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## Negotiating Acquisitions of Public Companies-A Follow-Up

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## Transcript

### Negotiating Acquisitions of Public Companies—A Follow-Up<sup>1</sup>

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Panel Chair & Moderator;

George R. (Gar) Bason, Jr.,<sup>3</sup>  
Counsel for the Target Company;

Joel I. Greenberg,<sup>4</sup>  
Counsel for the Buyer; and

Lisa A. Schmidt,<sup>5</sup>  
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1. An edited transcript of a panel presentation given in New York City on September 21, 2012, as part of the 9th Annual Institute on Corporate, Securities, and Related Aspects of Mergers and Acquisitions.

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### I. INTRODUCTION

RICK CLIMAN:  
(Moderator)

Our topic this morning is negotiating acquisitions of publicly traded companies. We have on the panel Gar Bason of Davis Polk & Wardwell here in New York, and Joel Greenberg of Kaye Scholer, also here in New York. They are going to be our lead negotiators today. We also have Lisa Schmidt, a director at the Delaware law firm of Richards, Layton & Finger. My name is Rick Climan. I am a partner in the Mergers & Acquisitions Group at Weil, Gotshal & Manges in Silicon Valley, and I will be chairing and moderating this session.

Last year on this panel we addressed a number of different facets of public company acquisitions. We discussed the way we structure these deals; we discussed the

negotiation of standstill provisions; we discussed the negotiation of exclusivity agreements; and we discussed the negotiation of the definitive acquisition agreement. In our discussions relating to the definitive acquisition agreement, we focused in particular on acquisitions structured as friendly tender offers and, in that context, we examined the “mechanical” provisions of that agreement, as well as the deal protection provisions and the conditions to the buyer’s obligation to purchase the shares tendered in response to its tender offer. We also talked about strategies for addressing antitrust issues.

Thanks to the *Penn State Law Review*, we have an edited transcript of last year’s presentation,<sup>6</sup> and we’ve included it in the materials for this session. You should turn to that edited transcript now, because we’re going to be referring to it frequently today.

Instead of covering the same ground we covered last year, we’re going to use the edited transcript as a point of departure—a jumping off point. This morning we’re going to cover a number of topics that we did not have the opportunity to discuss last year, including some topics that have become particularly relevant as a result of regulatory and judicial developments over the past year. We will continue to focus on “two-step” acquisitions involving friendly tender offers,<sup>7</sup> although much of our discussion today will also apply to acquisitions structured as one-step mergers.

For a good chunk of our session today, we will revert to the format of a mock negotiation, with

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6. Richard E. Climan, George R. Bason, Frederick R. Green & Joel I. Greenberg, *Negotiating Acquisitions of Public Companies in Transactions Structured as Friendly Tender Offers*, 116 PENN ST. L. REV. 615 (2012) [hereinafter *Friendly Tender Offers*].

7. *See id.* at 620-36.

Gar Bason playing the role of the target company's outside lawyer and Joel Greenberg playing the role of the buyer's outside lawyer. Lisa Schmidt will chime in with her observations on Delaware law.

## II. CONFIDENTIALITY AGREEMENT

RICK CLIMAN:  
(Moderator)

We're going to begin this morning with one of the preliminary documents that gets negotiated early in the process of acquiring a public company—the confidentiality agreement. Last year we examined one very important provision in the confidentiality agreement, the so-called “standstill” provision. This is the provision that limits the prospective buyer's ability to go hostile on the target company for a stipulated period of time. We're not going to renegotiate that provision now; you can take a look at the edited transcript of last year's session for an illustration of how that negotiation might proceed.<sup>8</sup> Instead, we're going to assume today that the parties have already negotiated and come to agreement on the terms of the standstill; and we're going to assume in particular that they've agreed to a 15-month standstill period. So, for a period of 15 months, the prospective buyer has agreed not to commence a hostile tender offer for the acquisition of any target company shares and not to take any other similarly hostile or coercive action vis-à-vis the target company.

With the standstill provision already fully negotiated, we're going to look at some other key provisions of the confidentiality agreement. These are provisions that have

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8. *See id.* at 636-50.

been thrust into the spotlight by a couple of recent Delaware decisions, *Vulcan*<sup>9</sup> and *RAA*,<sup>10</sup> both of which have had a noticeable effect on the way confidentiality agreements are being negotiated today.

You should have in front of you [*Exhibit 1*],<sup>11</sup> which contains some excerpts from the target company's form of confidentiality agreement, as drafted by the target company's lawyer, Gar Bason. Behind that you will find [*Exhibit 2*],<sup>12</sup> which contains some excerpts from the prospective buyer's response to that confidentiality agreement, drafted by the prospective buyer's lawyer, Joel Greenberg.

Let's take a look at section 1 of the target company's form of confidentiality agreement, which is really the guts of the agreement. It contains two basic prohibitions—the “two commandments,” as we sometimes refer to them—directed at the prospective buyer. The first commandment is enshrined in section 1(a): thou shalt not *use* the target company's confidential information, except for the specific purpose indicated. The second commandment is enshrined in section 1(b) of the confidentiality agreement: thou shalt not *disclose* the target company's confidential information, except as specifically permitted in section 4 of the confidentiality agreement.

#### A. Use Restriction

RICK CLIMAN:  
(Moderator)

We're going to focus initially on the first commandment, the use restriction. Joel, let's look at [*Exhibit 2*], which lays out your

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9. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012), *aff'd*, 2012 WL 2783101 (Del. July 10, 2012).

10. *RAA Mgmt., L.L.C. v. Savage Sports Holdings, Inc.*, 45 A.3d 107 (Del. 2012).

11. *See infra* pp. 700-03 (Exhibit 1).

12. *See infra* pp. 704-06 (Exhibit 2).

requested changes to the target company's original form of confidentiality agreement. It appears you didn't particularly like the way Gar drafted the permitted use language in the use restriction.

Gar's permitted use language allows your client, the prospective buyer, to use confidential information "for the specific purpose of considering, evaluating and negotiating a possible negotiated transaction between the parties." You replaced it with something a lot broader. You replaced it with language specifying that your client can use confidential information "for the purpose of considering, pursuing and/or facilitating a possible transaction involving the Target Company or any of its stockholders, including an unsolicited or uninvited acquisition of the Target Company or any of its securities." I note that, among other things, you shortened the term "possible *negotiated* transaction" to "possible transaction"—you removed the term "negotiated"—and you replaced the word "between" with the more general word "involving." What's going on here?

JOEL GREENBERG:  
(Counsel for Buyer)

Well, I have to give Gar credit for being, in the words of former Chancellor Chandler, a "forthright negotiator." Gar's original language is very clear as to what he's getting at, which is to limit our use of confidential information to a *negotiated* transaction between the parties. That may sound reasonable, but remember we've just negotiated a 15-month standstill, and the use restriction is for a longer period. As far as I'm concerned, the standstill period is the agreed deal as to when my client is precluded from going hostile on the target company. I don't want language anywhere else in the confidentiality agreement that basically says,

“now that we have all this confidential information, we can’t use it in connection with a proxy contest, a hostile tender offer or any other approach we might need or decide to take after the 15-month standstill period is over.” For 15 months we are barred from going hostile, and that’s the deal. Afterwards, we should be free to do whatever we choose to do.

GAR BASON:  
(Counsel for Target)

Look, I respect that view, but it seems anomalous to me. As a business matter, my client, the target company, thinks that while its confidential information can be used for a friendly deal, it shouldn’t be used for a hostile deal. We understand that at the end of 15 months you’ll have the ability to do anything you like. We just don’t think that you should use our confidential information to do that. This isn’t just an emotional thing. The fact is that your client’s use of my client’s confidential information gives your client an edge over anyone else in the market. It’s an advantage that we don’t think is appropriate or fair.

JOEL GREENBERG:  
(Counsel for Buyer)

Two points. Remember, this edge over anyone else is going to be based on information that is, by definition, at least 15 months old. It’s not as if my client will have *current* confidential information. But more important, there is a total lack of certainty on my client’s part as to whether we can do a transaction without your client alleging that we are “using confidential information.”

Our senior management team is not schizophrenic. They can’t divide their brains into two parts and say this part has the confidential information and it’s this other part that’s deciding to go hostile. And remember the way we’ve defined “confidential information.” It includes derivatives of the



stuff you give my client. It's not just the piece of paper that has a budget, for example; it's also the analysis my client makes from that budget. If your client decides to litigate, it's going to be very difficult for my client to take the position that my client has not "used confidential information" in deciding to go hostile.

GAR BASON:  
(Counsel for Target)

Joel, it's not that complicated to put together a "clean team." Your client could have both a clean team and—I won't call it a "dirty team"—another team; and the other team is the one that can look at my client's confidential data. That data would be walled off, so that members of the clean team would not have access to it, and only the clean team members would be permitted to get involved in the decision as to whether your client will go hostile on my client. If you want to talk with us about whether folks who are not on the clean team can report on some high-level basis to clean team members about their findings, we may be able to accommodate that. But I just don't think it's appropriate for your client to use my client's confidential data to launch a hostile bid for my client.

RICK CLIMAN:  
(Moderator)

Joel, we see clean teams used frequently in due diligence investigations. What's wrong with Gar's proposal? Why not identify the team that would make the decisions regarding any hostile approach your client might want to make, and have that team walled off from the team that receives and reviews the target company's confidential information?

JOEL GREENBERG:  
(Counsel for Buyer)

Clean teams work just fine for certain kinds of information, and if we were talking about walling off technical specifications of products or detailed customer-by-customer analyses of costs and revenues, that would probably be

acceptable. But what we can't do is wall off my client's board of directors and senior management from being able to have in mind, for example, the synergy estimates developed in the context of my client's due diligence investigation. When my client's board members make their decision to go hostile on the target company, they're going to know that a year and a half ago we concluded we could save a billion dollars a year by combining these two businesses. You can't erase that. It's quite relevant to deal pricing, and that kind of high-level strategic information is very hard to wall off because inevitably the decision makers who need to consider it, at least in a deal this substantial to my client, are top-level people who can't be replicated on two separate teams.

RICK CLIMAN:  
(Moderator)

Joel, can you walk us through your suggested permitted use language? You did a lot more here than just eliminate the word "negotiated." You actually added words like "facilitating," as in "facilitating a possible transaction." I suspect that might tie into things like proxy contests and other hostile tactics that aren't necessarily "transactions" *per se*.

JOEL GREENBERG:  
(Counsel for Buyer)

That's right, Rick. It's always important when drafting contractual language to take into account the experience of others, in this case what happened with Martin Marietta in the *Vulcan* litigation earlier this year. And some of the arguments that were made there—some successful, some ultimately not decided—included such things as the word "between" implying that it is an entity-to-entity transaction and not a transaction involving a direct approach to stockholders.<sup>13</sup> Similarly, words like "negotiating" and "implementing" may not cover a preparatory action we need to

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13. See *Vulcan Materials Co.*, 56 A.3d at 1106.

take, such as a proxy contest to replace the target company's board members so that we can get the new board to pull the target company's poison pill. That proxy contest *facilitates* an ultimate deal, but it may very well not be a "transaction" that's part of the ultimate deal. So, what we have tried to do here, as Gar did in his language, is be candid and forthright about what we're seeking to achieve. We want to be able to do things to pursue and facilitate a transaction even if these things are preparatory in nature and don't themselves constitute a "transaction."

Along the same lines, we don't want to have a notion that the transaction has to be *between* two entities. A hostile tender offer isn't a transaction "between" the buyer and the target company. That's why we said *involving* the target company *or any of its stockholders*. And then, again to avoid any doubt—because quite honestly it's not my objective in negotiating these things to drive business to my litigation department—we said quite specifically that we can proceed on an *unsolicited* or *uninvited* basis.

RICK CLIMAN:  
(Moderator)

Joel, the *Vulcan* case isn't the first case to point out some of these key wording distinctions in the verbiage of confidentiality agreements. Wasn't there a previous Canadian case that addressed these issues?

JOEL GREENBERG:  
(Counsel for Buyer)

Yes, there was a Canadian case that addressed these issues. The court in that case basically took the use restriction and turned it into an injunction against a hostile takeover.<sup>14</sup> The *Vulcan* decision has received a lot more attention than the Canadian case for a couple of reasons. First, because Delaware is such a key

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14. See *Friendly Tender Offers*, *supra* note 6, at 642 n.45.

forum for these types of disputes and, second, because the *Vulcan* case was litigated very thoroughly. It's hard to imagine any arguments that weren't made by the parties in that case. The Chancery Court's opinion is a wonderful analysis, provision by provision, of things people do in confidentiality agreements. What we're seeing in the market now are people responding to that. If the word "between" can be argued to connote "negotiated," which was certainly an argument that Chancellor Strine found to be valid on the facts of the *Vulcan* case,<sup>15</sup> then, if you want to be able to go hostile, you don't use the word "between." You use the word "involving."

RICK CLIMAN:  
(Moderator)

Gar, in our hypothetical negotiation, the parties have agreed to an explicit 15-month standstill. And as Joel pointed out, the narrow use restriction that you put forward could operate as a back-door standstill even *after* the expiration of the negotiated 15-month period. That's because, as a practical matter, it's very hard for Joel's client to go hostile in month 16 without using at least some of the confidential information that your client provided to Joel's client in due diligence. In an actual negotiation, would you agree to the expanded permitted use language [in *Exhibit 2*] that Joel has proposed to address this issue?

GAR BASON:  
(Counsel for Target)

Yes, I would. If the deal is 15 months for the term of the standstill, my client shouldn't be looking for semi-sneaky back-door ways of extending it.

In some senses, this is partly an emotional issue. Saying that, I don't mean to downplay it. But in the early phases of the negotiations, when you are having discussions CEO-to-CEO

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15. See *Vulcan Materials Co.*, 56 A.3d at 1115.

about a friendly deal, to have the buyer's lawyer send over a confidentiality agreement containing an explicit acknowledgement that after 15 months the buyer might decide to do this unilaterally and go hostile, that can really trigger a negative emotional reaction on the part of the target company's CEO. But if the target company's counsel is thoughtful about the issue, it's not one he will fight hard on.

JOEL GREENBERG:  
(Counsel for Buyer)

One way this is resolved in the marketplace is to simply make the time periods coterminous, so that the use restriction and the standstill provision run for the same period of time. Then, I don't need to fuss about the permitted use language because the use restriction terminates when the standstill terminates.

### ***B. Disclosure Restriction***

RICK CLIMAN:  
(Moderator)

Now, let's take a look at the "second commandment," which appears in section 1(b) of the confidentiality agreement. It's the *disclosure* restriction. It says that the prospective buyer may not disclose any of the target company's confidential information, except as permitted in section 4.

I turn the page to section 4, Gar, and there I see that in section 4(a)(iii) you're permitting the prospective buyer to disclose your client's confidential information "to the extent required by applicable law or governmental regulation or by valid legal process." That seems fair. If the prospective buyer is legally required to do something, it should not be precluded by this confidentiality agreement from doing it. But in the very next sentence you've added some verbiage that I haven't seen in negotiated confidentiality agreements before *Vulcan*. This sentence seems to say that, under certain circumstances, even after the 15-month

standstill period expires, the buyer may *not* make use of the “required by law” exemption in clause (iii)(A). And one circumstance under which the prospective buyer is prohibited from using this “required by law” exemption is where the prospective buyer decides to make a hostile tender offer or to accumulate target company shares. Yet, as we’ve just confirmed in the context of discussing the use restriction, beginning in month 16 the prospective buyer should be free to do just about anything of a hostile or coercive nature. So please explain what this additional sentence is intended to do and why it’s here.

GAR BASON:  
(Counsel for Target)

Well, I admire Joel’s style because, uneducated as I may have been, I had always thought that provisions like section 4(a)(iii) were intended to address the prospective buyer’s need to be able to respond to a subpoena. But after reading the lower court’s decision in *Vulcan*, I realize that a prospective buyer could argue that this provision goes further than that. The prospective buyer could argue that this provision comes into play when the prospective buyer unilaterally makes a decision, after the expiration of the 15-month standstill period, to go out and buy target company shares. The prospective buyer could reason as follows: “Well, of course, under the U.S. securities laws, I must either (1) disclose all material nonpublic information I have about the target company before I purchase target company shares, or (2) abstain from purchasing those shares. And because I want to purchase target company shares, I am ‘required by law’—by U.S. securities laws—to disclose all material confidential information in my possession. Section 4(a)(iii)(A) permits me to do just that.”

Now it’s not at all clear to me that the

prospective buyer's argument that this disclosure is "required by law" would stand up. In fact, there is authority suggesting that disclosure in this context is *not* "required by law."<sup>16</sup> But I'm not inclined to take any chances, especially in light of the *Vulcan* opinion, and that's why I put this sentence in here at the end of section 4(a). I want to make it clear that Joel's client can't decide to go hostile and then use this "required by law" exemption to publish my client's sensitive information.

RICK CLIMAN:  
(Moderator)

Joel, you've crossed out [in *Exhibit 2*] this sentence at the end of section 4(a), so I assume you want to retain the flexibility to do just that—to make any disclosure of confidential information legally required to enable your client to proceed with a tender offer. In fact, in your mark-up [in *Exhibit 2*], you even added language, in parentheses at the end of clause (a)(iii), to make it crystal clear that you can do this.

JOEL GREENBERG:  
(Counsel for Buyer)

Correct. I made it clear that my client can disclose confidential information "as required by law," even if the law becomes applicable only as a result of a specific decision on the part of my client, such as the decision to go hostile.

RICK CLIMAN:  
(Moderator)

Gar, you might use the term "bootstrapping" to describe what Joel is seeking to do.

GAR BASON:  
(Counsel for Target)

That word does, in fact, capture the notion. What Joel is seeking to be able to do reminds

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16. Chancellor Strine expressly declined to reach this issue in *Vulcan Materials Co.* See *id.* at 1135 n.241. *Vulcan* had argued that Martin Marietta could not "manufacture its own legal requirement" and then use that requirement to permit disclosure of information that was otherwise required to be kept confidential (citing, *inter alia*, ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 76.11; *Peckham v. Indus. Sec. Co.*, 113 A. 99 (Del. 1921)). See *Vulcan Materials Company's Post-Trial Brief* at 55-56, *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072 (2012) (No. 7102-CS).

me of the child who murders his parents and pleads for sympathy from the court because he's an orphan. It's a classic bootstrap.

RICK CLIMAN: Joel . . .  
(Moderator)

JOEL GREENBERG: Interestingly, this is one issue that Chancellor Strine avoided in *Vulcan*. The Chancellor declined to decide whether voluntary conduct that triggered a disclosure requirement was covered, because he got to his decision in a different way.<sup>17</sup> But this issue goes back to this basic business premise: there's no legal way we can do a hostile offer without disclosing at least some matters that are protected by the confidentiality agreement; therefore, the confidentiality agreement must permit that disclosure after the standstill period has expired. Take an obvious example: the prior negotiations between the parties regarding a possible friendly acquisition of the target company by my client. The SEC's regulations require my client to write a "background" section in its tender offer document that discloses these negotiations.

RICK CLIMAN: Your point, Joel, is that those prior negotiations constitute confidential information under the confidentiality agreement, but the SEC's tender offer regulations might require disclosure of these negotiations if your client decides to make a hostile tender offer in month 16.

GAR BASON: But I think that's okay. We'll agree to that disclosure. Disclosing past negotiations won't be troubling to my client.

JOEL GREENBERG: But there might be other things that fall into that category as well. If, for example, my

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17. See *Vulcan Materials Co.*, 56 A.3d at 1113.



client has worked out synergy numbers based on confidential information, I don't see how my client can go out into the market with a tender offer without disclosing those numbers. Are you going to be okay with that too?

Bootstrapping may seem to be a bad thing to do, and it's certainly the prejudicial term a good advocate would use. However, if we go back to the basic business premise that, after the 15-month standstill period, my client is supposed to be able to unilaterally launch a hostile tender offer, then my client needs to be able to do the things that go along with that. If we wanted to develop a more refined approach, I would say that you can probably make some distinction in the confidentiality agreement between types of confidential information that, if disclosed, would be really harmful and those that would not. If Gar is representing the Coca Cola Company as the target of an acquisition, I do not want or need the right to put the secret formula for Coke Classic in my tender offer documents.

GAR BASON:  
(Counsel for Target)

Right. That's not the same thing as disclosing past acquisition negotiations. There is often an argument made that the prospective buyer needs to let the target company's confidential information go stale before initiating a hostile bid. Most targets would not like to see their raw confidential information disclosed if it's still market sensitive. But I agree that disclosing past negotiations should not be controversial. And we would think of a way to address the synergies point. But this is what pushes people towards the solution that Joel articulated before, which is simultaneous termination of the standstill provision and other restrictions in the confidentiality agreement.

JOEL GREENBERG: Yes. And clearly, if Gar's client had disclosed the secret Coke Classic formula somewhere in the course of my client's due diligence investigation, that would be excepted from the termination of the disclosure restriction.

(Counsel for Buyer)

GAR BASON: Right.

(Counsel for Target)

RICK CLIMAN: Joel, you wouldn't have seen language like the language Gar included at the end of section 4(a) three years ago in an M&A-related confidentiality agreement, would you? Isn't this something that target companies are only now starting to address in the wake of the *Vulcan* decision?

(Moderator)

JOEL GREENBERG: That's right. Perhaps target companies should have included this type of language in the past. But, given that the "bootstrap" issue was argued in *Vulcan* and Chancellor Strine specifically declined to decide that issue,<sup>18</sup> the *Vulcan* case invites the parties to do some private ordering here.

(Counsel for Buyer)

GAR BASON: And that "bootstrap" issue has been lurking out there for a while.

(Counsel for Target)

RICK CLIMAN: Have you in fact seen an increase in the frequency with which parties have specifically addressed this particular issue since the *Vulcan* decision, Gar?

(Moderator)

GAR BASON: I'd say yes, certainly.

(Counsel for Target)

JOEL GREENBERG: I'd say yes too. And I'd also say that a related issue the parties are addressing a lot more carefully now since *Vulcan* is what it means for an action to be "required by law." Chancellor

(Counsel for Buyer)

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18. See *id.*

Strine went through a detailed analysis distinguishing between general legal requirements, on one hand, and what he called “external demands,” like subpoenas, on the other.<sup>19</sup>

And the so-called notice and vetting provisions that you often find in confidentiality agreements—the provisions that require the prospective buyer to give advance notice to the target company before making certain legally compelled disclosures of the target company’s confidential information—also did not get as much attention as they should have before *Vulcan*. It’s a kind of interesting exercise to have to go through if you’re trying to go hostile, to say that the first thing you need to do is call the target company and say: “I’m about to launch a hostile bid. Here’s my tender offer document, and I’ve circled the stuff that is covered by the confidentiality agreement and is required by law to be disclosed.”

GAR BASON:  
(Counsel for Target)

Right, but I think the better reading of confidentiality agreements before *Vulcan* on what we’ve been calling the “bootstrap” issue was that disclosures of confidential information in a tender offer were not “required by law” and so were prohibited by the confidentiality agreement.

JOEL GREENBERG:  
(Counsel for Buyer)

I agree. But after reading Chancellor Strine’s opinion in *Vulcan*, I’m no longer convinced that’s the better reading. There’s almost no argument that’s too much of a reach to make when you have a case litigated like this.

GAR BASON:  
(Counsel for Target)

But again, it does push you toward making the standstill provision and the use and disclosure restrictions coterminous, if for no other reason

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19. *See id.* at 1124-36.

than because the dialogue back and forth between CEOs is excruciating when you say: “Well, you know, we need to map out for you exactly how we do a hostile deal 15 months from now.”

### C. Standstill Provision

RICK CLIMAN:  
(Moderator)

We’ve been talking about how each of the “two commandments”—the use restriction and the disclosure restriction—can operate as a back-door standstill. Let’s turn our attention to the express standstill provision itself. The target company’s draft of the standstill provision appears in section 7 [in *Exhibit I*].<sup>20</sup> Again, we negotiated the standstill provision at our session last year, and we’re not going to repeat that negotiation this year.

Lisa, let me address a question to you as the panel’s Delaware law expert. Let’s assume that the board of directors of Gar’s client, the target company, has decided to sell the target company for cash and is seeking preliminary bids from multiple potential bidders. Before being allowed to conduct due diligence, each potential bidder is asked by the target company to sign a confidentiality agreement containing a protective standstill provision. The target company’s board is, of course, in “*Revlon*” mode<sup>21</sup>—its duty is to run the sale process in a manner reasonably designed to obtain the best risk-adjusted price reasonably attainable for stockholders.<sup>22</sup> Suppose an important potential bidder refuses to agree to a standstill provision, and the target company’s board decides to exclude that potential bidder from the due

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20. See *infra* pp. 700-03 (Exhibit 1).

21. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

22. See *id.* at 182.

diligence process. Is that decision defensible? I recognize that Delaware courts are reluctant to establish bright-line rules and that every case is fact-specific. But as a general matter, are Delaware judges inclined to uphold decisions to exclude potential bidders who balk at standstill restrictions?

LISA SCHMIDT:  
(Delaware Counsel)

As you say, it's all very case specific and depends on the specific facts. But the answer is, generally, yes—courts will support that sort of decision.<sup>23</sup>

JOEL GREENBERG:  
(Counsel for Buyer)

Particularly for a company that's conducting an auction process, it's very credible to argue that the only way to really extract the best bid from each of your bidders is for them to understand that there is no second round. The bidders need to understand that, if they lose in the first round and you sign a deal with somebody else, they've contractually given up the right to come back. And that to me, as a matter of auction theory, is a very credible, value-maximizing strategy.

RICK CLIMAN:  
(Moderator)

Let's look a little more closely at the wording of the standstill provision. Clauses (a) through (g) prohibit the prospective buyer from doing various things. For example, during the standstill period, the prospective buyer can't commence a hostile tender offer for shares of the target company, can't do a public or private "bear hug," can't accumulate target shares in the open market, and can't make uninvited proposals to acquire the target company. On top of that, clause (h) specifies that the

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23. See *Alliance Gaming Corp. v. Bally Gaming Int'l, Inc.*, No. 14440, 1995 WL 523543, at \*2 (Del. Ch. Aug. 11, 1995) (upholding a board's decision to decline to provide confidential information to a bidder that refused to sign a standard confidentiality and standstill agreement); *In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 784 (Del. Ch. 1988) (finding that a board's insistence upon a particular form of standstill agreement did not unfairly favor one bidder over another).

prospective buyer can't even request or propose that the target company amend or waive any of the standstill restrictions.

Lisa, the Delaware Court of Chancery has recently focused on the way that clause, which prohibits a mere request for a waiver, interacts with the non-solicitation and related provisions in the definitive acquisition agreement.<sup>24</sup> What are the court's concerns?

LISA SCHMIDT:  
(Delaware Counsel)

This clause can become a problem if the target company has entered into a definitive acquisition with a buyer, and another bidder seeks to make a "topping" bid. If that other bidder has signed a confidentiality agreement with the target company containing a standstill provision that includes a clause similar to clause (h), and if that standstill provision did not "fall away" upon the signing of the definitive acquisition agreement between the target company and the original buyer<sup>25</sup> (and accordingly remains in effect), then that other bidder is contractually precluded from communicating its interest in submitting a topping bid to the target company. At the same time, the definitive acquisition agreement with the original buyer will invariably contain a non-solicitation provision preventing the target company from reaching out to the potential bidder to find out about its interest in bidding, and may also contain a provision requiring the target company to enforce, and not waive, any standstill restrictions binding upon parties such as the potential bidder. These provisions can operate collectively to prevent the potential bidder from coming back to the table during the standstill period. We refer to this as a "don't-ask-don't-waive" scenario.

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24. See *Friendly Tender Offers*, *supra* note 6, apps. J & K, at 725-28.

25. For a description of "fall-away" provisions, see *id.* at 645-47.

At least two Delaware judges have commented negatively on this. In *Celera*,<sup>26</sup> Vice Chancellor Parsons suggested that, while he wasn't making a definitive statement on the validity of "don't-ask-don't-waive" provisions, he was concerned that they could lead to "willful blindness" on the part of the target company's board.<sup>27</sup> In *RehabCare*,<sup>28</sup> Vice Chancellor Laster was more direct in his comments. He said, "When is that ever going to hold up if it's actually litigated, particularly after *Topps*? It's just one of those things that optically looks bad when you're reviewing the deal facts."<sup>29</sup>

GAR BASON:  
(Counsel for Target)

I've always wondered what would really happen if a potential bidder who was subject to a standstill just went out to the target's stockholders and offered them ten dollars a share more than the price on the table, in flagrant violation of the standstill restrictions. I have a tough time seeing Vice Chancellor Laster or Chancellor Strine saying to that potential bidder: "Oh no. You've violated your standstill. Put that offer back in your pocket."

RICK CLIMAN:  
(Moderator)

Yes, the topping bidder might be inclined to ask, "What damages has the target company or

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26. *In re Celera Corp. S'holder Litig.*, No. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 2012 WL 6707736 (Del. Dec. 27, 2012).

27. *In re Celera Corp.*, 2012 WL 1020471, at \*21-22.

28. Transcript of Record, *In re RehabCare Group, Inc. S'holders Litig.*, C.A. No. 6197-VCL (Del. Ch. Sept. 8, 2011).

29. *Id.* at 46; *see also* Transcript of Record at 14-15, *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (granting preliminary injunction and finding that "a Don't Ask, Don't Waive Standstill is impermissible because it has the same disabling effect as the no-talk clause, although on a bidder-specific basis"); *cf.* Transcript of Record, *In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS, at 67-90, (Del. Ch. Dec. 17, 2012) (requiring the board to make additional disclosures regarding a don't-ask-don't-waive provision and noting that Delaware has no *per se* rule against such provisions and that, if used properly, such provisions can be a useful tool in obtaining a highest and best offer).

any of its stockholders suffered as a result of my breach of the standstill?”

GAR BASON:  
(Counsel for Target)

That’s right.

RICK CLIMAN:  
(Moderator)

But Joel, you pointed out in our session last year—it’s in the edited transcript—that there certainly are situations where an overt breach of a standstill can conceivably result in significant damages. I believe you cited the *Ventas* litigation in Canada.<sup>30</sup>

JOEL GREENBERG:  
(Counsel for Buyer)

That’s right. Interestingly, while the standstill litigation was in Canada, the damages action was in the United States.<sup>31</sup>

GAR BASON:  
(Counsel for Target)

It’s just such an ugly argument for the original buyer to say, “I had the right to buy this target company at a price lower than the topping bidder’s price.”

JOEL GREENBERG:  
(Counsel for Buyer)

I agree that, in the specific fact pattern of a higher bid sitting out there, it’s kind of difficult to argue that the higher price shouldn’t be offered to the target company’s stockholders, even though it may violate a standstill agreement. On the other hand, in his *Vulcan* decision, Chancellor Strine goes on at some length about the overall corporate market interest in encouraging companies to be willing to engage in preliminary discussions by protecting them against unwanted consequences that flow from it.<sup>32</sup> If you follow his lead and look at this as a systemic matter, you have to ask: Is the target company really going to get the bidder’s best bid in the first process?

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30. See *Friendly Tender Offers*, *supra* note 6, at 648-49.

31. See *id.* at 649 n.48.

32. See *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1136-38 (Del. Ch. 2012), *aff’d*, 2012 WL 2783101 (Del. July 10, 2012).



GAR BASON:  
(Counsel for Target)

I agree. I think the standstill in a confidentiality agreement is very much collateral to the rules of the road that you set out in an acquisition agreement. Clearly, the buyer that enters into a definitive acquisition agreement with the target company ought to expect that a court will enforce the no-shop and no-talk provisions in that agreement. But if I am that buyer, I have difficulty articulating that a standstill restriction in a confidentiality agreement between the target company and *another bidder* was really something I relied on to preclude that other bidder from making a topping bid.

JOEL GREENBERG:  
(Counsel for Buyer)

But would you say that even if, as the original buyer, you negotiated for a specific provision in the definitive acquisition agreement requiring the target not to waive, and in fact to actively enforce, its rights under standstill agreements with other bidders?

RICK CLIMAN:  
(Moderator)

That sort of provision is not uncommon in acquisition agreements, as you know.<sup>33</sup>

GAR BASON:  
(Counsel for Target)

I think that sort of provision makes the buyer's position stronger. But I still think it looks like opportunism on the part of the buyer.

RICK CLIMAN:  
(Moderator)

So, the standstill provision presents a fascinating series of issues that are continuing to play out, both at the negotiating table and in the courts. Stay tuned on this; there are bound to be additional developments.

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33. See *Friendly Tender Offers*, *supra* note 6, app. J, at 726 (clause (d)).

***D. Liability Disclaimer/Non-Reliance Provision***

RICK CLIMAN:  
(Moderator)

Now let's turn to section 3 of the confidentiality agreement, which appears [in *Exhibit I*].<sup>34</sup> It's long, so I won't read it word for word. It's basically what we might call a "non-reliance" provision as part of a liability disclaimer for the benefit of the target company. This provision has the prospective buyer acknowledging that the prospective buyer is not relying on any representation or warranty as to the accuracy or completeness of the confidential information that's being supplied on behalf of the target company in the due diligence context. The provision goes on to say that the target company will have no liability for any inaccuracies in that information.

The actual wording of this provision varies from agreement to agreement, but you see this sort of provision included frequently in M&A-related confidentiality agreements. Some might consider it—and I hesitate to use this word—"boilerplate."

I can understand why the target company would want this type of provision in its confidentiality agreements. After all, the process of collecting and providing due diligence information is not an exact science, and there are bound to be errors; and, if the parties do ultimately decide to do a deal, the buyer will have the opportunity to negotiate appropriate, legally binding representations and warranties in the definitive acquisition agreement to protect its interests.

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34. See *infra* pp. 700-01.

Joel, as the lawyer for the prospective buyer, would you be willing to accept the language in section 3?

JOEL GREENBERG:  
(Counsel for Buyer)

Not necessarily. I agree with the basic premise that due diligence is a fluid process; it's an imprecise process, and I think as a buyer I would find it very hard to argue for a position that the target company has liability for innocent mistakes it makes along the way. I do think, though, that you can make a distinction for *fraudulent* behavior, which involves concepts of willfulness and intent to deceive. And if you look at my mark-up of the confidentiality agreement [in *Exhibit 2*],<sup>35</sup> you'll see that I've added a fraud carve-out at the end of section 3.

RICK CLIMAN:  
(Moderator)

Joel, do you really need that carve-out? As a legal matter, can the contractual language that the target company proposed in section 3 actually operate to eliminate the target company's liability for its own outright fraud? Aren't there law school professors who've taught us that fraud trumps everything, and that you can't, in a contract, avoid or release liability for future fraud?

JOEL GREENBERG:  
(Counsel for Buyer)

You might think so, in which case I would argue that, while the carve-out I added may be unnecessary, it's also harmless because it just states the law. That is not the way, though, the case law is coming out. If you take a look at the Delaware Supreme Court's recent decision in *RAA*,<sup>36</sup> you'll see that the court held that a disclaimer very much like the one here was sufficient to neutralize a fraud claim by the prospective buyer.<sup>37</sup>

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35. See *infra* pp. 703-06.

36. *RAA Mgmt., L.L.C. v. Savage Sports Holdings, Inc.*, 45 A.3d 107 (Del. 2012).

37. See *id.* at 113.

The court basically said that sophisticated parties are free to set the rules of the road for how they are going to conduct the due diligence exercise. On that basis, the court upheld a Superior Court decision rejecting a damage claim by a prospective buyer that claimed it had been defrauded. The prospective buyer had asked several times about significant contingent liabilities of the target company, and claimed that the target company willfully concealed at least three such contingent liabilities. The prospective buyer claimed it spent substantial sums on its due diligence investigation, which came to naught once the buyer learned about the concealed contingent liabilities and thereafter ceased its efforts to buy the target company.

RICK CLIMAN:  
(Moderator)

So, Gar, what about that? Are you going to accept Joel's fraud carve-out? The *RAA* case seems to say that the language in section 3 gives your client a license to deliberately lie in due diligence. Would you agree that, if Joel could prove that your client deliberately lied, and that Joel's client spent a lot of extra money doing due diligence in reliance on your client's deliberate lies, Joel's client should at least be able to recover its due diligence costs from your client?

GAR BASON:  
(Counsel for Target)

No. This is a classic example of what people call "putting the bunny in the hat" because one litigator's innocent mistake is another litigator's fraud. The second thing I would say in a situation like this is that the amount of potential damages associated with a due diligence exercise is probably going to be very small relative to the size of the deal. And, as much as I understand the theoretical argument that my client might be defrauding someone willfully, my response to Joel will be very simple: "We understand your position. But if

you insist on a fraud carve-out, we just won't include your client in the auction."

RICK CLIMAN:  
(Moderator)

The result in *RAA* wasn't particularly surprising to those of us who were familiar with the Delaware case law in this area. We already knew about the effect of non-reliance clauses under Delaware law—how a non-reliance clause can actually limit a prospective buyer's fraud remedies. Nonetheless, I think this decision did come as a surprise to certain practitioners and their clients. I think it served as something of a wake-up call for buyers and, in some cases, has changed the way they negotiate disclaimer provisions in confidentiality agreements. Recently, I have seen some buyers insisting on fraud carve-outs along the lines of what Joel has proposed here.

Let me ask you out of character, Joel: Would you actually insist on a fraud carve-out when representing a prospective buyer in a real deal? I'm not sure I would. . . .

JOEL GREENBERG:  
(Counsel for Buyer)

Normally not, for two reasons. First, if I were that concerned about being defrauded by the target, I would be saying to my client: "These aren't people we should be talking to, period." But second, I think there is a very strong policy and practice in favor of saying, look, if these preliminary discussions don't work out, and we don't reach a deal, let's just go home, go about our business, and not spend the next two years arguing about the expenses. And I would note this could cut both ways. I would not want, as a potential buyer, to have to defend a claim that I misled the target by telling the target we could finance this acquisition, when in fact we didn't have a hope or a prayer of doing it. Again, one party's optimistic approach to life can turn into somebody else's fraud claim, and I think both parties are probably better served

by simply saying that if the deal doesn't happen, let's just go home and do other things.

RICK CLIMAN:  
(Moderator)

But I take it you concur that you are seeing a few more buyers out there actually seizing on *RAA* and saying: "We're not going to give the target company a license to lie."

JOEL GREENBERG:  
(Counsel for Buyer)

Absolutely. And that's an argument which has a visceral appeal to it when articulated to a client. It's only when you step back and analyze its implications that you realize maybe this isn't the place you want to go.

RICK CLIMAN:  
(Moderator)

Right. But to be clear, Joel, if you were talking about a non-reliance clause in the *definitive acquisition agreement* itself, rather than in a confidentiality agreement, I assume your view might be a little different. As the buyer's lawyer, you might actually object to including that non-reliance clause in the definitive agreement, right?

JOEL GREENBERG:  
(Counsel for Buyer)

Yes, that might be the case because there the buyer has in fact made a material commitment. The buyer has agreed to buy the target company, and, while it's nice to say the buyer should only rely on express reps and warranties contained in the definitive agreement, anybody who's been through a due diligence process knows that really isn't the buyer's true mindset. There are things you rely on that never get encapsulated in the reps and warranties. And I have more sympathy for a buyer saying in that case, "If I'm actively defrauded, I should have a remedy."

RICK CLIMAN:  
(Moderator)

You may recall that we negotiated this point in our session a year ago. That negotiation is included in the edited transcript.<sup>38</sup>

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38. See *Friendly Tender Offers*, *supra* note 6, at 677-82.

### III. DEAL STRUCTURE: RULE 14E-5 AND THE “DUAL TRACK” APPROACH

RICK CLIMAN:  
(Moderator)

Let's turn briefly to the topic of deal structure. Last year, we described two alternative ways of structuring an acquisition of a publicly traded company: first, by means of a one-step merger; and second, by means of a two-step structure involving a friendly tender offer on the front end.<sup>39</sup>

We noted that the two-step structure is the structure that generally allows the deal to be completed more quickly, and, therefore, as a general matter (but with several exceptions), it is the structure that tends to be favored by both parties. Buyers like speed because it truncates the period in which their deals are vulnerable to jumping bids. And target companies like speed too because it shortens the period in which something can go wrong, such as a material adverse change giving the buyer a walk right. Also, even in this low interest rate environment, target stockholders presumably like to get their money sooner rather than later in light of the time value of money.

We mentioned last year that the speedy two-step structure involving a front-end tender offer presents particular challenges for private equity buyers and other buyers seeking to use debt financing to finance the purchase price for their acquisitions.<sup>40</sup> We also mentioned that some private equity buyers have attempted to get the best of both worlds by taking a so-called “dual track” approach—by simultaneously doing a friendly tender offer and also doing the SEC paperwork for a one-step merger, and waiting to see which track gets them to the finish line

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39. *See id.* at 620-36.

40. *See id.* at 629-31.

first. We pointed out the Burger King deal and the Gymboree deal as two examples of this dual track approach.<sup>41</sup> And, finally, we mentioned that the SEC staff was expressing some potential concerns about the dual track approach in light of SEC Rule 14e-5.<sup>42</sup> Joel, maybe you can bring us up to speed on where the SEC stands on this issue.

JOEL GREENBERG:  
(Counsel for Buyer)

Sure. As indicated in footnote 36 of the edited transcript of last year's session, about a year ago there was a law firm client alert attributing to the SEC Staff the view that filing *preliminary* proxy material for the alternative one-step merger track while the buyer's tender offer was still open would be a violation of Rule 14e-5, which is the SEC rule that prohibits purchasing or arranging to purchase securities outside a tender offer while the tender offer is open.

That struck me as an odd conclusion, but I didn't have a chance to test it until a couple of weeks ago when I and some other members of the M&A Committee of the ABA's Business Law Section and I had a meeting with the Staff of the SEC's Office of Mergers & Acquisitions. I asked the Staff about the logic of the position described in the client alert, and the Chief of the Office of Mergers & Acquisitions told us that she had been misquoted in the client alert and that the client alert doesn't accurately reflect the Office's position.

The Office's position is that it would be a violation of Rule 14e-5 to *commence* the proxy solicitation—to file *definitive* proxy materials

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41. See *id.* at 631-32.

42. See *id.* at 632 n.36.



and to mail proxy soliciting materials—while the tender offer is still open. So I left the meeting comfortable that, if I were trying to structure a leveraged acquisition and had a transaction in which the target company had enough negotiating leverage to extract a dual track approach from the buyer, we could probably implement it. We could file our *preliminary* materials while the tender offer was proceeding, and there was no suggestion from the SEC Staff that they would view that as improper.

RICK CLIMAN:  
(Moderator)

Let's follow up on that point. Gar, are you finding that dual track structures are still being used? And if they're not used in every private equity deal, why not?

GAR BASON:  
(Counsel for Target)

I don't see them used in every private equity deal. I think it's an unwieldy structure. My recollection is that the Burger King structure was driven by people who were concerned with tax laws possibly changing on December 31. It's a lot of extra work because you're virtually doubling expense and effort. I don't see too many people eager to do that, absent some compelling rationale.

JOEL GREENBERG:  
(Counsel for Buyer)

It's a lot of work, and not just for the lawyers and others drafting the documents. Think of the financing structure the buyer needs to put in place. The buyer has to have financing that's ready to be drawn down when the tender offer closes 20 business days after launch, assuming satisfaction of the minimum condition, which is very high in these deals because it needs to work into a short-form merger.

RICK CLIMAN:  
(Moderator)

Right. If fewer than 90 percent of the target company's outstanding shares are tendered, then the buyer would have to exercise its top-

up option<sup>43</sup> to get its ownership percentage to 90 percent—the short-form merger threshold—so as to ensure that the back end can be completed at substantially the same time as the front end. But if only, say, 51 percent of the target's outstanding shares are tendered, the target may not have a sufficient number of authorized but unissued shares to enable the buyer to get to that 90 percent level. The minimum condition percentage would have to be set at a level high enough to ensure that, if the minimum condition is satisfied, the target company can issue enough shares under the top-up option to bring the buyer's ownership up to 90 percent.

JOEL GREENBERG:  
(Counsel for Buyer)

That's right. So you might have, say, an 85 percent minimum condition in your tender offer. And, at the same time, your debt commitments also have to say that, if the minimum condition isn't satisfied and the tender offer therefore fails, the debt will still be available two months later when the one-step merger is ready to close. Lending sources don't like providing those kinds of commitments, unless they get paid adequately for them, and they will insist on getting paid well. So I have found that most buyers will resist a dual track structure, unless the target company has a fair amount of bargaining leverage.

#### IV. DEFINITIVE ACQUISITION AGREEMENT—TENDER OFFER CONDITIONS

RICK CLIMAN:  
(Moderator)

Let's turn now to the conditions in the definitive acquisition agreement. In the context of the two-step structure we're focusing on today, these are set up as tender offer conditions. If they're not satisfied when

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43. See *Friendly Tender Offers*, *supra* note 6, at 666-69.

the buyer's tender offer finally expires, then the buyer can abandon the tender offer and simply walk away.

The litany of conditions that a buyer might demand in the definitive acquisition agreement appears in *Appendix E* to the transcript of last year's session, under the heading "Annex I."<sup>44</sup> Last year, we discussed two important tender offer conditions: First, the all-important and non-waivable minimum condition, which provides that the buyer can't close on its tender offer unless the number of target shares it would own represents more than 50 percent of the target's outstanding shares;<sup>45</sup> and second, the "no material adverse effect" condition, set forth in clause (c), which allows the buyer to refuse to close on its tender offer if the target company has suffered a catastrophic financial or business setback.<sup>46</sup> We also discussed briefly the so-called "market out" clause—clause (h)—and confirmed that it is generally not appropriate to include such a condition in friendly deals of the type we've been discussing.<sup>47</sup>

#### A. "Accuracy of Representations" Condition

RICK CLIMAN:  
(Moderator)

Now let's review some of the conditions we didn't consider last year, beginning with the so-called "accuracy of representations" condition proffered by the buyer in clause (a).<sup>48</sup> Gar, it seems to say—and I'm paraphrasing here—that the buyer can walk away if any one of the dozens of representations made by the target company in the acquisition agreement

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44. *See id.* at 714-16.

45. *See id.* at 659.

46. *See id.* at 672-76.

47. *See id.* at 676-77.

48. *See id.* at 714.

was inaccurate in any material respect when made, or is inaccurate in any material respect as brought down to the closing. It seems to turn each of the target company's representations into a separate condition. And it's all the more potent because you test the accuracy of those representations at two different points in time—at the time the definitive acquisition agreement was originally signed and at the time of the scheduled closing of the tender offer. Are you going to object to the wording of this tender offer condition?

GAR BASON:  
(Counsel for Target)

Yes. My objections are summarized in *Appendix F* to the edited transcript of last year's session, in the second bullet point. This formulation of the "accuracy of representations" condition might have been acceptable in the late 1970s, but not today.

It's even worse than you described, Rick, for a couple of reasons. First, as you said, even though everything is great and the reps are completely true at the closing, the fact that there might have been one rep that was busted at the signing gives the buyer a walk right. And, not only is the applicable materiality standard, which requires the reps to be accurate "in all material respects," off-market to begin with, there's also a carve-out at the end that says all MAE ["material adverse effect"] and other materiality qualifications contained in the reps are to be disregarded.

So, if a dog gets sick to its stomach in the parking lot of one of the target company's factories, it's probably a breach of a rep given that the materiality qualifications in the reps are disregarded. While I have occasionally seen people make the argument in large public company deals that an "in all material respects" materiality standard is appropriate, it's

completely inappropriate to then back out MAE and other materiality qualifications from the reps themselves.

As my opening position, though, I would insist on an MAE—a material adverse effect—standard rather than an “in all material respects” standard as the overarching materiality standard. The MAE materiality standard is now universally used in public company deals.

RICK CLIMAN: Joel, do your buy-side forms normally include a rep that no dogs will get sick in the parking lot?  
(Moderator)

JOEL GREENBERG: No.  
(Counsel for Buyer)

RICK CLIMAN: But I assume that the target company’s environmental rep would technically be breached if all materiality qualifications in that rep are disregarded, and a dog throws up in the parking lot.  
(Moderator)

GAR BASON: That’s right.  
(Counsel for Target)

RICK CLIMAN: Let’s look at Gar’s objections one at a time. First let’s focus on the materiality standard. Your language requires each rep to be accurate “in all material respects.” Gar’s response would require the reps to be accurate except where the inaccuracies collectively have a “material adverse effect” on the target company. Are the differences between these two materiality standards meaningful to you?  
(Moderator)

JOEL GREENBERG: Yes, they are meaningful differences. And I must say, Gar, I liked the 1970s. It was a great era. Great music, great deals. But, I think you have to look at the MAE qualifier you’re  
(Counsel for Buyer)

requesting in the context of the way the Delaware judges have interpreted the term “material adverse effect.” The Delaware Court of Chancery has acknowledged that it has never found a material adverse effect in any transaction.<sup>49</sup> So, assuming that you litigate most of these disputes in Delaware, when you use Gar’s proposed MAE-based formulation, you’re basically eliminating the “accuracy of representations” condition altogether.

GAR BASON:  
(Counsel for Target)

Correct. And that is exactly what the risk allocation should be.

JOEL GREENBERG:  
(Counsel for Buyer)

I will tell you, out of character, that I don’t know how I could, with a straight face, defend the formulation we have in here [in *Appendix E* to the edited transcript of last year’s session], with *both* the “in all material respects” materiality standard *and* the provision disregarding MAE and other materiality qualifications in the reps themselves. For example, if we have negotiated a rep that there’s no pending litigation against the target company that could reasonably be expected to have a material adverse effect, and then some trivial piece of litigation is brought against the target company right before the tender offer expires, I don’t see why I should be able to argue that the rep is inaccurate. But I would be able to do so if the MAE qualification in that litigation rep is disregarded.

I do think, however, I can make a respectable argument, which I know is going against market practice, that an “in all material respects” materiality standard is not unfair because we negotiated the reps to have some role. Because there’s no post-closing

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49. See *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 738 (Del. Ch. 2008).

indemnification role for the target's reps when the target is a public company, if you adopt Gar's MAE materiality standard—which I think Gar would concede takes the “accuracy of representations” condition out of the picture—we might as well save ourselves the trouble of even including the reps.

GAR BASON:  
(Counsel for Target)

I think in a small number of cases you still see the “in all material respects” standard, since many reps will already contain MAE qualifications baked into them. If I had to agree to the “in all material respects” standard, it wouldn't be the end of the world, so long as the MAE qualifications in the reps themselves are not disregarded. I concede that the Delaware courts have never found an MAE. The one instance I can think of in recent years that might rise to the level of an MAE under the Delaware standard is the Gulf of Mexico oil-spill catastrophe. That sounds like it had an MAE on BP's business. I bet even Leo Strine would agree with that.

JOEL GREENBERG:  
(Counsel for Buyer)

There's no question you can think of events that would have a “material adverse effect” on a target company's business.

GAR BASON:  
(Counsel for Target)

There are not too many.

JOEL GREENBERG:  
(Counsel for Buyer)

If you were buying the Tokyo Electric Power Company—TEPCO—at the time of the Fukushima earthquake and tsunami, I believe a court would find that to be an MAE.

GAR BASON:  
(Counsel for Target)

Right, but I think it would have to be something of that magnitude. Interestingly, Lisa, my perception is that our litigators quite accurately predicted the result in *Tyson-IBP*<sup>50</sup>

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

because our litigators have for years said the standard to walk from a deal is very, very high.

LISA SCHMIDT:  
(Delaware Counsel)

Absolutely.

JOEL GREENBERG:  
(Counsel for Buyer)

I do think, though, that the current market practice regarding the drafting of the “accuracy of representations” condition is much closer to your position than mine, Gar. MAE materiality standards are the general rule today.

RICK CLIMAN:  
(Moderator)

Joel, I know that the M&A Committee of the ABA’s Business Law Section studies these things. In deals involving publicly traded target companies, do you ever see the “in all material respects” materiality standard used in the “accuracy of reps” condition, even as a general standard applied collectively to all reps?

JOEL GREENBERG:  
(Counsel for Buyer)

The Committee’s most recent study of public company deals done by strategic buyers, which covered transactions announced in 2010—both one-step and two-step—had a very interesting statistic on this. One hundred percent of the deals surveyed used the broader MAE qualification.<sup>51</sup>

There is an important exception, however, which has become market practice. The target company’s capitalization rep, which is, in effect, a price rep because it tells the buyer how many shares it’s paying for, along with a few other “fundamental” representations, tend

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51. See Mergers and Acquisitions Comm. of the Section of Bus. Law of the American Bar Ass’n, *2011 Strategic Buyer/Public Target Mergers and Acquisitions Deal Points Study*, slide 20 (2011) [hereinafter *2011 Deal Points Study*]; see also Mergers and Acquisitions Comm. of the Section of Bus. Law of the American Bar Ass’n., *2012 Strategic Buyer/Public Target Mergers and Acquisitions Deal Points Study* (2012) (surveying transactions announced in 2011, which was released after the date of this panel presentation) [hereinafter *2012 Deal Points Study*]; see also *id.* at slide 20 (2012) (reporting that 96% of the transactions surveyed used an MAE qualification).



to get treated differently than the other reps. The materiality standard applied to these “fundamental reps” is typically much narrower than MAE. In fact, at least in the case of the capitalization rep, the standard may well be even narrower than “in all material respects.” For the cap rep, I’ve seen qualifying language like “except to a de minimis extent,” and I’ve even seen quantitative limits.<sup>52</sup>

RICK CLIMAN:  
(Moderator)

Joel, what about Gar’s other point, which is that you don’t really need the “accurate when made” test as long as you have the bring-down component—the “accurate as of the closing” test? To reframe Gar’s argument: If the target company is a pristine company at the time it is to be sold to the buyer, with every single one of the target’s reps 100 percent accurate at that point in time, your client shouldn’t be given a walk right just because some of those reps happen to have been inaccurate—even significantly inaccurate—three or four months earlier at the time of signing. As an intellectual matter, doesn’t Gar have the better argument?

JOEL GREENBERG:  
(Counsel for Buyer)

I think there are cogent arguments for the opposing view. The strongest opposing argument is that a buyer has an interest in not pursuing a broken deal, and, therefore, it doesn’t want a situation in which the target is willing to launch when the facts aren’t set up to permit a closing. Accepting Gar’s position on what the materiality standard should be, you’re suggesting the target should freely be able to say: “Let’s go forward and start a deal, and I haven’t told you about this defect in the reps that could have a material adverse effect because I think I could fix it by closing.” It’s not something a buyer should likely accept.

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52. See *2012 Deal Points Study*, *supra* note 51 (surveying transactions announced in 2011); see also *id.* at slide 22 (reporting that a materiality standard narrower than MAE applied to the capitalization representation in 94% of the transactions surveyed).

RICK CLIMAN: Joel, what does the M&A Committee's study say about this?  
(Moderator)

JOEL GREENBERG: According to the same study of strategic deals announced in 2010 involving public target companies that we mentioned earlier, about three quarters of the deals test the accuracy of the reps at both the signing and closing, with the remaining quarter testing the accuracy of the reps only at the closing.<sup>53</sup>  
(Counsel for Buyer)

### ***B. Condition Relating to Governmental Antitrust Approvals***

RICK CLIMAN: Let's turn to some of the other tender offer conditions. The condition in clause (e)<sup>54</sup> requires the parties to obtain any needed antitrust clearances. Is this condition controversial, Gar? Do you see it in all deals?  
(Moderator)

GAR BASON: In the abstract, it's not at all controversial to have requisite antitrust approvals. But I think we could figure out in advance—before the acquisition agreement is signed—what they are. So, assume in this case we need EU approval, we need Canadian approval and we need U.S. approval. We don't know of any other needed approvals, and we wouldn't be prepared to have any other approvals beyond those three as closing conditions.  
(Counsel for Target)

RICK CLIMAN: So, you would want to identify those three specific jurisdictions in the condition. What's wrong with just having the condition refer generically to all *material* antitrust approvals?  
(Moderator)

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53. See *2011 Deal Points Study*, *supra* note 51, at slide 17 (surveying transactions announced in 2010); see also *2012 Deal Points Study*, *supra* note 51, at slide 17 (surveying transactions announced in 2011 and reporting that 85% of transactions surveyed tested the accuracy of the target's representations both at signing and at closing).

54. See *Friendly Tender Offers*, *supra* note 6, at 715.

GAR BASON:  
(Counsel for Target)

Because—and I have nothing against Lichtenstein—I don't want Joel's client to attempt to use a Lichtensteinian antitrust approval, which he might try to argue is material, as a reason to stop the deal.

RICK CLIMAN:  
(Moderator)

Joel, do you always readily agree when the target company says: "Well, here are the three jurisdictions in which we need antitrust approval; let's mention them specifically in the conditions so there can be no question as to which approvals we need and which approvals we don't need"?

JOEL GREENBERG:  
(Counsel for Buyer)

Candidly, I have a fair amount of sympathy for that position, though I may want to draw the line at a different place than Gar would. But there are two reasons why I might object to what Gar is proposing. One is that we may not know with certainty at the time of signing which antitrust approvals are required. If we're unable to figure out up front that we need an approval in Lichtenstein, it may still become obvious that we do a week later when the deal is public and we can investigate more freely.

This problem is compounded because, for better or for worse, a lot of countries have asserted a very broad jurisdictional reach in interpreting their premerger clearance laws, and you may find that a country in which you have no physical presence takes the view that your transaction is subject to their review simply because a trickle of products finds their way into that country. On the other hand, as buyer's counsel, I find it hard to argue that the buyer should be able to abort a major transaction for that reason because the target is going to be worried that it won't be for *that* reason. The target may believe we're using

that particular reason as an excuse to walk away from the deal.

So, I think in general you try to identify the relevant jurisdictions in the condition. It's sometimes hard to do that given confidentiality restrictions when you're negotiating a transaction with a large, multinational company. But certainly if you can identify the relevant jurisdictions, I think it's better for both parties.

### *C. Condition Relating to Third Party Consents*

RICK CLIMAN:  
(Moderator)                    Gar, what about the condition in clause (f)<sup>55</sup> which refers to material third party consents—consents required under contracts to which the target company is a party? Are you going to have a similar objection to that condition given that it refers generically to third party consents, even with the word “material” in there?

GAR BASON:  
(Counsel for Target)            Yes. I'm going to object vigorously to the notion of third party consents being a tender offer condition. How difficult that argument is for me depends on whether there are any such consents required in connection with the consummation of the acquisition. In many large public company deals, there aren't any required consents important enough to hold up the deal.

If there is a significant consent that's needed, that can create a very difficult dilemma for the parties in that the target company will not want to subject the completion of the deal to the whim of a third party. The target company will argue that the buyer should be prepared to take that risk as a commercial matter. The target's ability to prevail on that argument really

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55. See *Friendly Tender Offers*, *supra* note 6, at 715.

depends on the cost of obtaining the needed consent from the third party. If the cost equates to, say, \$15 per share, that's an awfully hard sell for the target company to make.

JOEL GREENBERG:  
(Counsel for Buyer)

What you sometimes get pressed into, if the third party consent is sufficiently material, is a situation where the parties take some risk on confidentiality and have discussions with the third party before the definitive acquisition agreement is signed and announced. I represent one mid-size public company that has a single customer that accounts for 85 percent of its revenue. There are change of control provisions in the company's contract with that customer, and there is no way that I would suggest launching or announcing a transaction without having that customer's consent in my pocket.

RICK CLIMAN:  
(Moderator)

Yes. You would get that consent before you actually announce the deal, because you don't want to put leverage in the hands of that third party.

GAR BASON:  
(Counsel for Target)

As counsel for the target company, it would be silly for me to argue in that situation that the buyer should be required to close the deal without the required consent in hand. But when you're talking generally about unidentified material consents, I think most targets would just say absolutely not.

JOEL GREENBERG:  
(Counsel for Buyer)

I'm curious Gar—and not that I've seen this done a lot—would you be more comfortable if the closing condition in clause (f) instead referred generally to “any third party consent, the absence of which would have an MAE”?

GAR BASON:  
(Counsel for Target)

I'd fight that language, because you ought to be able to identify any such consent in the due diligence process.

JOEL GREENBERG: Right. I agree with that.  
(Counsel for Buyer)

**D. Litigation Condition**

RICK CLIMAN: What about the litigation condition, Gar? It's in clause (i); and there's a related condition in clause (j).<sup>56</sup> Clause (i) basically says that the buyer doesn't have to purchase shares tendered in its tender offer if there's pending or threatened litigation challenging the deal. Does that look okay to you?

GAR BASON: This condition is definitely *not* okay to the extent the existence of *private party* litigation gives the buyer a walk right. Remember, the plaintiffs' bar sues on almost every deal.

RICK CLIMAN: Joel, I assume you agree that if this condition is going to be in there at all, it should relate only to governmental litigation.

JOEL GREENBERG: Well, certainly I could not, with a straight face, argue for a condition requiring the absence of stockholder litigation. I think there are statistics confirming that something north of 90 percent of the public M&A deals in this country with an acquisition price of \$100 million or more attract stockholder litigation.<sup>57</sup> And while you could try to identify other kinds of private litigation that may be less frequent, I think in the real world you just don't see litigation outs based on private litigation in these deals.

GAR BASON: The much more complicated issue is governmental proceedings because, if the FTC or the DOJ is starting a case against the buyer

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56. See *Friendly Tender Offers*, *supra* note 6, at 715-16.

57. See ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RES., RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS: MARCH 2012 UPDATE (2012), available at <http://bit.ly/Vpu8FH>.

to challenge the contemplated acquisition, the target company may take the view: “No, we actually want you to go the distance and litigate against the FTC and the DOJ.” But that’s a subset of a broader argument about what the buyer’s antitrust commitment is to get the deal done.<sup>58</sup>

RICK CLIMAN:  
(Moderator)

But suppose Lichtenstein threatens to bring a suit challenging the transaction? Even if you agreed to include this condition, Gar, you might have to specify that pending or threatened lawsuits by only certain specified governmental plaintiffs will allow the buyer to refuse to close.

GAR BASON:  
(Counsel for Target)

Yes, I’ve done that in the past.

JOEL GREENBERG:  
(Counsel for Buyer)

The reality is that, while most of us take the position that *private* litigation is just a cost to the buyer of doing the deal, litigating full out with the Justice Department is a wholly different matter which has costs and other burdens that the buyer may not be so willing to accept.

RICK CLIMAN:  
(Moderator)

In a deal that’s not antitrust-sensitive, Joel, are you going to insist on this litigation condition, limiting it just to *governmental* litigation? Or would you be willing to get rid of it entirely?

JOEL GREENBERG:  
(Counsel for Buyer)

I’m not going to necessarily insist on it, but I would prefer it. It would depend on what other litigation risks may come out from the government. We talked about antitrust, but there are also other areas that the government takes a strong interest in. You have to be very context specific here.

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58. See *Friendly Tender Offers*, *supra* note 6, at 692-98.

RICK CLIMAN:  
(Moderator)

Isn't it true, though, Joel, that in public company acquisitions, both one-step and two-step, you often see *no litigation condition at all*, particularly in deals that are not antitrust-sensitive? In those deals, the buyer wouldn't have to close if there were an actual *injunction* in effect precluding the closing of the transaction,<sup>59</sup> but, in the absence of an injunction, the buyer *would* be required to close in the face of *any* pending or threatened litigation challenging the deal, whether private or governmental.

JOEL GREENBERG:  
(Counsel for Buyer)

You're right. According to the statistics compiled by the M&A Committee for strategic public company deals announced in 2010—both one-step and two-step—50 percent did not contain a closing condition with respect to governmental litigation.<sup>60</sup>

## V. DEFINITIVE ACQUISITION AGREEMENT—BOARD RECOMMENDATION COVENANT

RICK CLIMAN:  
(Moderator)

Let's turn now to the deal protection provisions in the acquisition agreement, which we addressed briefly in last year's program.<sup>61</sup> These are the provisions that the buyer requests in order to deter potential interlopers—potential competing bidders—from making topping bids after the definitive acquisition agreement is signed. We know from Lisa, our Delaware counsel who addressed this point at last year's session, that there's a limit as to how far the buyer can go in this regard. The fiduciary duties of the target company's board of directors limit the scope of permissible deal

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59. See *Friendly Tender Offers*, *supra* note 6, app. E, at 715 ("Annex I" clause (h)).

60. See *2011 Deal Points Study*, *supra* note 51, at slide 35 (surveying transactions announced in 2010); see also *2012 Deal Points Study*, *supra* note 51, at slide 34 (surveying transaction announced in 2011 and reporting that 42% of the transactions surveyed did not contain a closing condition with respect to governmental litigation).

61. See *Friendly Tender Offers*, *supra* note 6, at 682-86.



protection that a buyer can extract.

Joel, let's look at the board recommendation covenant, pursuant to which the buyer requires the target company's board to recommend that the target company's stockholders tender their shares to the buyer in response to the buyer's tender offer. This covenant also precludes the target board from later withdrawing its recommendation, subject to a key exception which we'll be addressing shortly. To set the stage for our discussion of this covenant, Joel, why does a buyer insist on this? How important is it?

JOEL GREENBERG:  
(Counsel for Buyer)

It's important because the buyer wants to know that it's pursuing a supported deal. The buyer wants to know it's going out to the target company's stockholders with the blessing of the target company's board, not only when it signs the acquisition agreement but also throughout the tender period because there are stockholders who value the judgment and opinion of the board as to the merits of the transaction.

RICK CLIMAN:  
(Moderator)

This covenant is universally subject to a fiduciary exception. The Delaware courts have made it pretty clear that a board can't be contractually required to continue to recommend a deal under all circumstances. The fiduciary exception lays out certain circumstances under which the board can modify or withdraw its recommendation in support of the deal.

We included in *Appendices G, H, and I* to the edited transcript of last year's session three different versions of that fiduciary exception.<sup>62</sup> At the risk of oversimplifying, *Appendix G*

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62. See *id.* at 721-24.

contains the narrowest, and therefore the most buyer-favorable, fiduciary exception. It limits the ability of the target company's board to withdraw its recommendation to situations where a topping bid has been made by a competing bidder. Under this version of the fiduciary exception, the target board is not permitted to withdraw its recommendation except in the specific context of a higher bid. No other reason will suffice to allow a change in the recommendation, not even a sudden, dramatic improvement in the target's operating results that significantly increases the target's value.

*Appendix H* is at the other end of the spectrum. It contains the broadest fiduciary exception and therefore is the most target-favorable version of this provision. It allows the target board to withdraw its recommendation for *any* reason whatsoever, as long as the board determines that there would be a material risk of a breach of its fiduciary duties if it didn't withdraw the recommendation.

Last, we have, in *Appendix I*, a hybrid provision that's somewhere between the two extremes. The fiduciary exception in *Appendix I* allows the target board to withdraw its recommendation if the board determines that its fiduciary duties so require, but only if there has been some sort of unforeseeable "intervening event" that leads the board to reconsider its recommendation.

So, Joel, we have provided three versions of the fiduciary exception to the board recommendation covenant here, each of which we see from time to time in acquisition agreements. I'm sure as a buyer you prefer the first one, which gives the target board the least flexibility to change its recommendation. But

stepping out of character—taking off your buyer’s counsel hat—which of these three do you think is actually the most appropriate?

JOEL GREENBERG: As an intellectual matter, I believe that the most appropriate version is *Appendix H*, the broadest one, because ultimately I don’t think you can put the target board in a position where it has to lie. If it genuinely believes, for any reason, that the deal is no longer advisable and it can’t continue to recommend it, I find a contract that says that it is required to keep recommending it to be a very odd concept.

LISA SCHMIDT: I would agree with Joel. And even a contract that requires you to stay silent for a four-day period, or some other waiting period before being honest with your stockholders, is problematic.<sup>63</sup>

JOEL GREENBERG: I’m not sure I would go that far, Lisa. If nothing irrevocable is going to happen during that period, I don’t know that it is improper for a buyer to say to a target company: “Look, if you’re going to change your recommendation you’re going to tell us first and tell us why, so that we have the chance to propose modifications to our transaction which may put you back on target.”<sup>64</sup>

RICK CLIMAN: Right. And, at least in some agreements, that sort of provision may help make the buyer’s

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63. See *In re Compellent Technologies, Inc. S’holder Litig.*, CA No. 6084-VCL, 2011 WL 6382523, at \*13 (Del. Ch., Dec. 9, 2011) (noting that a four-day recommendation provision was “aggressive” and “raised a host of questions”). *But see Micromet, Inc. S’holders Litig.*, CA No. 7194-VCP, 2012 WL 681785, at \*9 (Del. Ch. Feb. 29, 2012).

64. See *Micromet, Inc. S’holders Litig.*, CA No. 7197-VCP, 2012 WL 681785, at \*9 (Del. Ch. Feb. 29, 2012) (distinguishing *Compellent* and permitting a recommendation provision that “require[d] the Board to wait until [the buyer] ha[d] been given the opportunity to respond to a [s]uperior [o]ffer before undertaking to determine whether its fiduciary obligations require the Board to change its recommendation” because the provision “d[id] not restrict the Board’s ability to fulfill known fiduciary duties in a timely fashion”).

match right effective. It can give the original buyer time to come back and put together a new bid that matches or exceeds a topping bid made by an interloper.

Joel, both you and Lisa are pretty clear on what you think Delaware law requires, which is a very broad fiduciary exception to the recommendation covenant along the lines of *Appendix H* to the edited transcript of last year's session. You believe that, if the board changes its view on whether it should continue to support the current deal for *any* reason, it should have the absolute right to change its recommendation and say "we no longer support this deal." Yet, as you know, in a fair number of deals, buyers' lawyers at fine law firms continue to insist on narrower fiduciary exceptions, along the lines of *Appendix G* or *Appendix I*. Why is that?

JOEL GREENBERG:  
(Counsel for Buyer)

While we believe this is the right analysis and certainly members of the Delaware judiciary have stated publicly that this is the right analysis, the Delaware courts haven't addressed this head on in a decided case yet. Chancellor Strine has certainly been observed at the annual Coronado Securities Regulation Institute in California saying that any kind of restriction is nonsense and inconsistent with the board's duties,<sup>65</sup> but he hasn't had

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65. See Vice Chancellor Leo E. Strine, Jr., 33rd Annual Securities Regulation Institute sponsored by Northwestern University School of Law (Jan. 18, 2006) (reported in *THE M&A LAWYER*, Feb. 2008). Chancellor Strine stated:

If you're going to put out a proxy statement containing a board recommendation 45 days before the vote, and there's a contract that says the board must recommend the deal unless there's a higher bid, and the board really doesn't like the deal and the reason it doesn't like the deal is because something positive happened to the target's business or 'you've been . . . looking for some food and up from the ground came a bubblin' crude' . . . if the board nonetheless recommends the deal, I think it's violated its fiduciary duties. . . . I'd also say that if you are giving advice that puts the board in that predicament, I think it's kind of dumb advice. . . . And for those of you who say that you can disclose all the other material facts that suggest why your

occasion, to my knowledge, to say that from the bench. So, some buyers will take the view: “Look, if we can get a provision into the acquisition agreement that causes the target company’s board to pause and worry a little bit, and it’s not a provision that is *per se* invalid under existing case law, why shouldn’t we?” In the most recent M&A Committee study, nearly half the transactions had either the superior offer or the intervening event formulation (or both).<sup>66</sup>

RICK CLIMAN:  
(Moderator)

We’re out of time. Thanks for your attention.

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recommendation is false and then supposedly recommend in favor of the deal, you might remember that a lot of stockholders actually trust you. . . . This whole thing is better dealt with in the termination fee context, rather than in promising to tell a lie.

66. See *2011 Deal Points Study*, *supra* note 51, at slide 55; see also *2012 Deal Points Study*, *supra* note 51, at slide 54 (reporting that 44% of the transactions surveyed had either the superior offer or the intervening event formulation, or both).

**Exhibits**

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## EXHIBIT 1

***EXCERPTS FROM TARGET COMPANY'S  
FORM OF CONFIDENTIALITY AGREEMENT*****DRAFT****CONFIDENTIALITY AGREEMENT**

THIS CONFIDENTIALITY AGREEMENT ("Agreement") is being entered into as of \_\_\_\_\_, 20\_\_, between \_\_\_\_\_ (the "Prospective Buyer") and \_\_\_\_\_ (the "Target Company"). The Prospective Buyer and the Target Company are sometimes referred to collectively as the "Parties."

\* \* \*

The Parties, intending to be legally bound, acknowledge and agree as follows:

**1. Limitations on Use and Disclosure of Confidential Information.** Neither the Prospective Buyer nor any of the Prospective Buyer's Representatives (as defined in section 13 below) will, at any time, directly or indirectly:

(a) make use of any Confidential Information (as defined in section 12 below), except for the specific purpose of considering, evaluating and negotiating a possible negotiated transaction between the Parties; or

(b) disclose any Confidential Information to any other Person (as defined in section 13 below), except as expressly permitted in section 4 below.

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**3. No Representations by the Target Company.** Neither the Target Company nor any of the Target Company's Representatives will be under any obligation to make any particular Confidential Information available to the Prospective Buyer or any of the Prospective Buyer's Representatives or to supplement or update any Confidential Information previously furnished. Neither the Target Company nor any of its Representatives has made or is making, and neither the Prospective

Buyer nor any of its Representatives has relied or is relying on, any representation or warranty, express or implied, as to the accuracy or completeness of any Confidential Information, and neither the Target Company nor any of its Representatives will have any liability to the Prospective Buyer or to any of the Prospective Buyer's Representatives relating to or resulting from the use of any Confidential Information or any inaccuracies or errors therein or omissions therefrom. Only those representations and warranties (if any) that are included in any final definitive written agreement that provides for the consummation of a negotiated transaction between the Parties and is validly executed on behalf of the Parties (a "Definitive Agreement") will have legal effect.

#### **4. Permitted Disclosures.**

(a) Notwithstanding the limitations set forth in section 1 above:

(i) the Prospective Buyer may disclose Confidential Information if and to the extent that the Target Company consents in writing to the Prospective Buyer's disclosure thereof;

(ii) the Prospective Buyer may disclose Confidential Information to any Representative of the Prospective Buyer, but only to the extent such Representative (A) needs to know such Confidential Information for the purpose of helping the Prospective Buyer evaluate or negotiate a possible negotiated transaction between the Parties, and (B) has been provided with a copy of this Agreement and has agreed to abide and be bound by the provisions hereof; and

(iii) subject to section 4(b) below, the Prospective Buyer may disclose Confidential Information to the extent required (A) by applicable law or governmental regulation or (B) by valid legal process.

Notwithstanding anything to the contrary contained in this Agreement, the Prospective Buyer shall not be permitted to disclose Confidential Information pursuant to section 4(a)(iii)(A) if the law or governmental regulation requiring disclosure of such Confidential Information becomes applicable as a direct or indirect result of (i) a decision on the part of the Prospective Buyer or any of its Representatives to commence a tender or exchange offer for shares of the Target Company or (ii) a decision on the part of Prospective Buyer or any of its Representatives to



acquire beneficial ownership of any equity securities of the Target Company.

(b) If the Prospective Buyer or any of the Prospective Buyer's Representatives is required by law or governmental regulation or by subpoena or other valid legal process to disclose any Confidential Information to any Person, then the Prospective Buyer will immediately provide the Target Company with written notice of the applicable law, regulation or process so that the Target Company may seek a protective order or other appropriate remedy. The Prospective Buyer and its Representatives will cooperate fully with the Target Company and the Target Company's Representatives in any attempt by the Target Company to obtain any such protective order or other remedy. If the Target Company elects not to seek, or is unsuccessful in obtaining, any such protective order or other remedy in connection with any requirement that the Prospective Buyer disclose Confidential Information, and if the Prospective Buyer furnishes the Target Company with a written opinion of reputable legal counsel acceptable to the Target Company confirming that the disclosure of such Confidential Information is legally required, then the Prospective Buyer may disclose such Confidential Information to the extent legally required; *provided, however*, that the Prospective Buyer and its Representatives will use their reasonable efforts to ensure that such Confidential Information is treated confidentially by each Person to whom it is disclosed.

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**7. Standstill Provision.** During the two-year period commencing on the date of this Agreement (the "Standstill Period"), neither Prospective Buyer nor any of Prospective Buyer's Representatives will, in any manner, directly or indirectly:

(a) make, effect, initiate, cause or participate in (i) any acquisition of beneficial ownership of any securities of the Target Company or any securities of any subsidiary or other affiliate of the Target Company, (ii) any acquisition of any assets of the Target Company or any assets of any subsidiary or other affiliate of the Target Company, (iii) any tender offer, exchange offer, merger, business combination, recapitalization, restructuring, liquidation, dissolution or extraordinary transaction involving the Target Company or any subsidiary or other affiliate of the Target Company, or involving any securities or assets of the Target Company or any securities or assets of any subsidiary or other

affiliate of the Target Company, or (iv) any “solicitation” of “proxies” (as those terms are used in the proxy rules of the Securities and Exchange Commission) or consents with respect to any securities of the Target Company;

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

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

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

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

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

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

(h) request or propose that the Target Company or any of the Target Company’s Representatives amend, waive or consider the amendment or waiver of any provision set forth in this section 7.

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

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## EXHIBIT 2

***EXCERPTS FROM PROSPECTIVE BUYER'S  
RESPONSE TO TARGET COMPANY'S  
FORM OF CONFIDENTIALITY AGREEMENT***

DRAFT

## CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT ("Agreement") is being entered into as of \_\_\_\_\_, 20\_\_, between \_\_\_\_\_ (the "Prospective Buyer") and \_\_\_\_\_ (the "Target Company"). The Prospective Buyer and the Target Company are sometimes referred to collectively as the "Parties."

\* \* \*

The Parties, intending to be legally bound, acknowledge and agree as follows:

**1. Limitations on Use and Disclosure of Confidential Information.** Neither the Prospective Buyer nor any of the Prospective Buyer's Representatives (as defined in section 13 below) will, at any time, directly or indirectly:

(a) make use of any Confidential Information (as defined in section 12 below), ~~except for the specific purpose of considering, evaluating and negotiating a possible negotiated transaction between the Parties~~ except for the purpose of considering, pursuing and/or facilitating a possible transaction involving the Target Company or any of its stockholders, including an unsolicited or uninvited acquisition of the Target Company or any of its securities;  
or

(b) disclose any Confidential Information to any other Person (as defined in section 13 below), except as expressly permitted in section 4 below.

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**3. No Representations by the Target Company.** Neither the Target Company nor any of the Target Company's Representatives will be under any obligation to make any particular Confidential Information available to the Prospective Buyer or any of the Prospective Buyer's Representatives or to supplement or update any Confidential Information previously furnished. Neither the Target Company nor any of its Representatives has made or is making, and neither the Prospective Buyer nor any of its Representatives has relied or is relying on, any representation or warranty, express or implied, as to the accuracy or completeness of any Confidential Information, and neither the Target Company nor any of its Representatives will have any liability to the Prospective Buyer or to any of the Prospective Buyer's Representatives relating to or resulting from the use of any Confidential Information or any inaccuracies or errors therein or omissions therefrom. Only those representations and warranties (if any) that are included in any final definitive written agreement that provides for the consummation of a negotiated transaction between the Parties and is validly executed on behalf of the Parties (a "Definitive Agreement") will have legal effect. Notwithstanding anything to contrary contained in this section 3 or elsewhere in this Agreement, nothing in this Agreement or in any Definitive Agreement shall operate to limit any remedy the Prospective Buyer may have against any Person for fraud committed by the Target Company or any of the Target Company's Representatives (whether or not such fraud relates to a representation made in a written agreement between the Parties).

**4. Permitted Disclosures.**

(a) Notwithstanding the limitations set forth in section 1 above:

(i) the Prospective Buyer may disclose Confidential Information if and to the extent that the Target Company consents in writing to the Prospective Buyer's disclosure thereof;

(ii) the Prospective Buyer may disclose Confidential Information to any Representative of the Prospective Buyer, but only to the extent such Representative (A) needs to know such Confidential Information for the purpose of helping the Prospective Buyer evaluate or negotiate a possible negotiated transaction between the Parties, and (B) has been provided with a copy of this Agreement and has agreed to abide and be bound by the provisions hereof; and

(iii) subject to section 4(b) below, the Prospective Buyer may disclose Confidential Information to the extent required (A) by applicable law or governmental regulation or (B) by valid legal process (whether or not such law, governmental regulation or legal process becomes applicable as a result of a decision or action on the part of the Prospective Buyer).

~~Notwithstanding anything to the contrary contained in this Agreement, the Prospective Buyer shall not be permitted to disclose Confidential Information pursuant to section 4(a)(iii)(A) if the law or governmental regulation requiring disclosure of such Confidential Information becomes applicable as a direct or indirect result of (i) a decision on the part of the Prospective Buyer or any of its Representatives to commence a tender or exchange offer for shares of the Target Company or (ii) a decision on the part of Prospective Buyer or any of its Representatives to acquire beneficial ownership of any equity securities of the Target Company.~~