2012 Deal Points Study, *supra* note 35, at slide 62.

47. 2012 Deal Points Study, *supra* note 35, at slide 64; 2011 Deal Points Study, *supra* note 35, at slide 64; 2010 Deal Points Study, *supra* note 35, at slide 68; 2009 Deal Points Study, *supra* note 35, at slide 68; 2008 Deal Points Study, *supra* note 35, at slide 59; 2007 Deal Points Study, *supra* note 35, at slide 54.

48. 2007 Deal Points Study, *supra* note 35, at slide 54.

49. 2012 Deal Points Study, *supra* note 35, at slide 64.

50. Daniel E. Wolf et al., *Kirkland M&A Update: Crown Jewels—Restoring the Luster to Creative Deal Lock-ups?*, KIRKLAND & ELLIS (Feb. 14, 2013), http://www.kirkland.com/files/MA_Update/021413.pdf.

The memo goes on to detail the recent use of crown jewel lock-ups in Apple's acquisition of Authentec, ICE's acquisition of the NYSE, and the sale of Genomics.⁵¹ The client memo concludes that:

After a long period of dormancy, lock-ups—"crown jewel" or otherwise—have seen a recent creative rebirth with some structural twists. What remains clear is that, absent extreme circumstances (such as Bear Stearns), an old-fashioned "crown jewel" asset lock-up that serves only to end an auction by virtue of its preclusive impact on other bidders will be subject to significant judicial scrutiny under basic Revlon and Unocal principles. However, a small sampling of recent case law, coupled with developing market practice, suggest that in appropriate circumstances there may be room in the dealmaking toolkit for modern and creative variations on traditional lock-up arrangements (more so where there is demonstrable business benefit to one or both parties beyond the resulting deal protection).⁵²

The reinvention of old lock-ups reflects another aspect of lock-up creep also illustrated in the Oracle–Taleo agreement, the increasing complexity and nuance of the language used to define these lock-ups. A recent survey conducted by the law firm Gibson, Dunn & Crutcher illustrates this phenomenon. The law firm reviewed 59 acquisition agreements filed with the Securities and Exchange Commission in 2012, representing the universe of transactions in that year with a value greater than \$1 billion.⁵³ As part of this exercise the law firm tracked the different language used in each lock-up and repeatedly found that significant lock-ups varied greatly in the language used to define their parameters.⁵⁴ For example, most of these agreements had a requirement that a competing bidder could only be provided information if it signed an "acceptable" confidentiality agreement. But as Chart I.D. shows, the language used to set forth this requirement varied significantly:

51. *Id.*

52. *Id.*

53. *No-Shops & Fiduciary Outs: A Survey of 2012 Public Merger Agreements*, GIBSON DUNN M&A REPORT (Winter 2013), <http://www.gibsondunn.com/publications/Documents/MANewsletter-021913.pdf>.

54. *Id.*

Chart I.D: Definition of Acceptable Confidentiality Agreement

Standard	Number (Percentage)
"No less favorable" to the target or "not less restrictive"	31 (52.5%)
"Customary"	13 (22%)
Must permit target to comply with the merger agreement	12 (20.3%)
Does not have to restrict alternative buyer from making an unsolicited bid	10 (17%)
Standstill explicitly required	9 (15.3%)
"No less favorable in any material respect"	7 (11.9%)
"No less favorable in the aggregate"	6 (11.3%)
Cannot provide for exclusivity	3 (5%)
"Substantially similar"	3 (5%)
Standstill provision may be less favorable but, if so, such provision in the buyer's agreement is deemed amended or shall be amended to include such less favorable provision	2 (3.4%)
"No less favorable in any substantive respect"	2 (3.4%)
"Not materially less favorable" to the target	1 (1.7%)
"Not materially less restrictive in the aggregate"	1 (1.7%)
Standstill provisions not taken into account for purposes of determining whether agreement is acceptable	1 (1.7%)
If less favorable terms, company must offer to amend the buyer's agreement	1 (1.7%)

Source: Gibson Dunn & Crutcher M&A Report, Winter 2013

Similarly, Gibson, Dunn & Crutcher also tracked the differing language used to set forth the requirement for the fiduciary determination that a board must make before it can change its recommendation. Again, the variation is significant:

Chart I.E: Fiduciary Determination Required Before Target Board of Directors Can Change its Recommendation	
Standard	Number (Percentage)
"inconsistent with"	27 (45.8%)
"reasonably likely" and "inconsistent with"	9 (15.3%)
"reasonably likely" to be a breach	5 (8.5%)
"reasonably" to be expected to breach	5 (8.5%)
"would violate" or "would be a breach"	4 (6.8%)
"required" or "necessary"	4 (6.8%)
"reasonably" and "inconsistent with"	2 (3.4%)
"more likely than not" to result in a violation	1 (1.7%)
"could be required"	1 (1.7%)
"would be a breach" for superior proposals and "reasonable" for intervening event	1 (1.7%)

Source: Gibson Dunn M&A Report, Winter 2012

In both cases, it is questionable whether this differing language actually has any actual legal consequence. In fact, there is no court case that we know of that has addressed this differing language let alone explored the variation amongst it. In all likelihood, a court, if it did address this, would simply view the language as more or less saying the same thing.⁵⁵

The consequence of the diversity in language, heterogeneity, and multiplicity of lock-ups is that only a very small group of elite mergers and acquisitions lawyers can understand these agreements and the nuance. But it also leaves a bigger question: what are the consequences of lock-up creep?

55. This is essentially what has happened with the interpretation of the various forms of "efforts" that a person or entity is sometimes required to undertake in a contract. See Kenneth A. Adams, *Understanding "Best Efforts" and Its Variants (Including Drafting Recommendations)*, 50 PRAC. LAW. 11, 14 (2004) ("The case law on the meaning of *best efforts* suggests that instead of representing different standards, other *efforts* standards mean the same thing as *best efforts*, unless a contract definition provides otherwise.").

III. THE EFFECTS OF LOCK-UP CREEP

To assess the effects of lock-up creep, it is first necessary to understand its theoretical underpinning. Lock-ups are designed to compensate bidders for their initial bid. By offering to acquire the target, the initial bidder expends transaction-specific resources in terms of due diligence and employee resources as well as lawyers and investment bankers. The bidder also publicly reveals some of its private information through informational spillover about the target, most notably the target's value. When the bid is accepted and announced publicly, this information is provided to the market where it may be used by other bidders who assign a higher value for the acquired company. The other bidders can then bid using this information if the initial bid is lower than that value.

This theoretical problem is exacerbated by Delaware's so-called *Revlon* doctrine, which requires the board of directors of a target undergoing a change of control to obtain the highest price reasonably available.⁵⁶ A competing bidder can therefore bid after public announcement of the first acquisition agreement, and the target's board may be obligated to accept it under the *Revlon* doctrine.⁵⁷ If such a bid is made, the initial bidder will be left with nothing but sunk costs. Thus, lock-ups are designed to encourage bidding by compensating the initial bidder for making (and possibly losing) its bid. Without the compensation lock-ups provide, there will theoretically be fewer bids, as bidders will be hesitant to invest in making the first bid.⁵⁸

There is evidence to support this theory. A study by Professor John C. Coates, IV has found that there are more bids in the U.S. takeover market than the U.K. takeover market.⁵⁹ U.K. bids also have more than double the chance of incurring competition.⁶⁰ They also have a lower rate of completion than U.S. bids.⁶¹ Professor Coates attributes this development to the prohibition on lock-ups in the U.K. and the ability of competing

56. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) ("obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action").

57. For a general review of this doctrine, see STEVEN M. DAVIDOFF, *GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION* (2010).

58. See Coates & Subramanian, *supra* note 1, at 310–11. For a further discussion of the relevant auction theory, see generally GUHAN SUBRAMANIAN, *NEGOTIAUCTIONS: NEW DEALMAKING STRATEGIES FOR A COMPETITIVE MARKETPLACE* (W. Norton & Company ed., 2010); Paul Klemperer, *What Really Matters in Auction Design*, 16 J. ECON. PERSP. 169 (2002); Peter Cramton & Alan Schwartz, *Using Auction Theory to Inform Takeover Regulation*, 7 J.L. ECON. & ORG. 27 (1991); Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23 (1982); Paul R. Milgrom & Robert J. Weber, *A Theory of Auctions and Competitive Bidding*, 50 ECONOMETRICA 1089 (1982). See also Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L. J. 621, 679–80 (2003) (utilizing "negotiation-analytic tools to construct a model of bargaining in the 'shadow' of takeover defenses").

59. John C. Coates, IV, *M&A Break Fees: U.S. Litigation vs. U.K. Regulation*, in *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 255, 262–63 (Daniel Kessler ed., Chicago University Press, 2011).

60. *Id.* at 261–62.

61. *Id.*

bidders to trump an initial bid without paying a penalty to the initial bidder.⁶² This finding is in accord with auction theory that in many types of auctions, the greater number of bidders, the higher the premium.⁶³ In the U.K., there are likely more bidders once a bid is announced because the costs of making a bid are lower.⁶⁴ However, there are also fewer bids since bidders in the U.K. are likely less willing to make an initial bid without this compensation.⁶⁵

Other empirical studies largely support the conclusions that lock-ups can affect the bidding rate and premiums paid in takeovers. At least two studies examining the period of the 1990s have found that bid premiums are higher in transactions with termination fees paid by the target.⁶⁶ At least one study has found similar results in examining stock lock-ups.⁶⁷ Another study by John C. Coates, IV and Guhan Subramanian found that the size of the termination fee was correlated with the incidence of competition and that higher premiums were “more likely with a stock lockup, or a larger stock lockup, but not with breakup fees”⁶⁸

This can go too far, and if lock-ups are too onerous, some theorize they can prevent second bids.⁶⁹ In this scenario, lock-ups can be an agency cost management imposes in order to ensure its chosen bidder succeeds. Even if the lock-ups are not preclusive, they may individually or in the aggregate deter subsequent bidders from making a competing bid. This could reallocate surplus to initial bidders away from shareholders or otherwise place the firm in the hands of a bidder who is not willing to pay a higher value than another bidder. The question of whether lock-ups can go too far is still debated among academics where there is a sliding scale ranging from those who believe that lock-ups are always acceptable to academics who take the contrary position that lock-ups can be

62. *Id.*

63. Klemperer, *supra* note 58.

64. Coates, *supra* note 59, at 245, 261.

65. *Id.* In either case, which regulatory scheme allocates maximum surplus to the target is subject to debate. *Id.*

66. See Thomas W. Bates & Michael L. Lemmon, *Breaking Up Is Hard to Do? An Analysis of Termination Fee Provisions and Merger Outcomes*, 69 J. FIN. ECON. 469, 494 (2003) (observing that “bid premiums are between 3.7% and 6.3% higher in deals that include target termination fees compared to deals that do not”); Micah S. Officer, *Termination Fees in Mergers and Acquisitions*, 69 J. FIN. ECON. 431, 462 (2003) (observing that “takeover premiums are not lower when a target termination fee is included in the merger terms and are potentially as much as 7% higher”).

67. See Timothy R. Burch, *Locking Out Rival Bidders: The Use of Lockup Options in Corporate Mergers*, 60 J. FIN. ECON. 103, 124 (2007).

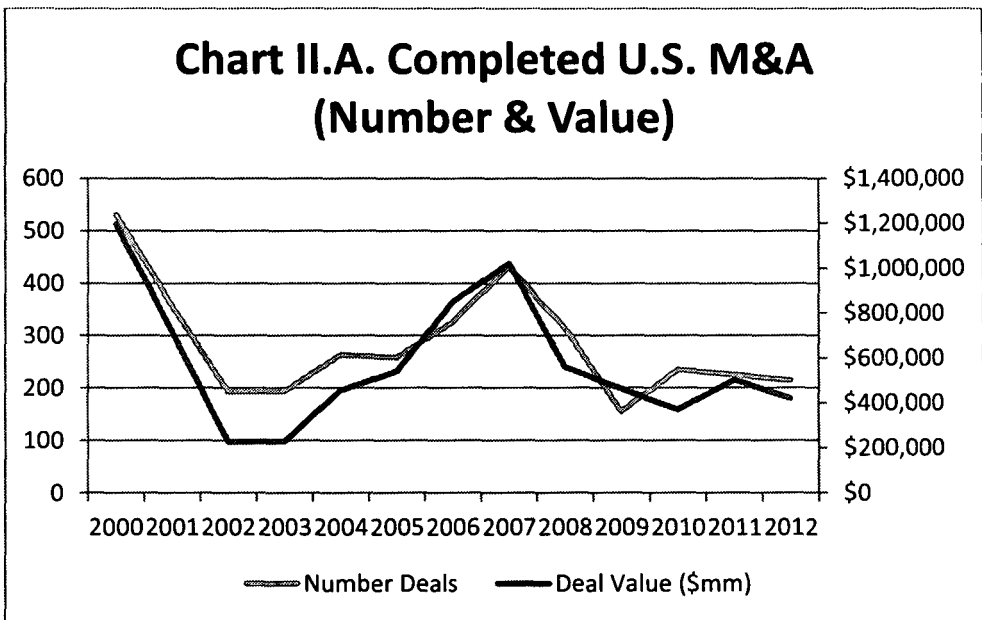
68. Coates & Subramanian, *supra* note 1, at 391. See also Jin Q. Jeon & James A. Ligon, *How Much is Reasonable? The Size of Termination Fees in Mergers and Acquisitions*, 17 J. CORP. FIN. 959, 961 (2011) (observing that competing bids are reduced in the case of higher termination fees paid by targets); Paul André et al., *Termination Fees in Mergers and Acquisitions: Protecting Investors or Managers?*, J. BUS. FIN. & ACCT. 541, 543 (2007) (examining Canadian transactions and finding that “[r]elative termination fees are found to be higher in transactions where the bidder incurs extensive merger costs, the deal includes a large cash component and operating synergies are expected”); Audra Boone & Harold Mulherin, *Do Termination Provisions Truncate the Takeover Bidding Process?*, 20 REV. FIN. STUD. 461, 484 (2007) (finding that termination fee size is positively related to takeover competition).

69. See Schwartz, *supra* note 1, at 238; Kahan & Klausner, *supra* note 1, at 120.

preclusive.⁷⁰

While the theorists debate, the empirical evidence points more to the reality that lock-ups influence the takeover market. To the extent that this is correct, the stronger and therefore more preclusive lock-ups are, the lower the bidding rate should be and the higher the premiums paid. The number of jump bids should also adjust. Accordingly, if markets are functioning efficiently, lock-up creep would increase the number of initial bids, reduce the number of competitive bids, and decrease premiums (what we term the “Lock-up Creep Hypothesis”). It would do so by increasing the cost of making a competing bid, thereby also reducing post-announcement competing bids.

Reviewing the market data in the United States for the period from 2000 through 2012, the evidence provides mixed support for the Lock-up Creep Hypothesis. Chart II.A sets forth the number and dollar value of U.S. completed takeover transactions with a value of \$100 million or greater over the time period from 2000 through 2012.



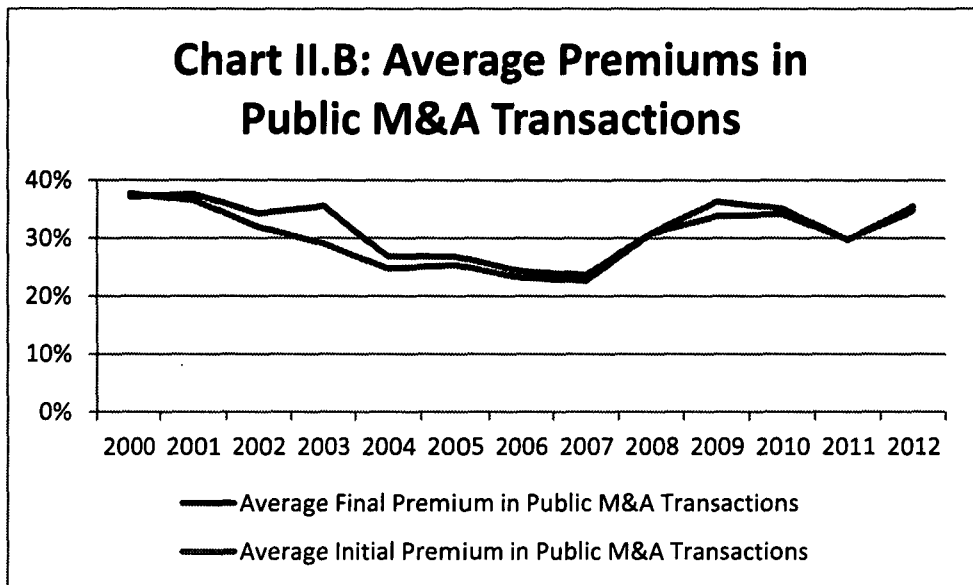
Source: Dealogic

The number and value of transactions tend to track each other over time, and there appears to be no secular trend in bid rates. The number of transactions peaked in 2000 at 531 with a value of \$1.196 trillion. From 2002 through 2005, the number of deals

70. Compare Ayres, *supra* note 1, at 715 (concluding that lock-ups are not outcome determinative when bidding competition exists); Fraidin & Hanson, *supra* note 1, at 1745 (concluding that lock-ups “like chicken soup, can’t hurt but may well help”) with Kahan & Klausner, *supra* note 1, at 1546 (concluding that lock-ups can affect the motivations of second bidders to enter into competitive bidding); Coates & Subramanian, *supra* note 1, at 313 (concluding that lock-ups can be foreclosing if sufficiently cost incurring).

fluctuated from a low of 193 acquisitions with a value of \$227 billion, to a high of 258 deals with a value of \$540.7 billion. After peaking again in 2007, the numbers from 2009 through 2012 have roughly mirrored 2002 through 2005 levels, with the value of transactions during this later time period being significantly higher, ranging from \$370.9 billion in 2010 to \$503.4 billion in 2011.

The rate of bids in mergers and acquisitions during this time period appears to be more driven by extrinsic economic factors. It peaked during the internet bubble and again in the years prior to the financial crisis, falling after each of these bubbles deflated. To further explore the Lock-up Creep Hypothesis, Chart II.B sets forth the average initial and final premiums in takeover transactions during the same time period.



Source: Dealogic (for completed transactions with a value greater than 100MM)

Over the twelve-year period, final premiums paid dip in the period prior to the financial crisis but then begin to rise towards pre-2003 levels. Theoretically, lock-up creep should reduce ultimate premiums paid by lowering the rate of competing bids. But the lack of a meaningful change in premiums does not provide evidence in support of the Lock-up Creep Hypothesis.⁷¹ Additionally, if markets are functioning efficiently, targets may demand higher initial premiums to compensate them for the reduced likelihood of competing bids keeping average premiums constant. Chart II.B does show some convergence in 2010 through 2012 with initial and final premiums paid having less than a 1% difference compared to 2009 where the difference is almost 3%. However, even in earlier times, there is similar convergence, such as during the period from 2001 to 2002 and 2004 through 2007. If Lock-up Creep were having an effect on initial premiums paid,

71. While the trend line over the period for final merger premiums is down, this appears to be driven by the financial crisis given the upswing in premiums to prior levels after that period.

it would be expected that there would be a more constant convergence than is present in the descriptive statistics.

We next further explore the issue of competing bids and premiums over time. Chart II.C sets forth descriptive statistics on the number and effect of bid jumps from the period 2003 through 2012. Bid jumps are announced transactions where a second competing bid is made.

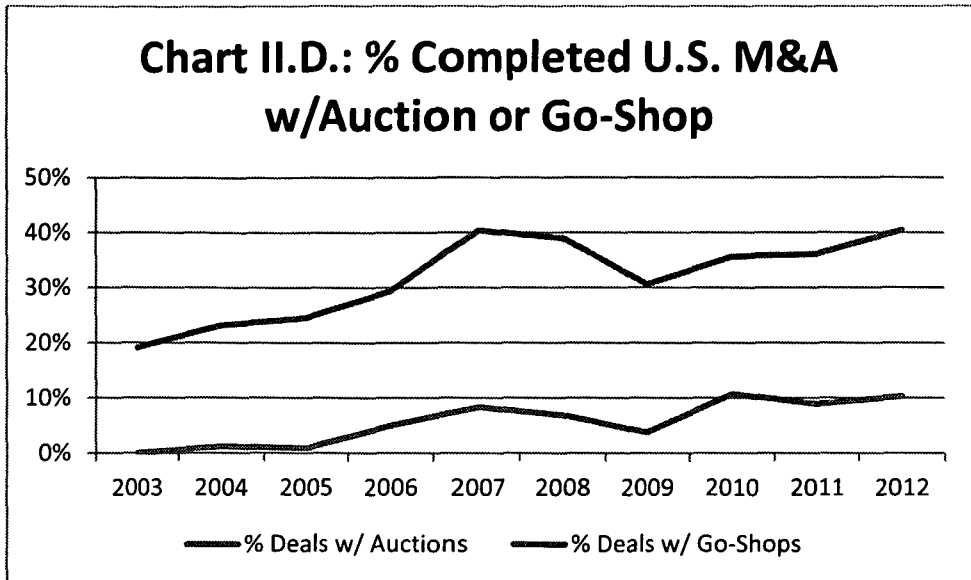
Chart II.C.: Number and Effect of “Bid Jumps” 2003–2012

Original Announce Date	# Situations	Average Change in Shareholder Value	Jumper Success Rate
2003	1	21.05%	0%
2004	8	18.36%	62.50%
2005	10	20.43%	70.00%
2006	17	11.90%	11.76%
2007	16	4.98%	56.25%
2008	4	8.33%	50.00%
2009	8	25.62%	75.00%
2010	11	25.57%	54.55%
2011	8	15.34%	50.00%
2012	9	21.64%	71.43%
Total	92	16.28%	51.11%

Source: Factset MergerMetrics

These numbers also provide mixed evidence for the Lock-up Creep Hypothesis, which would predict fewer competing bids and declining bid success rates and higher premiums paid for successful competing bids. While the number of bid jumps per year is low, the number of competing bids peaks during the years before the financial crisis, but is relatively flat from 2009 through 2012 and higher than in 2003 and 2004. Meanwhile, the average change in shareholder value due to these competing bids appears to rise in later years, while bidder success rates again fluctuate over the years without a recognizable pattern.

Finally, in Chart II.D we examine whether changes in the way firms are sold may have affected the type of lock-ups used. For example, if more firms are sold over time in pre-announcement auctions, it may very well be that lock-up creep is justified and merely reflects this market adjustment.



Source: Factset MergerMetrics (for completed transactions with a value greater than \$100 MM)

The number of auctions rises from 2003 through 2007 and then largely fluctuates between 30% and 40% starting in 2007. A similar pattern appears for transactions with go-shops, which rise to 10% of all transactions by 2007 and then stays fairly constant. The rise in auctions does support the market change story. In an auction scenario, buyers may demand more lock-ups to join the bidding, something that may not be the case in a negotiation, which typically involves only one bidder. Alternatively, though the lack of sustained growth in sales via auction decreased from 2007, continued lock-up creep mitigates against this determination.⁷²

While this evidence does not provide definitive support for the Lock-up Creep Hypothesis, this is not to say that lock-ups have not influenced individual bidding outcomes. Matching rights, for example, are repeatedly cited in individual cases for affecting the course of bids. In the case of the sale of MySpace to News Corp., Viacom executives claimed that Viacom refused to bid once News Corp. and MySpace executed a merger agreement because Viacom executives thought the match right was preclusive, foreclosing them from making a viable competing bid.⁷³

The recent competitive bidding for 3Par and Diedrich Coffee also illustrates the effect of matching rights on the course of bidding. In the case of 3Par, Dell originally agreed to pay \$18 per share to acquire the company and negotiated a reset match right giving it three business days to match any competing bid. HP first bid \$24, and in

72. Additionally, this data does not take into account the number of bidders in each auction, something that would further determine whether lock-up creep was a result of market forces.

73. See JULIA ANGWIN, *STEALING MYSPACE: THE BATTLE TO CONTROL THE MOST POPULAR WEBSITE IN AMERICA* 157–68 (2009) (describing the role of matching rights on Viacom's decision to bid for MySpace).

response, Dell bid \$24.30. HP then bid \$27, and Dell matched it, also bidding \$27. HP then bid \$33 per share, and Dell declined to bid.⁷⁴ By being able to bid in small increments, or even match HP's bid exactly, Dell was able to ensure it did not pay any more than its private value. Dell thereby likely forced HP to push up its bidding much higher than it might otherwise have bid.⁷⁵ In the case of Diedrich Coffee, the competing firms, Peet's Coffee & Tea Inc. ("Peet's") and Green Mountain Coffee Roasters Inc. ("Green Mountain"), conducted four rounds of competing bids with a similar pattern. Peet's, the initial bidder, had reset matching rights and other notice provisions, which led it to keep bidding—ultimately giving way when Green Mountain bid \$36 against its \$32.50 bid.⁷⁶ As with HP, Peet's raised its bid each time in small increments.

In these two cases, the competing bidder won multiple competitive rounds of bidding, with matching rights permitting the initial bidders to set the bidding rounds and bid no more than their private information allowed. It therefore pushed up the ultimate price the competing bidder paid, while minimizing the risks to the initial bidder. This could be beneficial in auctions where the parties have substantially differing values of the target. In those circumstances, some theorists believe that this type of match right does not deter bidding because each party is simply bidding their own value, thereby transferring surplus to target shareholders.⁷⁷ The end result is that target shareholders will receive a greater amount of surplus in these bids.

Professor Quinn also theorizes, though, that match rights can deter bids in other circumstances. One case may be where bidders with equivalent values in a private value auction may not want to incrementally bid.⁷⁸ In the case of matching rights, the determination of whether a bid is made because of this right is virtually impossible in individual cases because non-bidders never inform the market of their reasons for not bidding.⁷⁹ Matching rights may also lead initial bidders to bid in lower amounts than they otherwise would in a full blown auction where incremental bidding of this nature is not permissible.⁸⁰ The result may be lower prices generally for public shareholders.

74. Melly Alazraki, *Hewlett-Packard, Dell Bidding War over 3Par Continues*, DAILY FINANCE (Aug. 27, 2010, 10:28 AM), <http://www.dailyfinance.com/2010/08/27/3par-bidding-war-between-hp-dell-continues/>; Hugh Collins, *Hewlett-Packard to Purchase 3Par for \$2.35 Billion*, DAILY FINANCE (Sept. 3, 2010, 7:05 AM), <http://www.dailyfinance.com/2010/09/03/hewlett-packard-3par/>.

75. Steven M. Davidoff, *How Matching Rights Give Dell an Edge*, N.Y. TIMES DEALBOOK (Aug. 26, 2010, 12:08 PM) <http://dealbook.nytimes.com/2010/08/26/how-matching-rights-give-dell-an-edge/>; Brian JM Quinn, *Match Rights and Incremental Bidding—3Par*, M&A LAW PROF BLOG (Aug. 26, 2010), <http://lawprofessors.typepad.com/mergers/2010/08/match-rights-and-incremental-bidding.html>.

76. See Steven M. Davidoff, *Behind the Cease-Fire in the Coffee War*, N.Y. TIMES DEALBOOK (Dec. 9, 2009, 10:45 AM), <http://dealbook.nytimes.com/2009/12/09/behind-the-cease-fire-in-the-coffee-war/>.

77. Quinn, *supra* note 4, at 1013–14.

78. See Sushil Bikhchandani et al., *On the Right-of-First-Refusal*, ADVANCES IN THEORETICAL ECON., Apr. 26, 2005, at 16, available at <http://www.degruyter.com/view/j/bejte.2005.5.1/bejte.2005.5.1.1194/bejte.2005.5.1.1194.xml>.

79. The case of Viacom in the Myspace sale is a rare exception. Even then this may be cheap talk and not reflect Viacom's actual reason for not bidding.

80. See David I. Walker, *Rethinking Rights of First Refusal*, 5 STAN. J.L. BUS. & FIN. 1, 18–23 (1999) (comparing a bidder's incentives in an auction without a right of first refusal with an auction in which another bidder holds a right of first refusal).

Careful readers here will note that all of this is phrased in probability, and that what is really being said is that the actual effect of matching rights depends upon the individual circumstances of the auction and bidding, and that, in either case, the effects may be positive or negative. Of course, the theory of how matching rights should work may not match reality.

While individual transactions and individual lock-ups, or indeed lock-ups working together, may produce inefficient effects (or not), the bigger question in the case of lock-up creep is whether this is an aggregate social welfare problem. In individual cases, it may very well be that lock-up creep affects the course and outcome of bidding in a positive or negative manner, but in the aggregate, lock-up creep may have no effect or a positive effect because of similar issues as with matching rights—the individual situation of the bidder and target and whether theory works in reality. Individually or collectively, lock-ups may not affect the price of bidding, instead merely affecting the process used rather than the value. Even if individual cases result in uneconomic outcomes, these do not appear to be materially affecting the takeover market, at least not in an observable manner. As in the matching rights case, this is all driven by the fact that lock-ups may have positive, negative, or no effects depending upon the circumstances of the transaction.

Nor can we make definitive empirical conclusions at this time about the effect of lock-up-creep. It is difficult to isolate and identify individual lock-ups and their effect on bidding. Instead, each lock-up is related to the transaction itself and lock-ups act together to affect transaction bidding. The negotiated lock-ups also likely reflect the parties' anticipation of future bidding interest in the target. In such a circumstance, if you regress bidding competition on the presence of a lock-up, the results may simply reflect the parties' view of future interest in the target, not the actual effect of the lock-up itself. Even assuming we could code for the 30 or more different types of lock-ups and their varying formulations, it would still be difficult to ascertain whether one lock-up has more influence than another because of this endogeneity problem.⁸¹ There is also an issue of simultaneity. The initial bid price and lock-ups are negotiated simultaneously, so it is difficult, if not impossible, to determine how one influences the other.⁸²

Even coding for a general lock-up creep index would likely not address these problems. This is particularly true because many transactions have identical lock-ups with slight variation in the language, making differentiated coding difficult, if not meaningless. Different types of lock-ups also impose differing costs and have different effects. For example, termination fees impose a direct monetary cost, while information rights do not impose direct costs but affect the behavior and ability of bidders to act strategically in their bidding.

Because one cannot assess the wealth effects of lock-up creep without being able to

81. This is a gap in prior empirical research examining just termination fees or stock lock-ups. It does not account for the myriad of other types of lock-ups. Nonetheless, termination fees may be the most costly type of lock-up and so may predominate in their effects, thereby making them more susceptible to econometric analysis.

82. In workman's language, this is because you can't set up a regression because you don't know which variable to put on the left-hand-side—the bid premium or the lock-up variable.

do more econometric analysis, the best we can say looking at descriptive data is that there is no significant evidence to establish that lock-up creep is affecting the takeover market. Moreover, depending upon the type of auction, the effect of lock-up creep is quite distinct.⁸³ Yet, there is no substantial differential in lock-ups among clearly differing types of transactions. For example, the lock-ups in strategic deals that have private value attributes and private equity ones that have common value attributes often are largely similar. Because they do not appear to vary based on these transaction attributes, lock-ups, as negotiated in today's transactions, may not thus account for the idiosyncratic nature of a takeover, boards instead applying them with blunt force. They are suspect.

IV. THE CAUSES OF LOCK-UP CREEP

A. *Omnicare and the Delaware Court of Chancery*

The rise of lock-up creep can ironically be traced to the Delaware Supreme Court's decision in *Omnicare, Inc. v. NCS Healthcare, Inc.*⁸⁴ In that controversial case, the Delaware Supreme Court, by a divided 3-2 vote, held that the shareholder voting agreements entered into by two directors who together controlled majority voting power of the target were invalid under the *Unocal/Unitrin* enhanced scrutiny standard.⁸⁵ The focal point of the discord emanating from *Omnicare* was the court's requirement of an "effective fiduciary out" when boards authorize lock-ups.⁸⁶ The majority reasoned that because mergers are ownership decisions requiring a shareholder vote, the court must invalidate devices that absolutely lock up a merger before a shareholder vote.⁸⁷

Prior to *Omnicare*, lock-up creep existed, but it was arguably focused on a few confined and significant lock-ups. For example, Professors Thomas Bates and Michael Lemmon found that termination fees were uncommon in 1989.⁸⁸ They found that approximately 2% of transactions included a termination fee payable by the target to the acquirer.⁸⁹ This had grown to over 60% of all deals by 1998.⁹⁰ This trend continued, and

83. See Klemperer, *supra* note 58, at 170 (describing the effects of different auction designs on varying auction formats).

84. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 929, 933 (Del. 2003).

85. *Id.* at 935, 939. In addition to the shareholder voting agreements, the merger agreement between the target, NCS Healthcare, Inc., and the initial acquirer, Genesis Health Ventures, Inc. included a force-the-vote provision. *Id.* at 925. The Delaware Supreme Court found that the combination of these devices effectively resulted in an absolute lock-up. *Id.* at 939.

86. *Id.* at 939.

87. *Omnicare*, 818 A.2d at 939.

88. See Bates & Lemmon, *supra* note 66, at 470.

89. *Id.*

90. *Id.* ("The use of termination fees was a relatively uncommon practice in 1989, with approximately 2% of all deals including target fee provisions. . . . By 1998, however, termination provisions were significantly more prevalent with over 60% of all deals including target fee arrangements. . . ."); John C. Coates, IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307, 315 (2000) ("Lockup incidence has generally increased . . . growing from 40% of all deals in 1988 to 80% of all deals by 1998"); Micah S. Officer, *Termination Fees in Mergers and Acquisitions*, 69 J. FIN. ECON. 431, 441 (2003) ("There is a marked increase over time in the number of deals in which the target agrees to pay a termination fee to the bidder."). This finding has been attributed to undercounting in the Thomson/SDC

by the time of *Omnicare*, almost every deal had a termination fee paid by the target.

The *Omnicare* decision incited significant fear among practitioners that the application of an enhanced scrutiny standard to deal protections would lead Delaware courts to regularly scrutinize and strike down lock-ups, countering the trend in termination fee growth.⁹¹ Instead, the opposite occurred. Practitioners' fears were not realized because of the way Delaware courts operate. The Delaware Court of Chancery, the lower court, enjoys great latitude and decides the bulk of corporate law cases largely without Delaware Supreme Court supervision. The Chancery Court judges vociferously criticized the *Omnicare* decision.⁹² Not only that, they immediately began to sharply cut back the potential scope of *Omnicare*'s holding.⁹³ In *Orman v. Cullman*,⁹⁴ the Chancery Court held that a lock-up having a brief period of time before taking effect satisfied *Omnicare*.⁹⁵ This approach would later be validated in more recent Delaware decisions.⁹⁶

The Chancery Court continued to push back following *Orman*, not just on the specific holding of *Omnicare*, but on lock-ups more generally. We should note that the overwhelming majority of the cases discussed in this section are change of control transactions subject to the enhanced *Revlon* duty to obtain the best price reasonably available and not *Unocal* review.⁹⁷ Despite this distinction, in examining the lock-ups in

Database. Boone & Mulherin, *supra* note 68, at 468–69.

91. David Marcus, *Ruling on Openlane—KAR Offers Guidance on Omnicare*, DEAL MAGAZINE (Oct. 28, 2011, 1:15 PM), <http://www.thedeal.com/magazine/ID/042397/commentary/ruling-on-openlane-kar-offers-guidance-on-omnicare.php> (“Lawyers immediately complained that the holding ignored the reality that a company might be able to maximize its value only by committing itself irrevocably to a deal.”). In the wake of *Omnicare*, Professor John C. Coates, IV was quoted as saying, “[i]f you had taken a poll of M&A practitioners—or academics for that matter—90 percent would have said the case would have come out the other way.” Edward Teach, *The Deal, Unlocked*, CFO MAGAZINE (Nov. 1, 2003), http://www.cfo.com/article.cfm/3010743/1/c_3046601.

92. See, e.g., Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877, 902–03 (2005) (describing hypothetical transactions in which a seller could use an absolute lock-up to extract a higher price from a bidder and stating, “it is difficult to see why such an agreement would be inequitable”); Transcript of Oral Argument at 127, *Optima Int’l of Miami v. WCI Steel, Inc.*, No. 3833–VCL (Del. Ch. June 13, 2008) (then-Vice Chancellor Lamb stated, “it’s its really not my place to note this, but *Omnicare* is of questionable continued vitality”).

93. Sean J. Griffith, *The Costs and Benefits of Precommitment: An Appraisal of Omnicare v. NCS Healthcare*, 29 J. CORP. L. 569, 623 (2004) (recognizing courts’ “hasty retreat” from *Omnicare*).

94. 2004 WL 2348395 (Del. Ch. Oct. 20, 2004).

95. *Id.* at *8.

96. For examples of the Court of Chancery’s deferential approach to lock-ups, see Appendix B. This symposium contained a vibrant discussion of the evolution of Delaware’s post-*Omnicare* jurisprudence, see generally Christopher M. Foulds, *For Whom Should the Corporation Be Sold? Diversified Investors and Efficient Breach in Omnicare v. NCS*, 38 J. CORP. L. (2013); Sean J. Griffith, *The Omnipresent Specter of Omnicare*, 38 J. CORP. L. (2013); J. Travis Laster, *Omnicare’s Silver Lining*, 38 J. CORP. L. (2013); Brian JM Quinn, *Omnicare: Coercion and the New Unocal Standard*, 38 J. CORP. L. (2013); Megan W. Shaner, *Revisiting Omnicare: What Does Its Status 10 Years Later Still Tell Us?*, 38 J. CORP. L. (2013); Norman E. Veasey, *Ten Years After Omnicare: The Evolving Market for Deal Protection Devices*, 38 J. CORP. L. (2013).

97. As previously noted, the bulk of the cases summarized in Appendix B are also change of control transactions subject to *Revlon*. Despite their differing applications in modern M&A jurisprudence, *Revlon* and *Unocal* share common roots. That is, *Revlon* involved the application of the *Unocal* standard of review to a board’s reaction to a hostile bid. However, the “Delaware courts have extended these *Revlon* duties to

these cases, the Chancery Court has tended to apply, or at least mention, the preclusion or coercion elements of *Unocal* review.⁹⁸ We argue that the end-result of these cases has been to liberalize review of lock-ups for all transactions.

The milestone case to do this was arguably *In re Toys "R" Us Shareholders Litigation*.⁹⁹ In that case, the well-respected, then-Vice Chancellor Strine ruled on the following lock-up package: (1) a fixed termination fee of \$247 million, equal to 3.75% of equity value or 3.25% of enterprise value; (2) an agreement to pay up to \$30 million in documented expenses after a naked no vote; (3) a relatively non-restrictive no-shop clause permitting the consideration of unsolicited bids; and (4) a temporally-limited match right.¹⁰⁰ This decision was unique in that it was one of the only Chancery Court cases since *Omnicare* in which the court addressed expert testimony as to the use of lock-ups.¹⁰¹ Professor R. Preston McAfee, an economist at the California Institute of Technology, testified that matching rights were stiff barriers to rival bidders.¹⁰² Harvard Law School Professor Guhan Subramanian testified that termination fees, when combined with matching rights, were potent obstacles to emerging bidders.¹⁰³ Professor Subramanian further asserted that any termination fee of 3% or more "has a reasonable

negotiated transactions." Sautter, *Promises Made to be Broken?*, *supra* note 5, at 941.

98. See, e.g., *Koehler v. NetSpend Holdings Inc.*, Civil Action No. 8373-VCG, 2013 WL 2181518, at *17, *20 (Del. Ch. May 21, 2013) (recognizing "[t]raditional *Omnicare* claims allege that deal-protection devices impermissibly 'lock up' a transaction by being preclusive and/or coercive," and noting that the deal protections were unreasonable in light of the lack of a pre-signing sales process, but denying the motion for a preliminary injunction); *In re BioClinica S'holder Litig.*, C.A. No. 8272VCG, 2013 WL 673736, at *2 (Del. Ch. Feb. 25, 2013) (emphasis added) ("I must examine the effect of the deal-protection devices as they operate in concert to determine whether they *preclude* other offers or *coerce* the votes of the stockholders."); *In re Answers Corp. S'holder Litig.*, C.A. No. 6170-VCN, 2011 WL 1366780, at *4 n.47 (Del. Ch. Apr. 11, 2011) (finding lock-ups were not preclusive); *Louisiana Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007) (referring to the preclusive or coercive nature of the lock-ups).

99. *In re Toys "R" Us S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005).

100. *Id.* at 997.

101. Compare *id.* at 1016 (discussing the reasonableness of the deal protections, including lock-ups, and noting that "neither of the plaintiffs' distinguished experts has said what he would have done had he faced the choice that the Toys "R" Us board did"), with *Koehler v. NetSpend Holdings Inc.*, Civil Action No. 8373-VCG, 2013 WL 2181518, at *17, *20 (Del. Ch. May 21, 2013) (analyzing deal protections without addressing expert testimony as to the use of lock-ups); *In re Plains Exploration & Production Co. S'holder Litig.*, C.A. No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013) (analyzing deal protections without addressing expert testimony as to the use of lock-ups); *In re BioClinica S'holder Litig.*, C.A. No. 8272-VCG, 2013 WL 673736 (Del. Ch. Feb. 25, 2013) (analyzing deal protections without addressing expert testimony as to the use of lock-ups); *In re Answers Corp. S'holder Litig.*, C.A. No. 6170-VCN, 2011 WL 1366780, at *1 n.4, *5 (Del. Ch. Apr. 11, 2011) (addressing expert testimony only to the valuation of a target company and not to the use of lock-ups); *In re Atheros Commc'ns, Inc. S'holder Litig.*, C.A. No. 6124-VCN, 2011 WL 864928 (Del. Ch. Mar. 4, 2011) (analyzing deal protections without addressing expert testimony as to the use of lock-ups); *In re 3Com S'holders Litig.*, Civil Action No. 5067-CC, 2009 WL 5173804 (Del. Ch. Dec. 18, 2009) (analyzing deal protections without addressing expert testimony as to the use of lock-ups); *Louisiana Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1189 (Del. Ch. 2007) (addressing expert opinions on an antitrust issue but not on the use of lock-ups).

102. *In re Toys "R" Us*, 877 A.2d at 1014-15.

103. *Id.*

likelihood of foreclosing higher value bidders.”¹⁰⁴

After describing the arguments of these experts, the court asserted that neither of the experts had “said what he would have done had he faced the choice that the Toys “R” Us board did.”¹⁰⁵ The court later stated:

It is this tradeoff—between getting the highest price the board could from KKR Group right then and there, and the limited opportunity of receiving a higher bid from a well-canvassed market by reducing the termination fee and eliminating the match rights—which the board and its advisors had to address, and which the plaintiffs and their ivory tower-based experts refuse to realistically engage.¹⁰⁶

The court held that neither termination fees nor matching rights were *per se* invalid,¹⁰⁷ and that there were numerous examples showing that the combination of these two does “not deter a fervent bidder intent on paying a materially higher price for the [c]ompany.”¹⁰⁸ The court concluded by acknowledging that this lock-up package could preclude larger bids, but that, “it is not the concern of our law to set up a system that promotes endless incremental bidding. To do so risks creating an incentive for lower initial deal prices because buyers will have less closing certainty.” In other words, the Delaware courts were not about to adopt the U.K. system’s *per se* prohibition on lock-ups.

Notably, the court also adopted what could be equated with a deferential standard for review of lock-ups, stating:

Deal protections, of course, do provide a bidding cushion for merger partners that makes small, margin-topping bids non-viable. When that cushion results, as it did here, from a good faith negotiation process in which the target board has reasonably granted these protections in order to obtain a good result for the stockholders, there is no grounds for judicial intrusion.¹⁰⁹

Toys “R” Us marked a series of Delaware cases adopting this hands-off approach to lock-ups.¹¹⁰ Moreover, although the *Unocal–Unitrin* standard inherently called for a nuanced review of the record, Delaware courts since *Omnicare* have almost universally condoned deal protection measures so long as it appears that the deal was not otherwise “[t]ainted by self-interest.”¹¹¹ The Chancery Court’s repeated reliance on what is

104. *Id.* at 1015.

105. *Id.*

106. *Id.* at 1017.

107. *In re Toys “R” Us*, 877 A.2d at 1017.

108. *Id.* at 1019.

109. *Id.* at 1021.

110. *See, e.g.*, Quinn, *supra* note 4, at 1013 (“Although matching rights are subject to intermediate scrutiny in practice, courts appear to apply only a cursory review of the use of matching rights as deal protections.”).

111. *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 840 (Del. Ch. 2011). In *Del Monte*, Vice Chancellor Laster granted a preliminary injunction and enjoined the Del Monte shareholder vote for twenty days after finding severe impropriety on the part of Del Monte’s financial advisor, Barclays. *Id.* During this twenty-day period, the parties to the merger agreement were also enjoined from enforcing the lock-ups in the merger agreement, as the court found that these measures were secured as a part of a negotiation that was

“customary” is documented on the chart set forth in Appendix A. The chart summarizes each Chancery Court decision involving a challenge to lock-ups decided since *Omnicare* through May 21, 2013 and is available on Westlaw. It reveals that, despite the expert testimony in *Toys “R” Us*, the Delaware Court of Chancery has repeatedly upheld termination fees within a 2% to 4% range.¹¹² In fact, according to Factset Mergermetrics, the average termination fee during the period from 2008 and 2012 was 3.52% of transaction value and the median termination fee was 3.41% of transaction value.¹¹³ Moreover, the Court of Chancery has repeatedly upheld matching rights periods of between two and five business days.¹¹⁴

The Chancery Court’s deferential approach to lock-ups in the wake of *Toys “R” Us* was illustrated two years later in *Louisiana Municipal Police Employees’ Retirement System v. Crawford*.¹¹⁵ Relying on *Toys “R” Us* in its discussion, the court explained that there was no bright line rule that dealmakers must follow in designing deal protection devices.¹¹⁶ More specifically, the court enumerated factors it would consider when examining termination fees, including:

the overall size of the termination fee, as well as its percentage value; the benefit to shareholders, including a premium (if any) that directors seek to protect; the absolute size of the transaction, as well as the relative size of the partners to the merger; the degree to which a counterparty found such protections to be crucial to the deal, bearing in mind differences in bargaining power; and the preclusive or coercive power of *all* deal protections included in a transaction, taken as a whole.¹¹⁷

Once again, the court warned that dealmakers should not rely on a “3% rule,” which, although it may be “convenient . . . it is simply too blunt an instrument, too subject to abuse, for th[e] [c]ourt to bless as a blanket rule.”¹¹⁸ The court also cautioned that dealmakers could not “rely upon some naturally-occurring rate or combination of deal protection measures, the existence of which will invoke the judicial blue pencil.”¹¹⁹ Instead, plaintiffs challenging deal protections would need to show how those deal protections “operate in an unreasonable, preclusive, or coercive manner, under the standards of this Court’s *Unocal* jurisprudence, to inequitably harm shareholders.”¹²⁰

But while this rhetoric opens up some avenue for shareholders to challenge lock-

tainted by Barclays’ conflict. *Id.* Those lock-ups included, among other things, a two-tier termination fee and a three-business day matching right period. *Id.* Vice Chancellor Laster was quick to note, however, that “[i]f [these provisions had been] included in an arms’ length deal untainted by self-interest, the defensive measures would be quite reasonable.” *Id.*

112. See Appendix B.

113. MERGERMETRICS DATABASE, *supra* note 25.

114. See Appendix B.

115. *Louisiana Mun. Police Employees’ Ret. Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Crawford*, 918 A.2d at 1181 n.10.

ups, a review of the cases shows in reality that the Delaware Chancery Court has repeatedly signed off on merger agreement lock-ups without significant scrutiny.¹²¹ Chancellor Strine's decision in *Toys "R" Us* arguably remains one of the only Court of Chancery opinions in which the deal protection provisions were not automatically approved as standard. In contrast to *Toys "R" Us*, the majority of the Chancery Court decisions tend not to engage in a detailed analysis of the deal facts or otherwise cite to expert testimony. Even when there is some modicum of scrutiny, it is not focused on the full panoply of lock-ups but rather on the most significant ones with a particular focus on the termination fee.¹²² This lack of a detailed analysis may well be attributed to the context in which most lock-up challenges are brought. Namely, the overwhelming majority of these cases are brought on a motion for a preliminary injunction, and the standard applied to obtain a preliminary injunction places the burden of proof on the plaintiff at each step of the analysis.¹²³ Thus, it is the plaintiff who must submit expert testimony as to the preclusive or coercive nature of the lock-ups. With the dramatic increase in takeover litigation in recent years, expecting plaintiffs to produce expert testimony and evidence may be too much when most cases settle. This is particularly true in light of the Delaware court's inherent skepticism of expert witness testimony, which creates an obstacle against putting forth such testimony.¹²⁴

The end-result is that most Chancery Court decisions generally note that lock-ups are standard merger agreement provisions and emphasize that these devices are not *per se* unreasonable to then find that the lock-ups in that instance are appropriate.¹²⁵ For example, in *In re Atheros Communications, Inc.*, the court upheld an agreement that included a no shop, matching rights, and a termination fee that represented 3.3% of the transaction value, stating that "Delaware courts have repeatedly recognized 'that provisions such as these are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty.'"¹²⁶ Similarly, in *In re 3Com*

121. See Appendix B (reviewing cases that analyzed merger agreement lock-ups and finding those cases rarely used significant scrutiny).

122. One exception was in *In re Compellent Techs. S'holder Litig.*, No. 6084-VCL, 2011 WL 638252 (Del. Ch. Dec. 9, 2011), where the court engaged in an extended analysis of these lock-ups with the aid of expert witnesses. But *Compellent* was a fee petition and did not encompass merit review (one of the authors, Steven M. Davidoff, was an expert in the *Compellent* matter for the plaintiffs for purposes of the attorneys' fee petition).

123. *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599, 603 (Del. Ch. 1974), *aff'd*, 316 A.2d 619 (Del. 1974). In the context of mergers and acquisitions, this burden on the plaintiff is in contrast to the principles enumerated in the *Omnicare* and *Unocal* line of cases, placing the burden of strict scrutiny on a company's board of directors. *Omnicare Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 934 (Del. 2003).

124. See, e.g., *United Rentals, Inc. v. RAM Holdings, Inc.*, No. 3360-CC, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007) (allowing expert testimony regarding deal structures but prohibiting expert testimony regarding "customs and practices of drafting in M & A negotiations"); *In re Walt Disney Co. Derivative Litig.*, No. 15452-NC, 2004 WL 550750, at *1, (Del. Ch. Mar. 9, 2004) (granting motion to preclude expert testimony relating to board's fiduciary duties).

125. *In re Atheros Commc'ns, Inc. S'holder Litig.*, No. 6124-VCN, 2011 WL 864928, at *7 n.61 (Del. Ch. Mar. 4, 2011); *In re 3Com S'holders Litig.*, No. 5067-CC, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009).

126. *Atheros*, 2011 WL 864928, at *7 n.61 (quoting *3Com*, 2009 WL 5173804, at *7). The court reached a similar conclusion in *In re Answers Corp. S'holder Litig.*, No. 6170-VCN, 2011 WL 1366780 (Del. Ch. Apr. 11, 2011). In that case, the court dedicated little time to the review of "a termination fee plus expense

Shareholders Litigation, the shareholders alleged that the 3Com directors breached their fiduciary duties by approving an agreement including a no shop, matching rights provision, and a termination fee that, along with the reimbursement fee, represented over 4% of the equity value of the merger. The 3Com directors also allegedly failed “to make an effort to solicit other buyers before entering the Merger agreement.”¹²⁷ The Chancery Court did not engage in a detailed analysis of the deal facts as they related to the deal protection provisions nor detailed analysis of all of the lock-ups, instead stating:

[T]his Court has repeatedly held that provisions such as these are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty. Plaintiffs here fail to explain how these provisions would prevent another bidder from making a competing offer in this case. Indeed, plaintiffs ignore the notable absence of any other interested bidders.¹²⁸

Despite the repeated recognition that lock-ups are not *per se* unreasonable, the courts have recognized that lock-ups are ever-evolving.¹²⁹ In a 2011 case, *In re Orchid Cellmark Inc. Shareholder Litigation*, the court warned:

Deal protection measures evolve. Not surprisingly, we do not have a bright line test to help us all understand when too much is recognized as too much. Moreover, it is not merely a matter of measuring one deal protection device; one must address the sum of all devices. Because of that, one of these days some judge is going to say “no more” and, when the drafting lawyer looks back, she will be challenged to figure out how or why the incremental enhancement mattered. It will be yet another instance of the straw and the poor camel’s back. At some point, aggressive deal protection devices—amalgamated as they are—run the risk of being deemed so burdensome and costly as to render the “fiduciary out” illusory.¹³⁰

Notwithstanding that warning, the *Orchid Cellmark* court ultimately found that the line had not been crossed in that case.¹³¹ *Orchid Cellmark* highlights the Delaware Chancery

reimbursement of 4.4% of the [p]roposed [t]ransaction’s equity value, a no solicitation clause, a ‘no-talk’ provision limiting the Board’s ability to discuss an alternative transaction with an unsolicited bidder, a matching rights provision, and a force-the-vote requirement,” finding these provisions not to be preclusive. *In re Answers Corp. S’holder Litig.*, 2011 WL 1366780, at *4 n.47.

127. *3Com*, 2009 WL 5173804, at *7.

128. *Id.*

129. *In re Orchid Cellmark Inc. S’holder Litig.*, No. 6373–VCN, 2011 WL 1938253, at *8 (Del. Ch. May 12, 2011).

130. *Id.*

131. *Id.* In the beginning of 2012, the court relied on *Orchid Cellmark* not to invalidate a package of deal protection devices but rather to find a similar package to be reasonable. *In re Micromet, Inc. S’holders Litig.*, No. 7197VCP, 2012 WL 681785, at *9 (Del. Ch. Feb. 29, 2012). That case involved:

[A] tender offer at \$11 per share, followed by a second-step cash out merger . . . [and included] (1) a no-solicitation provision; (2) information and matching rights; (3) a termination fee [representing 3.4% of the overall equity value of the deal]; and (4) an amendment to Micromet’s [r]ights [a]greement exclude[ing] [the buyer from the target’s] poison pill, but [leaving] the pill in place as to all other potential bidders.

Court's deferential approach to lock-ups, which at the same time is evolving to continue this approach even with the advent of lock-up creep.

Our review of these cases thus leads us to conclude that by repeatedly stating that lock-ups are not *per se* unreasonable and continually upholding lock-ups so long as they are market terms, the Chancery Court has abandoned enhanced scrutiny analysis in favor of a reasonableness analysis. Of course, one can argue this is circular. If reasonableness is a market standard, then the market can change. And change it did as we have seen. In the period during and after these decisions, we have seen the expansion of market creep. This leads to the next question. We argue that changes in Delaware court doctrine allowed lock-up creep, but this begs the question of whether the response is based on market forces or due to other agency costs.

B. Market Forces Versus Agency Costs

The market story is an easy one. The relaxation of Delaware supervision allowed the market to function effectively. In this regard, targets are best able to judge their individual preferences. They can decide whether additional lock-ups will affect future bidding and adjust those based upon their prior contacts with other bidders, how the company has been shopped, and what lock-ups are appropriate. Bidders can negotiate based upon their own assessment. This will result in optimal market lock-ups.

There is evidence to support this theory. Again anecdotally, deals where there may be higher immediate bidding sometimes have more lock-ups (though sometimes they do not).¹³² In addition, the rise of the go-shop and its spread to outside private equity transactions may be seen as a way to deal with lock-up creep, though if that is the case, it begs the question of why they are used principally in private equity and not strategic deals.¹³³ The existence of these lock-ups did produce higher prices in the bidding for 3Par and Diedrich's Coffee.¹³⁴ The counter-evidence to this explanation is that lock-up creep has been relentless and uniform in almost all transactions, whether or not the buyer is a private equity or strategic one, and whether or not a go-shop is present.

This market story also has a darker gloss. The opening up of space for enhanced

Id. at *4. In addressing the plaintiffs' argument that all of the lock-ups considered collectively were preclusive, the court analogized the lock-ups in *Micromet* to those upheld in *Orchid Cellmark* and "further note[d] that *In re Orchid* involved only a slightly longer post-signing period of forty-two days, six more days than the post-signing period in this case." *Id.* at *9. The court then denied the plaintiffs' request for a preliminary injunction. *Id.* at *14.

132. See, e.g., *In re Compellent Techs. S'holder Litig.*, No. 6084-VCL, 2011 WL 6382523, at *21-22 (Del.Ch. Dec. 9, 2011) (referring to a study finding that stronger lock-up provisions correlate with a lower probability of topping bids). Then again, though, there does not appear any real consistent pattern in more competitive bidding beyond perhaps termination fees. See Boone & Mulherin, *supra* note 68, at 483 (finding that the use of termination fees is significantly and positively correlated with takeover competition).

133. See Christina M. Sautter, *Shopping During Extended Store Hours: From No Shops to Go-Shops—The Development, Effectiveness, and Implications of Go-Shop Provisions in Change of Control Transactions*, 73 BROOK. L. REV. 525, 554 (2008) (relating the increased use of go-shop provisions to the particular concerns private equity firms have in acquisition negotiations); Guhan Subramanian, *Go-Shop Provisions in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729, 730 (2008) (suggesting that go-shop provisions provide a better alternative to traditional no-shop provisions in deal structuring).

134. *Supra* notes 75-76 and accompanying text.

lock-ups may have led management to impose their own costs. Management may have pushed for these lock-ups in order to steer bids towards preferred bidders. In other words, sell-side agency costs are driving lock-up creep. In this case, anecdotal evidence is harder to find due to the uniformity of many types of lock-ups, but in examining transactions and in discussions with practitioners, there does not appear to be much evidence of this story.¹³⁵

An alternative narrative involves agency costs on the buy-side. Freed of court restrictions, buy-side lawyers, wanting to show value to their clients, negotiated more intricate and novel lock-ups. Alternatively, it may be that lock-up creep is a function of attorneys acting to protect their own interests. As one takeover attorney put it to us:

[I]n my experience, lock-up creep sometimes happens when a buyer was burned (or almost burned) when a prior deal was topped or challenged. Or even a particular law firm was burned in a situation. In their next deal, they put a tweak (but sometimes a whole new idea) into the contract to address the perceived gap that was taken advantage of. The lawyers on the other side of the next deal either don't notice or don't care enough to make a huge deal out of the new tweak (especially since the lawyer proposing it turns it into a life-or-death issue either because he/she is enamored with his/her creativity or because of a "fool me twice" mentality).¹³⁶

There is other evidence for this story. The takeover market is a concentrated one where a few law firms dominate.¹³⁷ These law firms regularly promote their new and novel lock-up inventions in client memoranda.¹³⁸ Lock-up creep works to set a high barrier to entry for competing law firms to enter into the takeover market, preserving the concentrated nature of this business.¹³⁹ In addition, because lawyers tend to be form-driven and market-based, meaning that innovation quickly spreads, the fact of a creeping market has been used to justify these lock-ups in all deals, further perpetuating lock-up creep. When we asked one takeover attorney about this possible explanation, he agreed, stating:

[O]nce one lawyer sneaks it into one deal (front door or back door), a lot of

135. It is also hard to conclude that management actually understands the scope and complexity of these lock-ups given their intricacies and novelty. At best, to the extent this is an explanation, it is more a result of management pushing knowledgeable attorneys in this direction. See *infra* notes 138–42 and accompanying text (discussing the relationship between attorney agency costs and lock-up creep). See also Matthew D. Cain & Steven M. Davidoff, *Form Over Substance? Management Buy-Outs and the Value of Corporate Process*, 36 DEL. J. CORP. L. 849 (2011) (examining the role of lock-ups in management buy-outs and assessing their agency costs).

136. Interview with M&A Partner at "top ten" takeover law firm.

137. Matthew D. Cain et al., *Broken Promises: The Role of Reputation in Private Equity Contracting and Strategic Default* (Sept. 11, 2012) (presented at AFA 2012 Chicago Meetings), available at <http://ssrn.com/abstract=1540000>.

138. See, e.g., *supra* notes 50–52.

139. See Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 91 J. EMP. LEG. STUD. 92, 107 (2012) (noting that from a sample of 1,020 transactions, 54.2% of transactions in the sample had "one or both parties represented by one of the top ten firms").

pressure builds on lawyers to ask for the same in their next deal. “Isn’t it irresponsible not to get it for my client?” And as soon as there are a handful of examples, the precedent-based argument becomes the downhill snowball. A little bit of a twist on your argument of “precedent.”¹⁴⁰

Professor John C. Coates, IV and Guhan Subramanian have called this the “Lake Wobegone” effect in the context of the growth of termination fees. Every transactional lawyer wants to meet or exceed the average.¹⁴¹ As we have already noted, the result has been that the variance among deals while existent does not appear significant, and any variance is often not based on the deal characteristics but rather the law firm negotiating the transaction.¹⁴²

Why would targets allow this to occur? We offer two explanations. First, these takeovers are all agreed transactions, and so targets are being paid their reservation price, the minimum price at which they were willing to sell. Accordingly, targets and their lawyers may not be concerned with bargaining significantly further to preserve the option of a higher bid. Second, targets and their lawyers may have acquiesced under the assumption that these lock-ups would not have meaning. In either case, it does not appear that lock-up creep has been met with significant resistance from targets.

The evidence thus seems to point to there being a strong measure of lawyer agency costs. The best evidence available is that lock-up creep does not appear to have affected the market, except in certain anecdotal cases, pointing to an agency cost explanation. The rapid spread and promotion of innovation in lock-ups and their trumpeting by law firms appears to jibe with this explanation. In particular, the general but not granular uniformity of lock-ups in transactions mitigates towards a lawyer agency story. The contrary evidence—that lock-ups were a market response or a trade-off for other innovations—does not appear to be as strong.

V. THE IMPLICATIONS OF LOCK-UP CREEP

Based on this evidence, what are Delaware courts to do? The current *status quo* can be viewed as deferential review where Delaware courts regularly find lock-ups acceptable absent egregious additional circumstances. This does not mean there is no review. In 2011, 92.1% of transactions with a value greater than \$100 million attracted a shareholder class action lawsuit.¹⁴³ Of all these transactions from 2006 through 2011, 71.6% of these lawsuits settled and 12.3% of all deals involved an amendment to the acquisition agreement.¹⁴⁴ In this litigation and the settlements which occur, there is a measure of judicial review.

140. Interview with M&A Partner at “top ten” M&A Firm.

141. Coates & Subramanian, *supra* note 1, at 334 n.90. Coates, *supra* note 59, at 246.

142. Our conclusion about law firms is based on our observation of the takeover markets and regular review of merger agreements. In some respects, these granular differences may ultimately be due to the forms used by law firms and the merger of competing forms that occur in takeover negotiations.

143. Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 35 (Jan. 31, 2013), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1984758.

144. *Id.*

Yet, the factors driving the composition of settlements are not subject to ready observation. It may very well be that these settlements are the result of attorneys on all sides acting under the shadow of Delaware law and its judges. It may also be that these settlements are merely a “tax” being paid to plaintiffs’ attorneys without regard to the actual merits.¹⁴⁵ While the evidence supports that there is some merit review occurring, there is once again no definitive evidence.¹⁴⁶

Regardless, under the current system of deferential judicial review, transactional lawyers receive little monitoring of lock-ups from the courts and litigation. Even if shareholder litigation does provide some form of monitoring through settlements, it does not appear that these settlements encompass anything other than material modifications to a handful of substantive lock-ups. They do not go into the “weeds” so to speak and redraft the convoluted and intricate language in these agreements, nor do they address most lock-ups. Instead, the settlements mainly adjust termination fees or perhaps go so far as to restrict matching rights, but not much further.¹⁴⁷ The courts follow the lead of the litigators, for the most part refusing to engage in a searching review of lock-ups either in merit review or through approval of settlements.¹⁴⁸

The question then becomes whether the current *status quo* is appropriate and whether Delaware courts should adjust their standard of review. The limited evidence makes firm doctrinal or normative recommendations more difficult, though we believe that the bulk of theoretical and empirical evidence, though not definitive, already pointed to heightened scrutiny of lock-ups since their effect is variant depending upon individual transactions. Because of the limited evidence of the effect of lock-up creep, this phenomenon alone does not justify a return to strict scrutiny of lock-ups by the Delaware courts. Nonetheless, we do believe that the Delaware courts should consider examining more broadly the collective effect of all merger agreement lock-ups in their analysis. This is particularly true in cases where competing bids emerge and lock-up creep has anecdotally been shown to have the greatest effect. In these cases, a higher level of scrutiny¹⁴⁹ would prevent undue litigation over lock-ups, while also providing salutary

145. John C. Coffee, Jr., *M&A Litigation: More and More Dysfunctional*, N.Y. LAW J. (Mar. 21, 2013), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202592906739&MA_Litigation_More_and_More_Dysfunctional.

146. See Randall Thomas & Robert Thompson, *A Theory of Representative Shareholder Suits and its Application to Multi-Jurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1817 (2012) (explaining that “Delaware seems, in most cases, to be doing an excellent job balancing investor and management interests” and not “manifest[ing] extreme hostility” towards shareholders in lock-up situations, although noting that “there are many who doubt this claim both today and historically”); Cain & Davidoff, *supra* note 143, at 21–23. See also Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053 (2013) (arguing that merger litigation is a market for claims preclusion “in which plaintiffs seek to sell and defendants seek to buy an important element of transactional certainty”).

147. Cain & Davidoff, *supra* note 143, at 17.

148. This approach may make perfect sense for Delaware courts who are already over-burdened with merger litigation. They may not view the costs associated with such a review to be outweighed by the perceived benefits. Again, one exception to this is the Chancery Court’s review of the *Compellent* settlement, which made extensive changes to the merger agreement lock-ups. See *supra* note 122.

149. In advocating for a higher level of scrutiny of lock-ups in a handful of cases, we are not necessarily arguing for the *Unocal/Unitrin* standard as the *Omnicare* court adopted. Instead, we acknowledge, as the

effects in the market place. It would also jibe with theories that posit the effects of these lock-ups are situational and dependent upon the individual facts of the transaction.

Attorneys and market participants are highly responsive to Delaware decisions—even dicta. With heightened scrutiny in a limited number of cases, the Delaware courts may push market practice back or at least check the growth of lock-up creep. This could be beneficial in moderating the effects of lock-up creep to the extent it is attributable to agency costs. Otherwise, there is a risk of ever-more continued and evolving lock-ups as lawyers push these devices into more arcane areas.

The uncertain empirical premise of even our modest recommendation must still be acknowledged. Accordingly, while we believe that our policy recommendation is appropriate, we acknowledge that it is not fully supported by the evidence. Nonetheless, we see lock-up creep as an arms race without end and view Delaware court action here as ameliorating the race before it does begin to result in preclusive situations. Again, we are aligning ourselves with prior authors who view lock-ups as situational and that enhanced scrutiny is appropriate to determine whether they are used appropriately.¹⁵⁰

Our remedy is thus more hortatory than anything else. Calling for courts to bully-pulpit parties to end what appears to be needless drafting. This is not an uncommon approach in Delaware, and was ably documented by Professor Ed Rock in his article, *Saints and Sinners*.¹⁵¹ Professor Rock analyzed Delaware's opinions in management buy-out transactions, finding that they had salutary effects by shaming future participants, rather than through lawmaking itself.¹⁵² If nothing else, identifying the issue may result in attorneys self-regulating and undertaking the weighing that courts would substitute for.

VI. CONCLUSION

The takeover market is a prestige one rather than a commodity business, where a well-compensated, concentrated group of law firms dominate. In seeking to justify their position, there is evidence that attorneys are extracting their own rents. Hence, lock-up creep. While more study of the issue is necessary, it is more certain that an arms race has erupted as lock-ups multiply and become ever more intricate and heterogeneous. While lock-ups were already under suspicion based on the available theoretical and empirical evidence, the further evidence pointing to attorneys rather than market forces leaves us to conclude that Delaware should more broadly review lock-ups, particularly in situations where there is competitive bidding. The scrutiny of the Delaware courts in these limited number of cases is also likely to have salutary effects more generally in takeover

Delaware Court of Chancery stated in *Ryan v. Lyondell*, that “*Unocal* is but one formulation of enhanced scrutiny that might be applied; it is not, however, the only test, nor is it necessarily appropriate in all circumstances.” *Ryan v. Lyondell Chem. Co.*, No 3176-VCN, 2008 WL 2923427, at *16 n.96 (Del. Ch. July 29, 2008), *rev'd*, *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

150. See Coates & Subramanian, *supra* note 1, at 376 (arguing that lock-ups are influenced by buy-side distortions and should be subject to a higher level of scrutiny); Quinn, *supra* note 4, at 1049 (“At the very least, courts should subject matching rights to the same level of scrutiny as that applied to termination fees.”).

151. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009, 1103 (1997).

152. *Id.*

transactions, pushing lawyers to limit their use of lock-ups and slowing, if not halting or reversing, lock-up creep. More succinctly, perhaps it is time to stop the madness.

*Appendix A***Excerpts from Oracle–Taleo Merger Agreement***Section 6.02. Stockholder Meeting; Board Recommendation; Proxy Material.*

(a) The Company shall establish a record date (which will be as promptly as reasonably practicable following the date of this Agreement) for, duly call, give notice of, convene and hold a meeting of its stockholders, which meeting the Company shall cause to occur on the 30th calendar day (or, if such calendar day is not a Business Day, on the first Business Day subsequent to such calendar day) immediately following the date of mailing of the Proxy Statement (the “Stockholder Meeting”), for the purpose of obtaining the Stockholder Approval, regardless of whether the Company Board determines at any time that this Agreement is no longer advisable or recommends that the stockholders of the Company reject it or any other Adverse Recommendation Change has occurred at any time; provided, however, that (i) if the Company is unable to obtain a quorum of its stockholders at such time, the Company may adjourn the Stockholder Meeting for no more than five (5) Business Days if necessary in order to obtain a quorum of its stockholders and the Company shall use its commercially reasonable efforts during such five (5) Business Day period to obtain such a quorum as promptly as practicable, (ii) the Company may adjourn or postpone the Stockholder Meeting to the extent (and only to the extent) the Company reasonably determines that such adjournment or postponement is required by Applicable Law and (iii) if the Company receives an Acquisition Proposal, or the price or material terms of a previously received Acquisition Proposal are modified or amended, in any such case during the five (5) Business Day period immediately prior to the day of the Stockholder Meeting, the Company may delay the Stockholder Meeting until the date that is the seventh (7th) Business Day after the date on which the Stockholder Meeting would have been held but for such extension. Unless the Company Board shall have effected an Adverse Recommendation Change in accordance with Section 6.03, the Company Board shall make the Board Recommendation and use its reasonable best efforts to obtain the Stockholder Approval, and the Company shall otherwise comply with all Applicable Laws applicable to the Stockholder Meeting. Without limiting the generality of the foregoing, the Company agrees that (x) its obligations pursuant to this Section 6.02 shall not be affected by the commencement, public proposal, public disclosure or communication to the Company or any other Person of any Acquisition Proposal, and (y) the Company shall establish a record date for, call, give notice of, convene and hold the Stockholder Meeting and the matters constituting the Stockholder Approval shall be submitted to the Company’s stockholders at the Stockholder Meeting whether or not (A) an Adverse Recommendation Change shall have occurred or (B) any Acquisition Proposal or Superior Proposal shall have been publicly proposed or announced or otherwise submitted to the Company or any of its Representatives. The Company agrees that it shall not submit to the vote of the stockholders of the Company any Acquisition Proposal (whether or not a Superior Proposal) prior to the vote of the Company’s stockholders with respect to the Merger at the Stockholder Meeting. The notice of such Stockholder Meeting shall state that a

resolution to adopt this Agreement and a resolution to adjourn the Stockholder Meeting will be considered at the Stockholder Meeting, and no other matters shall be considered or voted upon at the Stockholder Meeting without Parent's prior written consent.

(b) Except to the extent expressly permitted by Section 6.03: (i) the Company Board shall unanimously recommend that the Company's stockholders vote in favor of the adoption of this Agreement (the "Board Recommendation") at the Stockholder Meeting; (ii) the Proxy Statement shall include the Board Recommendation; and (iii) neither the Company Board nor any committee thereof shall fail to make, withdraw, amend or modify, or publicly propose to withhold, withdraw, amend or modify, in a manner adverse to Parent or Merger Subsidiary, the Board Recommendation.

(c) As promptly as practicable after the date hereof, the Company and Parent shall prepare jointly, and the Company shall file with the SEC, the preliminary Proxy Statement (but in no event later than twenty (20) calendar days after the date of this Agreement). Notwithstanding anything contained in this Agreement to the contrary, (x) if the Company does not receive comments from the SEC with respect to the preliminary Proxy Statement, the Company shall file with the SEC the definitive Proxy Statement, and shall use its reasonable best efforts to cause the mailing of the definitive Proxy Statement to the stockholders of the Company, on or prior to the third Business Day after the tenth calendar day immediately following the date of filing of the preliminary Proxy Statement with the SEC, and (y) if the Company does receive comments from the SEC with respect to the preliminary Proxy Statement, the Company shall file with the SEC the definitive Proxy Statement, and shall use its reasonable best efforts to cause the mailing of the definitive Proxy Statement to the stockholders of the Company, on or prior to the fifth Business Day immediately following clearance by the SEC with respect to such comments. The Company and Parent, as the case may be, shall furnish all information concerning the Company or Parent as the other party hereto may reasonably request in connection with the preparation and filing with the SEC of the Proxy Statement. Parent and its counsel shall be given a reasonable opportunity to review and comment on the Proxy Statement before such document (or any amendment or supplement thereto) is filed with the SEC, and the Company shall include in such document any comments reasonably proposed by Parent and its counsel. The Company shall (i) as promptly as practicable after receipt thereof, provide Parent and its counsel with copies of any written comments, and advise Parent and its counsel of any oral comments, with respect to the Proxy Statement (or any amendment or supplement thereto) received from the SEC or its staff, (ii) provide Parent and its counsel a reasonable opportunity to review the Company's proposed response to such comments, (iii) include in the Company's written response to such comments any comments reasonably proposed by Parent and its counsel, (iv) not file or mail such document, or respond to the SEC, prior to receiving the approval of Parent, which approval shall not be unreasonably withheld or delayed, and (v) provide Parent and its counsel a reasonable opportunity to participate in any discussions or meetings with the SEC. If, at any time prior to the Stockholder Meeting, any information relating to the Company, Parent or any of their respective Affiliates, officers or directors should be discovered by the Company or Parent which should be set forth in an amendment or supplement to the Proxy Statement, so that the Proxy Statement shall not contain any untrue statement of a material fact or omit to state any material fact

required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not misleading, the party that discovers such information shall promptly notify the other parties hereto, and an appropriate amendment or supplement describing such information shall be filed with the SEC and, to the extent required by Applicable Law, disseminated to the stockholders of the Company.

Section 6.03. No Solicitation.

(a) Neither the Company nor any of its Subsidiaries shall, nor shall the Company or any of its Subsidiaries authorize or permit any of its or their Representatives to, and the Company shall instruct, and cause each applicable Subsidiary to instruct, each such Representative not to, directly or indirectly, solicit, initiate or knowingly take any action to facilitate or encourage the submission of any Acquisition Proposal or the making of any inquiry, offer or proposal that would reasonably be expected to lead to any Acquisition Proposal, or, subject to Section 6.03(b), (i) conduct or engage in any discussions or negotiations with, disclose any non-public information relating to the Company or any of its Subsidiaries to, afford access to the business, properties, assets, books or records of the Company or any of its Subsidiaries to or otherwise cooperate in any way, or knowingly assist, participate in, facilitate or encourage any effort by, any Third Party that is seeking to make, or has made, any Acquisition Proposal, (ii) (A) amend or grant any waiver or release under any standstill or similar agreement with respect to any class of equity securities of the Company or any of its Subsidiaries or (B) approve any transaction under, or any Third Party becoming an "interested stockholder" under, Section 203 of Delaware Law, (iii) enter into any agreement in principle, letter of intent, term sheet, acquisition agreement, merger agreement, option agreement, joint venture agreement, partnership agreement or other Contract relating to any Acquisition Proposal or enter into any agreement or agreement in principle requiring the Company to abandon, terminate or fail to consummate the transactions contemplated hereby or breach its obligations hereunder, or (iv) resolve, propose or agree to do any of the foregoing. Without limiting the foregoing, it is understood that any violation of the foregoing restrictions by any Subsidiary of the Company or Representatives of the Company or any of its Subsidiaries shall be deemed to be a breach of this Section 6.03 by the Company. The Company shall, and shall cause its Subsidiaries and its and their respective Representatives to cease immediately and cause to be terminated, and shall not authorize or knowingly permit any of its or their Representatives to continue, any and all existing activities, discussions or negotiations, if any, with any Third Party conducted prior to the date hereof with respect to any Acquisition Proposal and shall use its reasonable best efforts to cause any such Third Party (or its agents or advisors) in possession of non-public information in respect of the Company or any of its Subsidiaries that was furnished by or on behalf of the Company and its Subsidiaries to return or destroy (and confirm destruction of) all such information.

(b) Notwithstanding the foregoing provisions of Section 6.03(a) or anything else to the contrary set forth in this Agreement, prior to the Stockholder Approval, the Company Board, directly or indirectly through any Representative, may (i) engage in negotiations or discussions with any Third Party that has made (and not withdrawn) a bona fide unsolicited Acquisition Proposal in writing after the date of this Agreement, that did not

result from a breach of this Section 6.03, and that the Company Board believes in good faith, after consultation with its outside legal counsel and Qatalyst Partners LP (or another financial advisor of nationally recognized reputation), constitutes or is reasonably likely to lead to a Superior Proposal, and (ii) thereafter furnish to such Third Party non-public information relating to the Company or any of its Subsidiaries pursuant to an executed confidentiality agreement with terms no less favorable to the Company than those contained in the Confidentiality Agreement and containing additional provisions that expressly permit the Company to comply with the terms of this Section 6.03 (a copy of which confidentiality agreement shall be promptly and in any event with 24 hours provided for informational purposes only to Parent), but in each case under the preceding clauses (i) and (ii), only if the Company Board determines in good faith, after consultation with outside legal counsel to the Company Board, that the failure to take such action would be a breach of its fiduciary duties to the stockholders of the Company under Applicable Law.

(c) The Company Board shall not take any of the actions referred to in clauses (i) or (ii) of Section 6.03(b) unless the Company shall have notified Parent in writing at least twenty-four (24) hours before taking such action that it intends to take such action (it being understood that: (i) the Company shall only be required to provide the notice required by this sentence to Parent on one occasion with respect to any particular Third Party; and (ii) this parenthetical shall have no impact on the notification and other obligations of the Company contained in the remainder of this Section 6.03(c)). The Company shall notify Parent promptly (but in no event later than 24 hours) after it obtains knowledge of the receipt by the Company (or any of its Representatives) of any Acquisition Proposal, any inquiry, offer or proposal that would reasonably be expected to lead to an Acquisition Proposal, or any request for non-public information relating to the Company or any of its Subsidiaries or for access to the business, properties, assets, books or records of the Company or any of its Subsidiaries by any Third Party, in either case in connection with any Acquisition Proposal or inquiry, offer or proposal that would reasonably be expected to lead to an Acquisition Proposal. In such notice, the Company shall identify the Third Party making, and the terms and conditions of, any such Acquisition Proposal, inquiry, offer, proposal or request. Commencing upon the provision of any notice referred to above, the Company shall (A) keep Parent reasonably informed, on a prompt basis, of the status and material terms of any such Acquisition Proposal, inquiry, offer, proposal or request, including any material amendments or proposed amendments as to price and other material terms of any such Acquisition Proposal, inquiry, offer, proposal or request, and (B) promptly upon receipt or delivery of any of the following, provide Parent (or its outside counsel) with copies of all material documents and material written or electronic communications relating to any such Acquisition Proposal (including the financing thereof), inquiry, offer, proposal or request exchanged between the Company, its Subsidiaries or any of their respective officers, directors, employees or Representatives, on the one hand, and the Person making an Acquisition Proposal, inquiry, offer, proposal or request (or any of such Person's Affiliates, or their respective officers, directors, employees, or Representatives), on the other hand. The Company shall promptly provide Parent with any non-public information concerning the business, present or future performance, financial condition or results of

operations of the Company (or any of its Subsidiaries), provided to any Third Party that was not previously provided to Parent. The Company shall provide Parent with at least 48 hours' prior notice (or any lesser period of advance notice provided to the members of the Company Board generally) of any meeting of the Company Board at which the Company Board is reasonably expected to consider any Acquisition Proposal.

(d) Neither the Company Board nor any committee thereof shall (i) fail to make, withdraw, amend or modify, or publicly propose to withhold, withdraw, amend or modify, in a manner adverse to Parent or Merger Subsidiary, the Board Recommendation, (ii) approve, endorse, adopt or recommend, or publicly propose to approve, endorse, adopt or recommend, any Acquisition Proposal or Superior Proposal, (iii) fail to recommend against acceptance of any tender offer or exchange offer for the Company Common Stock within ten (10) Business Days after the commencement of such offer, (iv) make any public statement inconsistent with the Board Recommendation or (v) resolve or agree to take any of the foregoing actions (any of the foregoing, an "Adverse Recommendation Change").

(e) Notwithstanding anything to the contrary set forth in this Agreement, at any time prior to receipt of the Stockholder Approval, the Company Board, following receipt of and on account of a Superior Proposal, may (i) make an Adverse Recommendation Change, or (ii) terminate this Agreement to enter into a definitive agreement with respect to such Superior Proposal in accordance with the terms of Section 8.01(d)(i), but only if, in either case, the Company Board determines in good faith, after consultation with outside legal counsel to the Company Board, that the failure to take such action would be a breach of its fiduciary duties under Applicable Law; provided, however, that the Company Board shall not make an Adverse Recommendation Change or terminate this Agreement in accordance with the terms of Section 8.01(d)(i), unless (A) the Company promptly notifies Parent (the "Adverse Recommendation Change Notice"), in writing at least three (3) Business Days before making an Adverse Recommendation Change or terminating this Agreement (the "Notice Period"), of its intention to take such action with respect to a Superior Proposal, (B) the Company attaches to such notice the most current version of the proposed agreement or a detailed summary of all material terms of any such Superior Proposal (which version or summary shall be updated on a prompt basis) and the identity of the Third Party making the Superior Proposal, (C) the Company shall, and shall cause its financial and legal advisors to, during the Notice Period, negotiate with Parent in good faith to make such adjustments in the terms and conditions of this Agreement so that such Acquisition Proposal ceases to constitute a Superior Proposal, if Parent, in its discretion, proposes to make such adjustments (it being understood and agreed (x) that in the event that, after commencement of the Notice Period, there is any material revision to the terms of a Superior Proposal, including, any revision in price, the Notice Period shall be extended, if applicable, to the extent necessary to ensure that at least three (3) Business Days remains in the Notice Period subsequent to the time the Company notifies Parent of any such material revision and (y) that there may be multiple extensions of the Notice Period); and (D) Parent does not make, within the Notice Period, a binding offer capable of acceptance by the Company that is determined by the Company Board in good faith, after consulting with its outside counsel and Qatalyst Partners LP (or another financial advisor of nationally recognized reputation), to be at least as favorable to the stockholders of the Company as such Superior Proposal.

(f) Notwithstanding the provisions of Section 6.03(d), the Company Board may, in response to a material fact, event, change, development or set of circumstances (other than an Acquisition Proposal occurring or arising after the date of this Agreement) that was not known to the Company Board nor reasonably foreseeable by the Company Board as of or prior to the date of this Agreement (and not relating in any way to any Acquisition Proposal) (such material fact, event, change, development or set of circumstances, an “Intervening Event”), fail to make, withdraw or modify, in a manner adverse to Parent or Merger Subsidiary, the Board Recommendation (which shall be deemed to be an “Adverse Recommendation Change”) if the Company Board determines in good faith, after consultation with outside legal counsel to the Company Board, that, in light of such Intervening Event, the failure of the Company Board to effect such an Adverse Recommendation Change would be a breach of its fiduciary duties under Applicable Law; provided that no fact, event, change, development or set of circumstances shall constitute an Intervening Event if such fact, event, change, development or set of circumstances resulted from or arose out of the announcement, pendency or consummation of the Merger; and, provided, further, that the Company Board shall not be entitled to exercise its right to make an Adverse Recommendation Change pursuant to this clause (f) unless the Company Board has (A) provided to Parent at least four (4) Business Days’ prior written notice advising Parent that the Company Board intends to take such action and specifying the facts underlying the Company Board’s determination that an Intervening Event has occurred, and the reasons for the Adverse Recommendation Change, in reasonable detail, and (B) during such four (4) Business Day period, if requested by Parent, engaged in good faith negotiations with Parent to amend this Agreement in such a manner that obviates the need for an Adverse Recommendation Change as a result of the Intervening Event.

(g) Nothing contained in this Section 6.03 shall prevent the Company Board from complying with Rule 14d-9 and Rule 14e-2(a) under the Exchange Act with regard to an Acquisition Proposal; provided that any such disclosure (other than a “stop, look and listen” communication or similar communication of the type contemplated by Section 14d-9(f) under the Exchange Act) shall be deemed to be a Adverse Recommendation Change unless the Company Board expressly publicly reaffirms its Board Recommendation (x) in such communication or (y) within two (2) Business Days after requested to do so by Parent.

“**Acquisition Proposal**” means any offer, proposal or indication of interest from any Third Party relating to any transaction or series of related transactions involving (i) any acquisition or purchase by any Person, directly or indirectly, of 15% or more of any class of outstanding voting or equity securities of the Company, or any tender offer (including a self-tender) or exchange offer that, if consummated, would result in any Person beneficially owning 15% or more of any class of outstanding voting or equity securities of the Company, (ii) any acquisition or purchase by any Person, directly or indirectly, of a majority of any class of outstanding voting or equity securities of one or more Subsidiaries of the Company the business of which constitutes 15% or more of the consolidated revenues, net income or assets of the Company and its Subsidiaries (for or as of, as applicable, the twelve (12) month period ended on the last day of the Company’s last fiscal year), (iii) any merger, amalgamation, consolidation, share exchange, business

combination, joint venture or other similar transaction involving the Company or any of its Subsidiaries, the business of which constitutes 15% or more of the consolidated net revenues, net income or assets of the Company and its Subsidiaries (for or as of, as applicable, the twelve (12) month period ended on the last day of the Company's last fiscal year), (iv) any sale, lease, exchange, transfer, license (other than licenses in the ordinary course of business), acquisition or disposition of 15% or more of the consolidated assets of the Company and its Subsidiaries (measured by the lesser of book or fair market value thereof as of the last day of the Company's last fiscal year) or (v) any liquidation, dissolution, recapitalization, extraordinary dividend or other significant corporate reorganization of the Company or any of its Subsidiaries, the business of which constitutes 15% or more of the consolidated net revenues, net income or assets of the Company and its Subsidiaries (for or as of, as applicable, the twelve (12) month period ended on the last day of the Company's last fiscal year).

"Superior Proposal" means any binding bona fide, unsolicited, written Acquisition Proposal capable of acceptance by the Company which did not result from a breach of Section 6.03 of this Agreement, made by a Third Party, which, if consummated, would result in such Third Party (or in the case of a direct merger between such Third Party or any Subsidiary of such Third Party and the Company, the stockholders of such Third Party) owning, directly or indirectly, all of the outstanding shares of Company Common Stock, or all or substantially all of the consolidated assets of the Company and its Subsidiaries, and which Acquisition Proposal the Company Board determines in good faith, after considering the advice of its outside legal counsel and Qatalyst Partners LP (or another financial advisor of nationally recognized reputation), and after taking into account all of the terms and conditions of such Acquisition Proposal (including any termination or break-up fees, expense reimbursement provisions and any conditions, potential time delays or other impediments to consummation), and after taking into account all financial, legal, regulatory, and other aspects of such Acquisition Proposal (including the financing terms and the ability of such Third Party to finance such Acquisition Proposal), is more favorable to the Company's stockholders (other than Parent and its Affiliates) than as provided hereunder (including any changes to the terms of this Agreement proposed by Parent in a binding offer capable of acceptance by the Company in response to such Superior Proposal pursuant to and in accordance with Section 6.03 or otherwise).

Excerpts from Yahoo–Geocities Merger Agreement

5.2 MEETING OF GEOCITIES STOCKHOLDERS.

(a) Promptly after the date hereof, GeoCities will take all action necessary in accordance with the Delaware Law and its Certificate of Incorporation and Bylaws to convene the GeoCities Stockholders' Meeting to be held as promptly as practicable after the declaration of effectiveness of

the Registration Statement, for the purpose of voting upon this Agreement and the Merger. GeoCities will use its commercially reasonable efforts to solicit from its stockholders proxies in favor of the adoption and approval of this

Agreement and the approval of the Merger and will take all other action necessary or advisable to secure the vote or consent of its stockholders required by the rules of the NASD or Delaware Law to obtain such approvals. Notwithstanding anything to the contrary contained in this Agreement, GeoCities may adjourn or postpone GeoCities Stockholders' Meeting to the extent necessary to ensure that any necessary supplement or amendment to the Prospectus/Proxy Statement is provided to GeoCities' stockholders in advance of a vote on the Merger and this Agreement or, if as of the time for which GeoCities Stockholders' Meeting is originally scheduled (as set forth in the Prospectus/Proxy Statement) there are insufficient shares of GeoCities Common Stock represented (either in person or by proxy) to constitute a quorum necessary to conduct the business of the GeoCities' Stockholders' Meeting. GeoCities shall ensure that the GeoCities Stockholders' Meeting is called, noticed, convened, held and conducted, and subject to Section 5.2(c) that all proxies solicited by the GeoCities in connection with the GeoCities Stockholders' Meeting are solicited, in compliance with the Delaware Law, its Certificate of Incorporation and Bylaws, the rules of the NASD and all other applicable legal requirements. GeoCities' obligation to call, give notice of, convene and hold the GeoCities Stockholders' Meeting in accordance with this Section 5.2(a) shall not be limited to or otherwise affected by the commencement, disclosure, announcement or submission to GeoCities of any Acquisition Proposal, or by any withdrawal, amendment or modification of the recommendation of the Board of Directors of GeoCities with respect to the Merger.

(b) Subject to Section 5.2(c): (i) the Board of Directors of GeoCities shall recommend that GeoCities' stockholders vote in favor of and adopt and approve this Agreement and the Merger at the GeoCities Stockholders' Meeting; (ii) the Prospectus/Proxy Statement shall include a statement to the effect that the Board of Directors of the GeoCities has recommended that GeoCities' stockholders vote in favor of and adopt and approve this Agreement and the Merger at the GeoCities Stockholders' Meeting; and (iii) neither the Board of Directors of GeoCities nor any committee thereof shall withdraw, amend or modify, or propose or resolve to withdraw, amend or modify in a manner adverse to Yahoo!, the recommendation of the Board of Directors of GeoCities that GeoCities' stockholders vote in favor of and adopt and approve this Agreement and the Merger.

(c) Nothing in this Agreement shall prevent the Board of Directors of GeoCities from withholding, withdrawing, amending or modifying its recommendation in favor of the Merger if (i) a Superior Offer (as defined below), or an offer reasonably believed by the Board of Directors of GeoCities to be a Superior Offer, is made to the GeoCities and is not withdrawn, (ii) neither GeoCities nor any of its representatives shall have violated any of the restrictions set forth in

Section 5.4, and (iii) the Board of Directors of GeoCities or any committee thereof concludes in good faith, after consultation with its outside counsel, that, in light of such Superior Offer, the withholding, withdrawal, amendment or modification of such recommendation is required in order for the Board of Directors of GeoCities or any committee thereof to comply with its obligations to GeoCities' stockholders under applicable law. Nothing contained in this Section 5.2(c) shall limit GeoCities' obligation to hold and convene the GeoCities Stockholders' Meeting (regardless of whether the recommendation of the Board of Directors of the GeoCities shall have been withdrawn, amended or modified). For purposes of this Agreement ("SUPERIOR OFFER") shall mean an unsolicited, bona fide written offer made by a third party to consummate any of the following transactions: (i) a merger, consolidation, business combination, recapitalization, liquidation, dissolution or similar transaction involving GeoCities pursuant to which the stockholders of GeoCities immediately preceding such transaction hold less than 50% of the equity interest in the surviving or resulting entity of such transaction; (ii) a sale or other disposition by GeoCities of assets representing in excess of 50% of the fair market value of GeoCities' business immediately prior to such sale, or (iii) the acquisition by any person or group (including by way of a tender offer or an exchange offer or issuance by GeoCities), directly or indirectly, of beneficial ownership or a right to acquire beneficial ownership of shares representing in excess of 50% of the voting power of the then outstanding shares of capital stock of the GeoCities, on terms that the Board of Directors of GeoCities determines, in its reasonable judgment, after consultation with its financial advisor, to be more favorable, or is reasonably likely to be more favorable, to GeoCities stockholders than the terms of the Merger; PROVIDED, HOWEVER, that any such offer shall not be deemed to be a "Superior Offer" if any financing required to consummate the transaction contemplated by such offer is not committed and is not likely in the judgment of GeoCities' Board of Directors to be obtained by such third party on a timely basis.

5.4 NO SOLICITATION.

(a) From and after the date of this Agreement until the Effective Time or termination of this Agreement pursuant to Article VII, GeoCities and its subsidiaries will not, nor will they authorize or permit any of their respective officers, directors, affiliates or employees or any investment banker, attorney or other advisor or representative retained by any of them to, directly or indirectly, (i) solicit, initiate, encourage or induce the making, submission or announcement of any Acquisition Proposal (as hereinafter defined), (ii) participate in any discussions or negotiations regarding, or furnish to any person any non-public information with respect to, or take any other action to facilitate any inquiries or the making of any proposal that constitutes or may reasonably be expected to lead to, any Acquisition Proposal, (iii) engage in discussions with any person with respect to any Acquisition Proposal, except as

to the existence of these provisions, (iv) subject to Section 5.2(c), approve, endorse or recommend any Acquisition Proposal or (v) enter into any letter of intent or similar document or any contract, agreement or commitment contemplating or otherwise relating to any Acquisition Transaction; PROVIDED, HOWEVER, that prior to the approval of this Agreement by the required GeoCities stockholder vote, this Section 5.4(a) shall not prohibit GeoCities from furnishing nonpublic information regarding GeoCities and its subsidiaries to, entering into a confidentiality agreement with or entering into discussions with, any person or group in response to a Superior Offer submitted by such person or group (and not withdrawn) if (1) neither GeoCities nor any representative of GeoCities and its subsidiaries shall have violated any of the restrictions set forth in this Section 5.4, (2) the Board of Directors of GeoCities concludes in good faith, after consultation with its outside legal counsel, that such action is required in order for the Board of Directors of GeoCities to comply with its fiduciary obligations to GeoCities' stockholders under applicable law, (3) prior to furnishing any such nonpublic information to, or entering into discussions with, such person or group, GeoCities gives Yahoo! written notice of the identity of such person or group and of GeoCities' intention to furnish nonpublic information to, or enter into discussions with, such person or group and the GeoCities receives from such person or group an executed confidentiality agreement containing customary limitations on the use and disclosure of all nonpublic written and oral information furnished to such person or group by or on behalf of the GeoCities, and (4) contemporaneously with furnishing any such nonpublic information to such person or group, GeoCities furnishes such nonpublic information to Yahoo! (to the extent such nonpublic information has not been previously furnished by the GeoCities to Yahoo!). GeoCities and its subsidiaries will immediately cease any and all existing activities, discussions or negotiations with any parties conducted heretofore with respect to any Acquisition Proposal. Without limiting the foregoing, it is understood that any violation of the restrictions set forth in the preceding two sentences by any officer, director or employee of GeoCities or any of its subsidiaries or any investment banker, attorney or other advisor or representative of GeoCities or any of its subsidiaries shall be deemed to be a breach of this Section 5.4 by GeoCities. In addition to the foregoing, the GeoCities shall provide Yahoo! with at least two (2) business days or forty-eight (48) hours prior written notice of a meeting of GeoCities' Board of Directors at which GeoCities' Board of Directors is reasonably expected to recommend a Superior Offer to its stockholders and together with such notice a copy of the documentation relating to such Superior Offer that exists at such time.

For purposes of this Agreement, "ACQUISITION PROPOSAL" shall mean any bona fide offer or proposal (other than an offer or proposal by Yahoo!) relating to any Acquisition Transaction. For the purposes of this Agreement, "ACQUISITION TRANSACTION" shall mean any transaction or series of related transactions other than the transactions contemplated by this Agreement

involving: (A) any acquisition or purchase from the GeoCities by any person or "group" (as defined under Section 13(d) of the Exchange Act and the rules and regulations thereunder) of more than a 15% interest in the total outstanding voting securities of the GeoCities or any of its subsidiaries or any tender offer or exchange offer that if consummated would result in any person or "group" (as defined under Section 13(d) of the Exchange Act and the rules and regulations thereunder) beneficially owning 15% or more of the total outstanding voting securities of the GeoCities or any of its subsidiaries or any merger, consolidation, business combination or similar transaction involving the GeoCities pursuant to which the stockholders of the GeoCities immediately preceding such transaction hold less than 85% of the equity interests in the surviving or resulting entity of such transaction; (B) any sale, lease (other than in the ordinary course of business), exchange, transfer, license (other than in the ordinary course of business), acquisition or disposition of more than 50% of the assets of the GeoCities; or (C) any liquidation or dissolution of the GeoCities.

(b) In addition to the obligations of GeoCities set forth in paragraph

(a) of this Section 5.4, GeoCities as promptly as practicable shall advise Yahoo! orally and in writing of any request for non-public information which GeoCities reasonably believes would lead to an Acquisition Proposal or of any Acquisition Proposal, or any inquiry with respect to or which GeoCities reasonably should believe would lead to any Acquisition Proposal, the material terms and conditions of such Acquisition Proposal (to the extent known), and the identity of the person or group making any such request, Acquisition Proposal or inquiry. GeoCities will keep Yahoo! informed in all material respects of any material amendments or proposed amendments to any such Acquisition Proposal.

Appendix B

**Delaware Court of Chancery Rulings on Deal
Protection Devices Post-Omnicare
(As Found on Westlaw)**

Case Name	Challenged Lock-Ups	Ruling
Orman v. Cullman, No. Civ.A. 18039, 2004 WL 2348395 (Del. Ch. 2004).	Stockholders' voting agreement required approval from Class A stockholders (majority of the minority); 18-month restrictive period during which stockholders party to voting agreement agreed not to vote in favor of another acquisition proposal .	Motion for summary judgment granted in favor of defendants.
<i>In re</i> MONY Group Inc., S'holder Litig., 852 A.2d 9 (Del. Ch. 2004).	Termination fee representing 3.3% of equity value and 2.4% of transaction value.	Preliminary injunction motion by plaintiffs granted to correct disclosure.
<i>In re</i> Toys 'R' Us., Inc. S'holder Litig., 877 A.2d 975 (Del. Ch. 2005).	Three business days matching rights; termination fee representing 3.75% of equity value or 3.25% of enterprise value; up to \$30 million expense reimbursement after a naked no vote.	Preliminary injunction motion by plaintiffs denied.

<p><i>In re</i> Topps Co. S'holders Litig., 926 A.2d 58 (Del. Ch. 2007).</p>	<p>40-day go shop; four business days matching rights;¹⁵³ termination fee and expense reimbursement of 3% of transaction value during go-shop and 4.6% of transaction value after go-shop.</p>	<p>Preliminary injunction motion by plaintiffs granted to correct disclosure and release third party from standstill.</p>
<p>Louisiana Mun. Police Employees' Ret. Sys. v. Crawford, 918 A.2d 1172 (Del. Ch. 2007).</p>	<p>Five business days matching rights; termination fee of more than 3% of deal value.</p>	<p>Preliminary injunction motion by plaintiffs granted to correct disclosure.</p>
<p><i>In re</i> Lear Corp. S'holder Litig., 926 A.2d 94 (Del. Ch. 2007).</p>	<p>45-day go shop; if the acquirer did not exercise its matching right it was obligated to vote its block of shares in favor of superior offer; matching rights: 10 days but if the superior proposal was in excess of \$37 per share, the acquirer had a single chance to match but if superior proposal was not in excess of \$37, the acquirer had three days to match successive bids; termination fee and expense reimbursement of 2.79% equity or 1.9% of enterprise value during go-shop and 3.52% of equity value or 2.4% enterprise value after go-shop.</p>	<p>Preliminary injunction motion by plaintiffs granted to correct disclosure.</p>

153. TOPPS Company, Inc., Current Report (Form 8-K, Exhibit 2.1), § 6.3(b)(ii) (March 6, 2007), available at <http://www.sec.gov/Archives/edgar/data/812076/000095013607001390/0000950136-07-001390.txt>.

Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).	Termination fee representing approximately 3% of equity value ¹⁵⁴ and 2% of enterprise value; three business days ¹⁵⁵ matching rights.	Reversed Court of Chancery's denial of defendant's motion for summary judgment.
<i>In re</i> 3Com S'holders Litig., Civil Action No. 5067-CC, 2009 WL 5173804 (Del. Ch. Dec. 18, 2009).	Termination fee representing over 4% of equity value; five business days ¹⁵⁶ matching rights.	Motion to expedite discovery denied.
<i>In re</i> Dollar Thrifty S'holder Litig., 14 A.3d 573 (Del. Ch. 2010).	Termination fee representing 3.5% of deal value (or 3.9% of deal value when taking into account expense reimbursement); two business days matching rights.	Preliminary injunction motion by plaintiffs denied.

154. Ryan v. Lyondell Chemical Co., C.A. No. 3176–VCN 2008 WL 2923427, at *8 (Del. Ch. July 29, 2008).

155. Lyondell Chemical Co., Current Report (Form 8-K, Exhibit 2.1), § 4.2(b)(ii) (July 17, 2007), available at <http://www.sec.gov/Archives/edgar/data/842635/000084263507000007/lyoexhibit2-1.htm>.

156. 3Com Corp., Current Report (Form 8-K, Exhibit 2.1), § 5.3(a)(i)(C) (Nov. 12, 2009), available at <http://www.sec.gov/Archives/edgar/data/738076/000095012309061809/b78042exv2w1.htm>.

<p><i>In re Cogent, Inc. S'holder Litig.</i>, 7 A.3d 487 (Del. Ch. 2010).</p>	<p>Termination fee representing 3% of equity value or 6.58% of enterprise value; five business days matching rights; top-up provision allowing “3M to purchase up to approximately 139 million shares, consisting of all of Cogent’s treasury stock and authorized but unissued stock, at the tender offer price of \$10.50 per share. 3M, at its discretion could pay for any stock purchased under this provision either in cash or with a promissory note due in one year.”</p>	<p>Preliminary injunction motion by plaintiffs denied.</p>
<p><i>In re Del Monte Foods Co. S'holders Litig.</i>, 25 A.3d 813 (Del. Ch. 2011).</p>	<p>First match: three business days; subsequent matches: two business days; 45-day go-shop; if transacting with enumerated “Excluded Party,” termination fee “representing 1.13% of total deal value and 1.5% of equity value” but if transacting with non-Excluded Party, termination fee “representing 2.26% of total deal value [and] 3% of total equity value.”</p>	<p>Preliminary injunction motion by plaintiffs granted to delay stockholder vote 20 days in an attempt to obtain a third party overbid. The Vice Chancellor found that the board likely breached its fiduciary duties as it was misled by a conflicted financial advisor. The Vice Chancellor compared the delay “to a disclosure-based injunction” and prevented the enforcement of the deal protection devices during the delay.</p>

<i>In re</i> Atheros Commc'ns, Inc., C.A. No. 6124–VCN, 2011 WL 864928 (Del. Ch. Mar. 4, 2011).	Five business days ¹⁵⁷ matching rights; termination fee representing 3.3% of “total value of the Transaction.”	Preliminary injunction motion by plaintiffs granted to correct disclosure.
<i>In re</i> Answers Corp. S'holders Litig., C.A. No. 6170–VCN, 2011 WL 1366780 (Del. Ch. Apr. 11, 2011).	Three business days ¹⁵⁸ matching rights; termination fee and expense reimbursement of 4.4% of equity value; force-the-vote provision; two voting agreements locking up approximately 27% of the vote.	Preliminary injunction motion by plaintiffs denied.
<i>In re</i> Orchid Cellmark, Inc. S'holders Litig., C.A. No. 6373–VCN, 2011 WL 1938253 (Del. Ch. May 12, 2011).	Four business days ¹⁵⁹ matching rights; termination fee of “less than 3% of the deal price”; top-up provision.	Preliminary injunction motion by plaintiffs denied.
<i>In re</i> Smurfit-Stone Container Corp., S'holder Litig., C.A. No. 6164–VCP, 2011 WL 2028076 (Del. Ch. May 20, 2011), <i>revised</i> (Del. Ch. May 24, 2011).	Three calendar days matching rights; termination fee of approximately 3.4% of equity value.	Preliminary injunction motion by plaintiffs denied.
<i>In re</i> Micromet, Inc. S'holders Litig., C.A. No. 7197–VCP, 2012 WL 681785 (Del. Ch. Feb. 29, 2010).	Four business days matching rights; termination fee of 3.4% of equity value and of enterprise value; top-up provision; poison pill.	Preliminary injunction motion by plaintiffs denied.

157. Atheros Communications, Inc., Current Report (Form 8-K, Exhibit 2.1), § 4.02(b)(iii) (Jan. 5, 2011), available at <http://www.sec.gov/Archives/edgar/data/1140486/000119312511001634/dex21.htm>.

158. Answers Corp., Current Report (Form 8-K, Exhibit 2.1), § 6.3(d)(iii) (Feb. 7 2011), available at http://www.sec.gov/Archives/edgar/data/1283073/000114036111006460/ex2_1.htm.

159. Orchid Cellmark, Inc., Current Report (Form 8-K, Exhibit 2.1), §5.2(c) (April 6 2011), available at <http://www.sec.gov/Archives/edgar/data/1107216/000119312511090300/dex21.htm>.

<p><i>In re</i> OPENLANE, Inc. S'holders Litig., C.A. No. 6849–VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011).</p>	<p>Termination fee if majority of OPENLANE shareholders did not consent to Agreement within 24 hours: 0%. Also, if the agreement was validly terminated, 0%.¹⁶⁰</p>	<p>Preliminary injunction motion by plaintiffs denied.</p>
<p><i>In re</i> Synthes, Inc. S'holder Litig., 50 A.3d 1022 (Del. Ch. 2012).</p>	<p>Force-the-vote provision; matching rights of five business days for a superior proposal and two business days for an amended superior proposal; termination fee representing “approximately 3.05% of the equity value of the [m]erger” or 2.9% of enterprise value; voting agreement locking up 37% of the stock which would be reduced to 33% of the stock upon a change in the board’s merger recommendation.</p>	<p>Motion to dismiss by defendants granted.</p>
<p><i>In re</i> Novell, Inc. S'holder Litig., C.A. No. 6032–VCN, 2013 WL 322560 (Del. Ch. Jan. 3, 2013).</p>	<p>Five business days matching rights; termination fee of 2.7% of equity value</p>	<p>Motion to dismiss by defendants granted.</p>
<p><i>In re</i> BJ’s Wholesale Club, Inc. S'holder Litig., C.A. No. 6623–VCN, 2013 WL 396202 (Del. Ch. Jan. 31, 2013).</p>	<p>“[T]ermination fee representing 3.1% of the deal value”; force-the-vote provision; matching rights of three calendar days for superior proposal and one calendar day for superior proposal revisions.¹⁶¹</p>	<p>Motion to dismiss by defendants granted.</p>

160. OPENLANE, INC., Preliminary Proxy Statement (Sch. 14A), § 8.3 (Aug. 29, 2011), available at http://www.sec.gov/Archives/edgar/data/1438302/000114420411050194/v233512_prem14a.htm

161. BJ’s Wholesale Club, Inc., Current Report (Form 8-K, Exhibit 2.1), § 6.1(b)(iii) (June 29, 2011), available at <http://www.sec.gov/Archives/edgar/data/1037461/000119312511176822/dex21.htm>.

<p><i>In re</i> BioClinica S'holder Litig., C.A. No. 8272VCG, 2013 WL 673736 (Del. Ch. Feb. 25, 2013).</p>	<p>Termination fee representing approximately 3.6% of equity value¹⁶²; matching rights of four business days for superior offers which could be extended by two business days for superior offer revisions¹⁶³; poison pill; top-up option.</p>	<p>Plaintiffs' motion to expedite denied.</p>
<p><i>In re</i> Plains Exploration & Production Co. S'holder Litig., C.A. No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013).</p>	<p>"Three percent termination fee," matching rights of four business days and two business days for revised offers.¹⁶⁴</p>	<p>Motion for a preliminary injunction denied.</p>
<p>Koehler v. NetSpend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013).</p>	<p>Termination fee "representing 3.9% of the deal value"; no-shop provision; matching rights of five business days and three business days for revised offers¹⁶⁵; don't ask, don't waive standstills (which were withdrawn after oral argument in the case), and "voting agreements . . . lock[ing] up approximately 40% of the stock . . . [that] only terminate if the Board terminates the . . . Merger Agreement."</p>	<p>Motion for preliminary injunction denied.</p>

162. *In re* BIOCLINICA, INC. S'holder Litig., BioClinica Defendants' Opposition to Plaintiffs' Motions for Expedited Proceedings, 2013 WL 663191 (Del. Ch. Feb. 20, 2013).

163. BioClinica, Inc., Current Report (Form 8-K, Exhibit 2.1), § 6.3(c)(iii) (Jan. 30, 2013) available at http://www.sec.gov/Archives/edgar/data/822418/000104746913000537/a2212643zex-2_1.htm.

164. Plains Exploration & Production Co., Current Report (Form 8-K, Exhibit 2.1), § 5.4(d) (Dec. 6, 2012), available at <http://www.sec.gov/Archives/edgar/data/891456/000119312512493974/d449913dex21.htm>.

165. NetSpend Holdings, Inc., Current Report (Form 8-K, Exhibit 2.1), § 6.3(d) (Feb. 19, 2013), available at http://www.sec.gov/Archives/edgar/data/1496623/000110465913011811/a13-5550_1ex2d1.htm.
