

Delaware Chancery Court Reaffirms on *Revlon* Market Checks and Parameters of Fiduciary Duty

BY FRANK AQUILA

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Sullivan & Cromwell LLP represented the Buyer, Amgen, Inc., in the transaction and Delaware litigation. This article is based on a Sullivan & Cromwell Memorandum to Clients with respect to the Micromet decision.

In the Delaware Chancery Court's recent *Micromet*¹ decision, the Court reaffirmed that *Revlon's* enhanced scrutiny is a reasonableness standard based on the particular circumstances of the target company. According to the decision, Delaware's fiduciary duty of disclosure only requires that the information provided to shareholders for purposes of their vote on a merger be sufficiently robust in its entirety so that the information omitted would not significantly alter the total mix of information available to shareholders. The Chancery Court found that *Micromet's* presigning market check was adequate even though it was limited to strategic buyers with which *Micromet* previously had a commercial relationship, and to a short diligence period. The Court recognized that, because of the nature of *Micromet's* fledgling pharmaceutical company's business that involved partnering with strategics and its Board's

understanding of the Company and its needs, this limited process was adequate.

The Chancery Court was also not persuaded that the following omissions from the 14D-9 disclosure statement sent to shareholders were sufficient to show a reasonable probability of success on a breach

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From the EDITOR

The Not-Quite-Combative Proxy Season

On April 17, at its annual shareholders' meeting, Citigroup failed to win majority approval for its executive compensation practices, with Citigroup reportedly only getting 45% support during its nonbinding say-on-pay vote. (By contrast, Citigroup reportedly received 92.9% approval of its compensation practices in 2011.) The vote was the culmination of growing investor discontent with Citigroup's post-2008 performance (the bank has repeatedly posted negative annual shareholder returns) and the compensation of CEO Vikram Pandit in particular. According to news reports, Citigroup directors said they would meet with shareholders to hear their concerns. Among those who voted against the current compensation practices were the likes of the California Public Employees' Retirement System.

However, it's also hard to argue that the Citigroup shareholder revolt portends anything like an industry-side burst of shareholder activism. According to ISS, only three other U.S. companies—KB Home, International Game Technology and Actuant Corp—have had failed say-on-pay votes this year. So far 2012 looks much like 2011, the first year of mandatory pay votes for most U.S. companies. As of mid-April, "the average investor support level during say-on-pay votes has been 90.4%, which includes vote results from 175 companies. That percentage is almost identical to the average support during all of 2011," ISS wrote.

And ISS noted that many companies that had failed votes (or close votes) last year have fared much better this proxy season "due to engagement efforts with investors and, in some cases, positive changes to their pay programs. For instance, Jacobs Engineering Group and Beazer Homes USA,

which both suffered failed 2011 votes, received more than 95% support this year after making improvements to their pay programs."

As we were going to press, another tumultuous shareholder meeting at Wells Fargo turned out to be less radical than promised. While the meeting was disrupted by activists, Wells Fargo shareholders shot down a host of proposals presented at the meeting, including one that would have required the chairman of the board to be an independent director, another that provided for cumulative voting in contested director elections, and a proposal amending Wells Fargo's by-laws to allow stockholders to nominate director candidates for inclusion in the company's proxy materials. It's another sign that as proxy season enters full swing, the Citigroup vote could prove to be an anomaly.

In our lead article this month, Sullivan & Cromwell's Frank Aquila examines the Delaware Chancery Court's recent *Micromet* decision, in which "the Court reaffirmed that *Revlon's* enhanced scrutiny is a reasonableness standard based on the particular circumstances of the target company." Aquila notes that according to the decision, Delaware's fiduciary duty of disclosure still only requires that information provided to shareholders for purposes of their vote on a merger only "be sufficiently robust in its entirety so that the information omitted would not significantly alter the total mix of information available to shareholders." In this case, the Chancery Court found that *Micromet's* presigning market check was adequate despite its efforts being limited to strategic buyers with which *Micromet* previously had a commercial relationship.

CHRIS O'LEARY
MANAGING EDITOR

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of fiduciary duty of disclosure claim: (i) the specific fees paid by Micromet to Goldman Sachs, its financial advisor, for unrelated work for the previous two years, (ii) the amount of Goldman's ownership of the buyer's stock, (iii) the basis for Micromet management's probability of success rates for trial drugs, (iv) management's projections regarding the use of net operating loss carry-forwards, (v) Goldman's sum of the parts discounted cash flow ("DCF") analysis (that was not significantly different than Goldman's DCF analysis), and (vi) management's "upside case" projections provided to Goldman but described by the CEO as "highly optimistic and, in fact, not realistic" and that were not relied upon by Goldman in its analysis. The Court noted that "Delaware courts have repeatedly held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion" in satisfying the fiduciary duty of disclosure.

The Facts

Throughout the summer and fall of 2011, Amgen, Inc. ("Amgen"), while engaged in a drug development partnership with Micromet, Inc. ("Micromet" or the "Company"), made periodic private offers to acquire Micromet. Micromet's Board of Directors (the "Board") rejected Amgen's offers as being inadequate, and instead pursued a standalone strategy in which it would partner with established biopharmaceutical companies in developing drugs in its product pipeline. Beginning in late December 2011, Micromet was sufficiently interested by Amgen's then-\$10.75 per share potential proposal that it authorized Goldman, Sachs & Co. ("Goldman"), its financial advisor, to contact seven pharmaceutical companies that the Board determined might be interested in acquiring Micromet. Of the seven companies (all but one of which had already conducted due diligence on the Company in the context of the partnering process), only three expressed any interest, and after conducting due diligence sessions none of them indicated that they were interested in acquiring Micromet. During the market check, Micromet began negotiations with Amgen. On January 25, Micromet entered into a Merger

Agreement with Amgen providing for a tender offer to Micromet's shareholders at \$11 per share, followed by a second-step cash out merger. As part of the Merger Agreement, the Board agreed to various standard deal protection measures in favor of Amgen, including a no shop, a four-business day match right and a break-up fee of \$40 million, which was equal to approximately 3.4% of the equity value, and 4.9% of the enterprise value, of the transaction.

On February 27, various shareholders of Micromet ("Plaintiffs") brought a motion for a preliminary injunction in the Delaware Chancery Court to enjoin the tender offer, asserting that the Board breached its fiduciary duties by favoring Amgen as a bidder, failing to do any meaningful market check until immediately before the announcement of the proposed transaction and putting in place deal protections that would make it impossible for a competing bidder to make a successful offer. Additionally, Plaintiffs asserted that the Board breached its fiduciary duty of disclosure by omitting material information from the disclosure statement that was disseminated to its shareholders. The Plaintiffs' motion was denied.

The Findings

Vice Chancellor Donald F. Parsons held that the limited presigning market check conducted by the Board was adequate to fulfill its *Revlon* duties because it was based on the Board's understanding of Micromet's market position—specifically that any company that would be interested in an acquisition of Micromet would be one that was interested in the development of its most important drug (MT103) and was large enough to undertake the transaction. As such, Vice Chancellor Parsons found it reasonable that the Board chose to limit its pre-signing market check to strategic buyers that could benefit from and further develop MT103, and had the technical expertise to realize its full potential. Vice Chancellor Parsons also was not troubled by the diligence period provided to the potential bidders during the short pre-signing market check, in large part because six of the seven potential buyers had previously engaged in due diligence with Micromet focused

on its most important potential product during a previous partnering process, and each of the three that performed due diligence informed Micromet before it signed the Merger Agreement that it was not interested in making a competing offer.

The Vice Chancellor was not persuaded that the omissions from the disclosure statement sent to shareholders was sufficient to show a reasonable probability of success on a breach of fiduciary duty of disclosure claim.

Under Delaware law, in assessing whether a Board has breached its fiduciary duty of disclosure by failing to disclose material information to shareholders, the central question is whether “a reasonable shareholder would consider it important in a decision pertaining to his or her stock.” An omitted fact is not material ‘simply because [it] might be helpful.’ Instead, the inclusion of the missing fact must ‘significantly alter the total mix of information available to shareholders.’² Furthermore, “[t]he duty to disclose ‘is not a mandate for prolixity’³ and “[b]alanced against the requirement of complete disclosure is the pragmatic consideration that creating a lenient standard for materiality poses the risk that the corporation will bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decisionmaking.”⁴ To this end, Vice Chancellor Parsons held that the following additional disclosures were unlikely to significantly alter the total mix of available information and, accordingly, their omission was not sufficient to lead to injunctive relief on the issue of a breach of duty of disclosure:

- the specific fees Micromet paid Goldman over the previous two years, when it was generally disclosed that Micromet had paid Goldman fees in the past and Goldman’s contingent fee interest in the transaction was disclosed to shareholders;
- Goldman’s \$336 million specific interest in Amgen stock, representing 0.16% of its overall investment holdings on behalf of the firm and firm clients and 3.8 % of its healthcare sector investments, when it was generally disclosed that Goldman may at any time hold

positions in both Amgen and Micromet, the information was already available via publicly filed information, there was no evidence that the size of its holdings would be likely to impede its ability “effectively and loyally” to perform its assignment for Micromet, and Goldman held an equal or greater interest in two of the bidders Goldman reached out to during the pre-signing market check;

- the basis for the probability of success rates for the drugs in Micromet’s product pipeline, which was used by Goldman in its analysis, when such underlying information is highly technical, concerns assumptions made by the Board relating to the viability of specific and unique drugs being developed by Micromet and it would be hard to determine whether the rates applied were, as asserted by Plaintiffs, unusually low (Vice Chancellor Parsons noted that Delaware courts have repeatedly held that a board is not required to disclose details underlying a financial advisor’s opinion);
- management’s projections regarding Micromet’s expected use of net operating loss carry-forwards, since the provisions of such information would involve a “level of granular disclosure not required under our law”;
- Goldman’s “sum of the parts” discounted cash flow analysis because, even though it was prepared at the request of the Board, it was not relied on for Goldman’s fairness opinion and the valuation range was substantially similar to the valuation range of the discounted cash flow analysis disclosed; and
- “upside case” projections prepared by management, where such projections were not relied on by the financial advisor and at least some of the directors found the projections to be unreliable and overly optimistic.

The *Micromet* decision is useful to M&A lawyers as a primer for the application of fiduciary duty of disclosure claims to the specifics of financial analyses, and as a reminder of the importance of disclosure with respect to significant conflicting interests of transaction participants.

NOTES

1. *In re Micromet, Inc.*, C.A. no. 7191-VCP, slip op. at 32 (Del. Ch. February 29, 2012).
2. *Id.* At 23 (quoting *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *1 (Del. Ch. Dec. 18, 2009) and *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *12 (Del. Ch. Nov. 30, 2007)).
3. *Id.* At 25 (quoting *Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *19 n.115 (Del. Ch. July 29, 2008)).
4. *Id.*

Controlling Stockholders May Face Liability If Found to Have Acted in Coercive Manner in Exit Sale

BY KEVIN C. LOGUE,
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One benefit that controlling stockholders often seek in an exit transaction is the ability to negotiate a control premium which is not shared with minority stockholders. This ability has been generally upheld by Delaware courts as, with limited exceptions, Delaware typically permits a controlling stockholder to act in its own self interest when determining whether, and at what price, to sell its shares, without considering the interests of minority stockholders¹.

In the recent case of *In re Delphi Financial Group Shareholder Litigation*, the Delaware Court of Chancery (the "Court") was confronted with the issue of whether a controlling stock-

holder breaches his fiduciary duties to minority stockholders when he conditions his consent to a merger transaction upon his receipt of a control premium for his shares, notwithstanding a provision in the charter explicitly prohibiting such a control premium. Even though Vice Chancellor Glasscock ultimately denied the minority stockholders' motion for a preliminary injunction to enjoin a vote on the merger, the Court cleared the path for the minority stockholder plaintiffs to pursue damage claims against the controlling stockholder, as well as certain executives who assisted him. *In re Delphi Financial Group Shareholder Litigation* is an important reminder that courts can be expected to closely examine alleged conflicts of interest, and that controlling stockholders and those who assist them may face liability when they are found to have acted in an inequitable or coercive manner in an exit sale context.

Background

Since its initial public offering in 1990, Delphi Financial Group, Inc. ("Delphi") had two classes of authorized capital stock: Class A, which was largely held by the public, and Class B, which was held solely by one of the Defendants, Robert Rosenkranz ("Rosenkranz"). While Rosenkranz only held approximately 12.9% of Delphi's outstanding capital stock (based on number of shares), each share of Class B stock was entitled to ten votes (versus one vote per share of Class A stock), providing Rosenkranz with a 49.9% stake for voting purposes (the voting stake was capped at 49.9% pursuant to a voting agreement). Significantly, as part of Delphi's initial public offering and the concurrent creation of Delphi's dual-class capital structure, Delphi's charter was amended to require that, upon a merger involving payments on the shares of Class A stock and/or Class B stock, each share of Class B stock would be converted to one share of Class A stock so that all shares of capital stock would be entitled to receive the same per share consideration from such sale.

Tokio Marine Holdings, Inc. ("TMH") approached Rosenkranz in 2011 regarding a possible acquisition of Delphi. Rosenkranz, as Delphi's

CEO and Chairman, commenced negotiations with TMH on Delphi's behalf. According to the Court, Rosenkranz did not inform Delphi's Board of Directors (the "Board") of his desire for disparate consideration for the Class B stock until a few months into the discussions, although he and other Delphi executives used company resources to analyze how a division of merger proceeds might be accomplished. When he later informed the Board that he would not consent to the sale of Delphi unless he received a control premium for his Class B stock, the Board was initially reluctant to consider a price differential for the Class B stock, but eventually recognized that TMH was offering a well above-market price for both classes of Delphi's capital stock (even factoring in a differential for the Class B stock) and that Rosenkranz was unlikely to consent to the transaction without a differential. Therefore, the Board formed a special committee to consider the merger transaction with TMH and a separate sub-committee to negotiate with Rosenkranz the price differential between the Class A stock and the Class B stock. Despite the apparent conflict of interest between the Class A stockholders and Rosenkranz, the special committee determined that it was in the best interest of Delphi as a whole that Rosenkranz continue to negotiate with TMH on behalf of Delphi because of his intimate knowledge of Delphi's business and concerns that TMH would be alerted to an internal conflict if Rosenkranz was replaced. Contemporaneously with the TMH negotiations regarding the merger consideration, Rosenkranz and the sub-committee continued to negotiate the price differential between the classes of capital stock. The special committee ultimately agreed to accept TMH's offer of \$46 per share (without distinction between the Class A stock and Class B stock). Meanwhile, the results of the negotiation between the sub-committee and Rosenkranz resulted in a price allocation between the two classes of capital stock of \$44.875 per share of Class A stock and \$53.875 per share of Class B stock. The Board approved the merger conditioned upon the approval of a majority of the disinterested Class A stockholders (excluding Class B stockholders and their affiliates), and an amendment to Delphi's charter to

remove the prohibition on classes of stock receiving different consideration, which charter amendment required approval by a majority vote of all stockholders. Certain of the minority stockholders subsequently brought an action to enjoin the stockholders' vote on the merger.

Court's Analysis

The plaintiff minority stockholders asserted various legal claims against Rosenkranz and the other defendants (including members of the Board), but the Court analyzed most closely and found most persuasive the claim that Rosenkranz breached his contractual and fiduciary duties to the minority stockholders by seeking and obtaining a control premium for his Class B stock.

While affirming that a controlling stockholder is generally permitted to negotiate and receive a control premium for its shares, the Court indicated that Rosenkranz had already received such a premium for his Class B stock in connection with the 1990 initial public offering and related charter amendment, surmising that the stockholders who acquired shares of Class A stock in or after the initial public offering "in return for the protection against differential merger consideration found in the charter paid a higher price for their shares." The court continued that "though Rosenkranz retained voting control, he sold his right to a control premium to the Class A stockholders via the charter" and that to permit a second control premium on the Class B shares would render the minority stockholders' charter rights illusory and could likely result in "a wrongful transfer of merger consideration from the Class A stockholders to Rosenkranz." The Court was critical of the fact that Rosenkranz had interests that were not aligned with those of the Class A stockholders on whose behalf he was negotiating, as he "knew he was negotiating a price which he, as controlling stockholder, would not accept for his stock."

Although the Court noted that the plaintiffs' claims were reasonably likely to succeed, it denied the plaintiffs' motion for preliminary injunction, thereby permitting a vote on the merger and charter amendment. The Court reasoned that any damages suffered by the stockholders would be

easily determinable and remediable through money damages, based on the price differential between the two classes of capital stock. The Court also was concerned that the stockholders might lose the existing deal, especially given that there were no other bidders and the deal under consideration would still pay the minority stockholders a 76% premium to market price.

Because the Court determined that it was reasonably likely that Rosenkranz had breached his fiduciary duties, the Court did not address the question of whether Rosenkranz's actions were also reasonably likely to represent a breach of contract, noting simply that Rosenkranz had violated duties to stockholders, either contractual or fiduciary. However, the Court did suggest that it may have been sympathetic with the plaintiffs' position with respect to this question:

[A] corporate charter, along with its accompanying bylaws, is a contract between the corporation's stockholders. Inherent in any contractual relationship is the implied covenant of good faith and fair dealing. A party breaches the covenant by taking advantage of its position to control implementation of the agreement's terms, such that its conduct frustrates the overarching purpose of the contract.

Vice Chancellor Glasscock went on to note that while "clear of any impending sale," Rosenkranz presumably could have purchased the right to a control premium back through a negotiated vote for a charter amendment, to allow him to coerce such an amendment in the sale context would render the charter rights illusory.

Conclusion

In re Delphi Financial Group Shareholder Litigation emphasizes the risk of coercive behavior by controlling stockholders against minority stockholders in the sale context, even where the procedures surrounding the negotiation of the transaction are not in themselves unreasonable. While the general rule that controlling stockholders may negotiate a control premium for their shares and/or exercise their voting rights inde-

pendently is undisturbed, *In re Delphi Financial Group Shareholder Litigation* is an important reminder that actions by controlling stockholders in the sale context are not completely immune from judicial review, and that desired amendments of the type at issue may be best pursued well in advance of any impending sale process.

NOTE:

1. See, e.g., *Abraham v. Emerson Radio Corp.*, 901 A.2d 751 (Del. Ch. 2006) and *In re John Q. Hammons Hotels, Inc. Shareholder Litigation*, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009).

Delaware Supreme Court Adheres to "Plain Meaning" of Preferred Stock Terms

BY ROBERT REDER, ROLAND HLAWATY, DAVID SCHWARTZ AND NEHAL SIDDIQUI

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Applying well-established principles of contract interpretation, the Delaware Supreme Court, in *Alta Berkeley VI C.V., et al v. Omneon, Inc.*,¹ recently declined to require payment of a liquidation preference to preferred stockholders that was not clearly mandated by the "plain meaning" of the governing instrument. In affirming a lower court ruling, the Court concluded that a pre-merger conversion of the preferred stock into common stock was not the first in a "series of related transactions" so as to require integration with the subsequent merger and thereby trigger a liquidation event. This decision underscores the reluctance of Delaware courts to give contracting

parties rights that they failed to bargain for when negotiating their arrangements.

Background

Omneon, Inc., a “privately-held technology company” headquartered in California, was acquired on September 15, 2010 via merger by Harmonic, Inc., a NASDAQ-traded technology company. Pursuant to the merger agreement, Omneon’s common stock was converted into “roughly \$190 million in cash plus \$120 million in Harmonic stock.” The merger was conditioned on Omneon’s preferred stockholders (other than the holders of the Series A-2.2 preferred stock) approving, by majority vote, an “automatic” conversion of their preferred shares into common stock before the merger. Holders of the Series A-2.2 preferred stock were permitted by Omneon’s charter to “opt out” of the conversion and receive their liquidation preference of approximately \$1.5 million.

Although both the conversion and merger were approved by the requisite votes of Omneon’s preferred and common stockholders, the holders of Omneon’s Series C-1 preferred stock claimed that they, too, were entitled to their liquidation preference (which exceeded their share of the merger consideration) and asked the Delaware Superior Court to award “damages equal to the difference between their liquidation preference and the merger consideration they received following the conversion and merger.” Under Omneon’s certificate of incorporation, which set forth the preferred stock terms, a “Liquidation Event” includes “the acquisition of the Company by any person or entity *by means of any transaction or series of related transactions*” The Series C-1 preferred stockholders argued that the conversion—although occurring *before* the merger—was related and integral to the merger and, therefore, triggered a “Liquidation Event.”

The Superior Court granted summary judgment in favor of Omneon. The Series C-1 preferred stockholders appealed to the Delaware Supreme Court, which affirmed the lower court ruling on the basis that “because the conversion validly converted the Series C-1 preferred into

common shares *before* the Liquidation Event (the merger), the Series C-1 shareholders were no longer entitled to any liquidation preference at the time the merger took place.”

The Court’s Analysis

The Court began by noting the “undisputed” fact that the merger itself was a “Liquidating Event that would entitle every Series of preferred to its respective liquidation preference.” The key question, therefore, was whether the “antecedent conversion” was related and integral to the merger and, as a result, a part of a “Liquidation Event.” If not, then the Series C-1 preferred stock was validly converted into common stock before the merger and entitled to only its share of the merger consideration paid to the common stockholders.

To address this question, the Court utilized well-established rules of contract interpretation providing that, “[u]nless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning.” Certificates of incorporation, such as the Omneon charter, “are regarded as contracts between the shareholders and the corporation” and, as a result, courts “must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument.” Further, a contract “is not ambiguous merely because the parties dispute what it means.” Rather, “[t]o be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning.”

The Court found that “the plain meaning of Omneon’s unambiguous charter language” supported the lower court’s ruling. The Court reached this result by focusing on three factors:

- Per Omneon’s charter, a Liquidation Event contemplates “‘transactions’ that involve an acquirer that gains some incremental ‘voting power’ or stock in each component transaction, and that eventually obtains ... majority voting power at the completion of the ‘series.’” The Court noted, however, that “Harmonic, did not acquire Omneon or *any* part of its stock ... , let alone majority vot-

ing power, in the conversion.” Under such circumstances, “Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty.”

- The conversion should not be viewed as part of a “series of related transactions” with the merger because “[t]o do so would transmute the preferred shareholders’ performance of an antecedent condition of the merger (the conversion) into a Liquidation Event transaction where Harmonic acquired Omneon (the merger itself).” While the two events may have been “related” sequentially and factually, they cannot be fused together so as to become ‘related’ legally, and thereby made part of the same Liquidation Event ‘series’.”²
- The fact that the holders of the Series A-2.2 Preferred Stock were expressly authorized by the charter to “opt out” of any “automatic” conversion that is “conditioned upon ... consummation of a Liquidation Event” supported the lower court’s grant of summary judgment to Omneon. To allow the Series C-1 preferred stockholders to avoid the automatic conversion in order to obtain their liquidation preference would, in the Court’s view, render the right bargained for by the Series A-2.2 preferred stockholders—but not by the Series C-1 preferred stockholders—“superfluous.” The Court was not prepared to permit the Series C-1 preferred stockholders to “now ob-

tain from the courts a right that they failed to achieve at the bargaining table.”

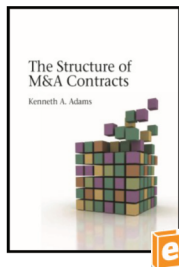
Conclusion

The *Omneon* Court relied on fundamental principles of contract interpretation to read Omneon’s charter through a plain language lens. Absent any ambiguity in the relevant provision, the Court refused to circumvent the plain text to make “superfluous” one provision at the expense of another. As *Omneon* makes clear, courts will not “do violence to the plain language” of a contract, or rely on so-called “anti-circumvention” provisions, in order to grant rights to parties which they failed to obtain at the negotiating table.

NOTES

1. C.A. No. N10C-11-102 (Del. Sup. Ct. March 5, 2012).
2. In this connection, the Court cited *Bank of New York Mellon Trust Co. v. Liberty Media Corp.*, 29 A.3d 225 (Del. 2011), for the proposition that the “series of related transactions” formulation is “anti-circumvention language, intended to prevent Omneon and Harmonic from evading the Liquidation Event definition ... such as by a ‘creeping acquisition.’” The Court did not view the forced conversion of the Series C-1 preferred stock before the merger as an anti-circumvention event. For a discussion of the *LibertyMedia* decision, please see our Client Alert entitled “*Delaware Supreme Court Provides Guidance on Interpretation of ‘Boilerplate’ Indenture Provisions,*” dated November 2, 2011.

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More Abuse?: The Competition Bureau Proposes Revised Guidelines on Abuse of Dominant Market Position

BY JAMES B. MUSGROVE AND
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On March 22, 2012 the Canadian Competition Bureau released revised Draft Enforcement Guidelines on the Abuse of Dominance Provisions of the *Competition Act* (the “*New Draft Guidelines*”¹). The *New Draft Guidelines* provide a summary of the Competition Bureau’s approach to the enforcement of the abuse of dominant market position (or ‘monopolization’) regime. The most significant differences between the existing guidelines which were issued in 2001 (the “*2001 Guidelines*”), the *2009 Draft Guidelines*, which were never finalized, and the *New Draft Guidelines* are summarized below.

- **Necessary Intent:** The most important development in the *New Draft Guidelines* is the Bureau’s changed interpretation of the intent necessary to find that conduct constitutes an anti-competitive act, and therefore can be the basis for finding of abuse of dominant market position. The jurisprudence has been unanimous that, to constitute an anti-competitive act, conduct must be undertaken with the goal of having a negative effect on a competitor which is predatory, exclusionary or disciplinary. However, the *New Draft Guidelines* state that “While many types of

anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose.” This approach, if adopted, will greatly expand the scope for finding that conduct constitutes an Abuse of Dominance.

- **Joint Abuse of Dominance:** The *2001 Guidelines* expressly stated that mere conscious parallelism was insufficient to found a joint abuse of dominance case, but the *2009 Draft Guidelines* removed that provision. The *New Draft Guidelines* confirm the shift and go further, indicating that firms may be found to hold market power as a group based on: collective market share; barriers to entry or expansion; evidence of a lack of inter-firm competition; and “other relevant factors.” Coordinated behavior between those alleged to be jointly dominant is not necessary to find joint dominance. This approach will make it very difficult to know when firms will be viewed as jointly dominant.
- **Market Share Thresholds:** The *New Draft Guidelines* maintain the historic 35% market share “safe harbor.” They also indicate that, while a firm with a market share of between 35% and 50% could be examined by the Bureau, depending upon the circumstances, there will be no presumption of dominance below 50% market share. This change is consistent with jurisprudence and suggests that the Bureau is now less likely than to focus on firms with market shares below 50%.
- **Substantial Lessening of Competition and Sufficient Remaining Competition:** The *New Draft Guidelines* indicate that the focus in deciding whether there has been a “substantial lessening or prevention of competition” as a result of anti-competitive conduct requires an assessment of the relative decrease in competition in the market as a result of the conduct, not a consideration of the overall competitiveness of the market. As a result, it is at least theoretically possible for conduct

that results in a “substantial” lessening of competition to be challenged, even when the market in issue continues to be characterized by a significant level of competition in absolute terms.

- **Administrative Monetary Penalties:** Historically, a finding of abuse of dominant market position did not give rise to fines or civil damages. In March 2009, administrative monetary penalties (a maximum of \$10 million, or \$15 million for repeat conduct) were introduced. There is not yet any jurisprudence regarding the imposition of such penalties. It would have been helpful to have guidance on when and what level of administrative monetary penalties would be sought by the Commissioner, but the *New Draft Guidelines* are silent on this important issue.
- **Less is Less:** The *New Draft Guidelines* offer much less guidance, by way of examples and analyses of types of anti-competitive conduct, than did the *2009 Draft Guidelines* and the *2001 Guidelines*. This will be a controversial development since guidelines are most useful in articulating enforcement approaches where jurisprudence is not available, and the extensive discussion of these issues in the *2009 Draft Guidelines* was praised by commentators.

The *New Draft Guidelines* arrive on the heels of significantly enhanced enforcement efforts by the Competition Bureau. Between 2000-2008, only a single abuse of dominance case was filed. Since mid-2009, the Bureau has filed a Consent Agreement settling a matter involving joint abuse of dominance in the waste business; brought an abuse of dominance case against the Canadian Real Estate Association which was subsequently settled; and is pursuing an abuse case against the Toronto Real Estate Board. The Bureau is also litigating a case against Visa and MasterCard under the price maintenance provisions of the Act that is similar in many respects to an abuse of dominance case. Thus, the issues addressed in the *New Draft Guidelines* case are of significant practical, as well as policy, importance.

Those interested in commenting on the current Draft Guidelines are to submit their views in writing to the Competition Bureau by May 22, 2012.

NOTES

1. The New Draft Guidelines are available on the Competition Bureau's Web site at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03445.html.

Under Fire: Continued Attacks on Exclusive Forum Provisions May Slow Adoption

BY DAVID HERNAND AND THOMAS BAXTER

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In February, 11 Delaware corporations and their directors were sued in the Delaware Court of Chancery for adopting bylaw provisions mandating that shareholder lawsuits be filed exclusively in the Chancery Court. All 11 cases were brought by the same two plaintiffs' law firms, and all essentially assert the same arguments that (i) exclusive forum bylaw provisions were inappropriately adopted by the corporations' directors without shareholder approval; (ii) designating an exclusive jurisdiction for litigation is not an appropriate matter to be addressed in a corporation's bylaws; and (iii) such designation exceeds the jurisdiction of the Chancery Court and conflicts with the jurisdiction of federal and other state courts.

The new Delaware lawsuits follow on the heels of last year's federal court decision in *Galaviz v.*

Berg,¹ striking down a similar exclusive forum provision in Oracle Corp.'s bylaws, increasing hostility of institutional shareholder groups toward exclusive forum provisions, and recent shareholder proposals to cause corporations that already have exclusive forum provisions to remove them. These collective attacks raise the question of whether it is worth it for existing public corporations without such provisions to add them, at least until the enforceability and desirability of such provisions (and the method of their adoption) becomes more certain. This article reviews the recent uptick in adoption of exclusive forum provisions, the recent attacks, and weighs the relative benefits and costs.

Background

Public corporations incorporated in Delaware showed renewed interest in adopting exclusive forum provisions in their charters and bylaws after Delaware Vice Chancellor J. Travis Laster suggested in dicta in his March 2010 decision in *In re Revlon Shareholders Litigation*² that directors and shareholders are free to select an exclusive forum for intra-entity disputes.³ A handful of Delaware companies had adopted such provisions in their charters and bylaws prior to Vice Chancellor Laster's decision, but his words seemed to provide the catalyst for commentators and practitioners to start recommending that public corporations adopt exclusive forum provisions. By the end of last year, 195 Delaware corporations had adopted or proposed exclusive forum selection clauses in their charters or bylaws.⁴

An exclusive forum provision can take many forms, but the following is representative for a Delaware corporation:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's

stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to this exclusive forum provision.

Such a provision does not limit the ability of shareholders to sue for violations of federal law (such as federal securities law violations) or non-corporate law claims under state law.

Some corporations have chosen to include an exclusive forum provision in their bylaws, which typically can be accomplished with board approval alone, while other corporations have elected to include such a provision in their charter, which requires both board and shareholder approval. The vast majority of public companies adopting exclusive forum provisions did so prior to becoming a public company, and of those public companies implementing such a provision after already being public, most adopted the provision by by-law amendment without seeking shareholder approval.⁵

During the 2011 proxy season, only six companies sought shareholder approval for a charter amendment, five of which were adopted. Life Technologies Corp.'s proposal was bundled with charter amendments declassifying the corporation's board and passed easily. The five other proposals were presented on a stand-alone basis. While the proposals passed without issue for InsWeb Corp. and Lighting Science Group, both companies had significant insider ownership that favored the proposals and the result may not be indicative of future shareholder votes on similar stand-alone proposals. Proposals by DIRECTV and Altera Corp. were narrowly approved, while the proposal by The Allstate Corp. failed. To date, only three companies have filed proxy statements seeking equity approval of an exclusive forum provision in the 2012 proxy season.⁶

The rise in adoption of exclusive forum provisions is directly related to the rise in multi-jurisdictional litigation being asserted against public

companies to challenge corporate actions, which is viewed by most corporate officers, shareholders and lawyers as wasteful of corporate resources. Particularly in connection with significant merger transactions, plaintiffs' firms routinely sue companies in multiple jurisdictions, as they compete to serve as lead counsel for the companies' shareholders and extract larger settlements.⁷ Chancellor William B. Chandler, noted and described this phenomenon in March 2011:

Judges, defense counsel, and the plaintiffs' bar are now routinely confronted with these sorts of disputes and have yet to come up with a workable solution. The potential problems, as one can imagine, are numerous. Defense counsel is forced to litigate the same case—often identical claims—in multiple courts. Judicial resources are wasted as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions. Worse still, if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved. Efficiency and comity would be better served if these cases were litigated in one jurisdiction.⁸

There are many reasons cited by Delaware corporations for designating Delaware as an exclusive jurisdiction to resolve intra-company disputes. Fairchild Semiconductor International, Inc.'s March 7 proxy statement provides a useful overview of the reasons companies cite in support of these provisions. The Fairchild proxy statement first notes that "[m]any authorities on corporate governance believe that stockholders derive a significant benefit from the inclusion of a provision in a corporation's certificate of incorporation requiring that certain stockholder lawsuits be brought exclusively in the Court of Chancery," and then offers the following explanation:

The benefits of litigating intra-company disputes in the Court of Chancery are clear. Over the years, the State of Delaware has developed a well-established body of corporate law, and the Court of Chancery is the most experienced forum for deciding the outcome of such disputes. Litigating intra-company corporate disputes in Delaware results in greater certainty and predictability for all stockholders. Furthermore, there is a significant risk that allowing stockholders to bring such highly sophisticated matters in forums with little familiarity or experience in corporate governance leaves stockholders at risk that foreign jurisdictions may misapply Delaware law. Additionally, such a provision helps to eliminate duplicative litigation in multiple forums, which can be costly and inefficient. Finally, the ability of the Court of Chancery to resolve disputes on an accelerated schedule reduces the time and cost of uncertain, protracted litigation.

Although not identified as a reason to adopt the forum selection clause in the proxy statements of the few companies who have put the matter to a shareholder vote, companies favor shareholder litigation in the Court of Chancery because it is a court of equity, which is one of the principal reasons plaintiffs' attorneys express for avoiding the court. As a court of equity, plaintiffs in Chancery Court cannot recover punitive damages (unless expressly authorized by statute) or demand a jury trial. An exclusive forum selection clause that requires shareholder disputes to be brought in the Court of Chancery eliminates jury unpredictability, including the risk that a jury may award damages in a far greater amount than is warranted, based on juror sympathies.

Shots Across the Bow

Despite the proliferation of exclusive forum provisions and many corporate lawyers' view that such provisions are beneficial to both the corporation and such corporation's shareholders, use of exclusive forum clauses is under attack. In January 2011, a federal district court in California

refused to enforce an exclusive forum provision in Oracle Corp.'s bylaws where the "provision was unilaterally adopted by the directors who [were] defendants in [the derivative] action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect."⁹ Because the decision was based on federal law, it left unresolved the question of whether directors may unilaterally adopt forum selection bylaws under Delaware law. However, the court suggested that the argument to enforce a forum selection clause would be much stronger if the clause were adopted as a charter amendment approved by a majority of shareholders.¹⁰

Surprisingly to some, institutional shareholder groups are challenging and resisting exclusive forum provisions. During the 2011 proxy season, Institutional Shareholder Services Inc. (ISS) announced that it would oppose forum selection proposals unless a corporation asserting such a proposal had in place the following best-practices governance features:

- an annually elected board;
- a majority vote standard in uncontested elections of directors;
- a meaningful special meeting right (generally 10% without onerous restrictions); and
- the absence of a poison pill, unless the pill was approved by the company's shareholders.¹¹

In effect, this policy reflected a view of tolerance for an otherwise undesirable exclusive forum provision only if a corporation adopted four other governance provisions considered important to ISS. For the 2012 proxy season, ISS announced that it would consider exclusive forum proposals on a case-by-case basis, taking into account both the company's litigation history (whether it has been materially harmed by shareholder litigation in jurisdictions outside its state of incorporation) and overall governance practices (whether it has an annually elected board, has majority voting in

uncontested director elections, and does not have a non-shareholder approved poison pill).

For 2012, Glass Lewis & Co. (Glass Lewis) announced that it will generally recommend that shareholders vote against any stand-alone bylaw or charter amendment seeking to adopt an exclusive forum provision.¹² Where a proposal to adopt an exclusive forum provision is bundled with other bylaw or charter amendments that would be beneficially to shareholders, Glass Lewis will consider such proposal on a case-by-case basis. However, if the board adopts an exclusive forum bylaw provision without shareholder approval, or, if the board seeks shareholder approval of an exclusive forum provision pursuant to a bundled bylaw or charter amendment, Glass Lewis recommends a vote against the chairman of the corporate governance committee. Glass Lewis also will recommend a vote against the chairman of the corporate governance committee when a forum selection provision is adopted prior to an initial public offering (IPO), or, if there is no such committee, a vote against the chairman of the board who served when the provision was adopted. Glass Lewis explains its view that "any provision limiting a shareholder's choice of legal venue is not in the best interests of shareholders as such provisions may effectively discourage the use of shareholder derivative claims by increasing their associated costs and making them more difficult to pursue." Consequently, corporations can expect opposition from Glass Lewis to proposals to add exclusive forum provisions and support for shareholder proposals to repeal provisions previously adopted.¹³

Similarly, the Council of Institutional Investors (CII), an association of pension funds, employee benefit funds, foundations and endowments, has adopted a policy of discouraging companies from adopting charter or bylaw provisions that restrict venue for shareholder litigation.¹⁴

Opposition to exclusive forum provisions also is starting to show up in the form of non-binding shareholder proposals seeking repeal of exclusive forum provisions adopted without shareholder approval. For the 2012 proxy season, at least four corporations received shareholder proposals advocating repeal of the exclusive forum by-

law provisions adopted by board action without shareholder approval.¹⁵

The opposition of institutional shareholder groups to exclusive forum provisions is surprising to many corporate law practitioners and corporate managers who tend to view multi-jurisdictional litigation as imposing unwarranted costs on the corporation that are shared by all shareholders. The positions taken by ISS, Glass Lewis, CII and shareholders advancing proposals to remove exclusive forum provisions clearly demonstrate there is vocal support for a contrary view that such provisions impinge on shareholder rights.

Direct Legal Attack in Delaware

Against the backdrop of the federal court decision invalidating Oracle's exclusive forum bylaw and opposition from institutional shareholder groups against exclusive forum provisions generally, two notable Delaware plaintiffs' firms, Prickett, Jones & Elliot, P.A. and Kessler Topaz Meltzer & Check, LLP,¹⁶ jointly filed substantially similar complaints on behalf of shareholders of Delaware corporations Air Products & Chemicals, AutoNation, Inc., Chevron Corp., Curtiss-Wright Corp., Danaher Corp., FEDEX Corp., Franklin Resources, Inc., Navistar International Corp., Priceline.com Inc., SPX Corp. and Superior Energy Services, Inc.¹⁷ In each case, the plaintiffs challenged the validity of an exclusive forum bylaw provision adopted by the corporation's board without shareholder approval. The sample exclusive forum provision provided above is similar to the exclusive forum provision bylaw for each of the defendant corporations.

Plaintiffs in these cases offer similar arguments to attack each board's adoption of an exclusive forum bylaw. The following arguments in the complaint filed against Danaher¹⁸ are representative of the arguments made against the other defendant corporations:

- An exclusive forum bylaw provision exceeds the scope of matters permitted to be covered in bylaws under Section 109(b) of the Delaware General Corporation Law (DGCL), which states that bylaws "may contain any

provision not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its shareholders, directors, officers or employees." The plaintiffs allege that the exclusive forum bylaw exceeds such authority because it (i) purports to apply to persons not subject to bylaw regulation, including *former* shareholders, directors, officers and employees, as well as non-shareholders who have "any interest" in the companies' stock (*e.g.*, holders of options, warrants and convertible debentures), and (ii) does not relate to internal corporate governance. Two of the bylaws at issue also require shareholders to institute actions against agents of the corporation in the Chancery Court, which is not specifically authorized by the statute.

- Mandating use of Delaware Chancery Court to resolve all intra-company disputes (which might include actions at law) violates Delaware statutes that limit the Chancery Court's subject matter jurisdiction to equitable claims and matters specifically authorized by statute.
- An exclusive forum bylaw provision cannot confer the Chancery Court with exclusive personal jurisdictions over shareholders and certain defendants who would not otherwise be subject to personal jurisdiction in Delaware. The Danaher complaint asserts that under Section 3114 of the DGCL, personal jurisdiction is available only for directors and certain senior officers, leaving the Chancery Court without personal jurisdiction over most other corporate officers and employees. This could result in aggrieved shareholders not being able to sue certain officers and employees in the sole court where the shareholders are authorized to bring suit. The exclusive forum bylaw for two of the defendant corporations specifically provides that the provision only applies when all indispensable defendants are subject to personal jurisdiction in Delaware.

- The specific bylaw provision at issue is invalid and unenforceable because it (i) was unilaterally adopted without shareholder consent and under contract law principals would require mutual consent, and (ii) lacks mutuality by restricting only a shareholder's choice of forum while leaving the corporation free to initiate litigation in any forum it chooses. Like the Danaher bylaw, eight of the other challenged bylaw provisions allow the corporation to consent to a forum other than the Chancery Court, to which the plaintiffs argue that the time required to obtain the corporation's approval would effectively limit the availability of other courts, given the expedited nature of many corporate lawsuits.
- A bylaw provision designating Delaware as an exclusive forum for a broad range of litigation conflicts with federal law, including the Securities Litigation Uniform Standards Act of 1998 (SLUSA), and impinges original federal jurisdiction, federal diversity and supplemental jurisdiction, and federal bankruptcy jurisdiction.
- The specific provision at issue is not reasonable and equitable because it was unilaterally adopted by directors "to give themselves control over where they may be sued" and is "mandatory, excessive and ill-defined."
- The specific provision at issue is the product of a breach of fiduciary duty by self-interested directors. The plaintiffs in the Danaher complaint argue that the directors were self-interested because the bylaws "(i) enable[] them to cause litigation against them to be confined to the forum where they believe they are least likely to be held liable; (ii) enable[] them to avoid a jury trial; and (iii) may make it difficult or impossible for certain claims to be brought against them." Because the directors were self-interested, the plaintiffs argue that the entire fairness was applicable and not met.

The 11 cases recently filed in Delaware squarely raise the issue of enforceability of exclusive forum

bylaws adopted without shareholder approval, and may provide Delaware courts an opportunity to address the legality of such provisions generally (including, for instance, where included as a charter provision adopted with shareholder approval). The 11 cases have been consolidated and will be heard by Chancellor Leo E. Strine, Jr.¹⁹

Most commentators writing about the 11 cases in the first few weeks after they were filed have predicted Delaware courts will uphold the right of boards to add such provisions to corporate bylaws as a general proposition. Nevertheless, the full frontal attack on such provisions by the plaintiffs in these cases, and the possibility of future litigation concerning various nuances of exclusive forum provisions, creates uncertainty regarding their utility to corporations considering adopting them.

Practical Considerations

While many Delaware corporations responded to Vice Chancellor Laster's 2010 invitation to adopt exclusive forum provisions binding on all shareholders, corporations did so with the expectation that adopting such provisions offered the benefit of giving a corporation an additional way to combat multi-jurisdictional litigation with little downside. The rise of substantial resistance from institutional shareholder groups, the possibility of having deal with shareholder proposals to remove provisions and the specter of attracting litigation concerning the exclusive forum provisions themselves (or their manner of adoption) undoubtedly changes the calculus for corporations deciding whether to adopt one.

For the many corporations that adopt exclusive forum provisions in their charters prior to going public, being spun off or emerging from bankruptcy, there is less concern of litigation challenging the act of inserting such a provision. These companies can get the benefits of including such provisions in their charters without having to worry about seeking shareholder approval in the face of institutional shareholder group opposition (which will be present after going public) or risk litigation concerning the manner in which such provisions are adopted. These companies

ultimately will face the prospect of shareholder proposals to remove such provisions and litigation challenging specific aspects of the particular provisions adopted if and when intra-company litigation ensues, but these risks are more remote and speculative.

For existing public corporations considering whether to adopt exclusive forum provisions, the risk of litigation if a board acts unilaterally to adopt an exclusive form bylaw and likely shareholder opposition to such a provision if adopted by charter amendment, coupled with the later risks of shareholder proposals seeking to remove such provisions and litigation challenging aspects of such provisions, may warrant waiting to implement such provisions until Delaware (and possibly other) courts confirm the legality of such provisions and manner of adoption. Such companies may still face shareholder opposition when they ultimately seek to add an exclusive jurisdiction provision, but by waiting may be able to avoid costly litigation while the issues are sorted out in Delaware and ultimately be in a position to adopt an exclusive forum provision that is better tailored to address the specific issues raised in the current lawsuits.

NOTES

1. *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (2011).
2. *In re Revlon Shareholders Litigation*, 990 A.2d 940 (Del. Ch. 2010).
3. *Revlon* at 960. In footnote 8 of the opinion, Vice Chancellor Laster identifies numerous authorities for this proposition.
4. Claudia H. Allen, *Study of Delaware Forum Selection in Charters and Bylaws*, n.6 & 8 (Updated Jan. 25, 2012) (hereinafter, Study).
5. Study at 1.
6. The companies that included in the provisions in their proxy statements are Sally Beauty Holdings Corp., Fairchild Semiconductor International, Inc., and Suburban Propone Partners LP, which proposed adopting the provision in its existing partnership agreement.
7. Study at 3 (citing several authorities discussing this phenomenon); see also Edward Micheletti and Cliff Gardner, *M&A Shareholder Litigation: A Year in Review*, Law360 (Jan. 12, 2012) ("In nearly every deal litigation matter, the plaintiffs' counsel attempt to create leverage for themselves by filing deal litigation raising

issues of Delaware law not only in Delaware, but also in a non-Delaware forum.").

8. *In re Allion Healthcare Inc. Shareholders Litigation*, No. 5022-CC, 2011 WL 1135016, at *4 (Del. Ch. March 29, 2011).
9. *Galaviz*.
10. *Galaviz* at 1175.
11. ISS, *U.S. Corporate Governance Policy 2012 Updates*, at 13 (Nov. 17, 2011), available at http://www.issgovernance.com/files/ISS_2012US_Updates20111117.pdf.
12. Glass Lewis & Co., *2012 North American Proxy Season Preview*, at 13-14 (Dec. 12, 2011).
13. Glass Lewis & Co., *Proxy Season Preview 2012*, at 5-6 (Jan. 1, 2012).
14. Council of Institutional Investors, *Corporate Governance Policies* (Dec. 21, 2011), available at [http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20\(2\).pdf](http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20(2).pdf).
15. Study at 1.
16. Both firms recently served as plaintiffs' counsel in *In re Southern Peru Corporation Shareholder Derivative Litigation*, C.A. No. 961-CS (Del. Ch. Oct. 14, 2011), in which Chancellor Strine awarded plaintiffs the largest damages award in the Chancery Court's history (\$1.3 billion plus interest for a total award of \$2 billion) and awarded the two plaintiffs' firms a staggering \$300 million in attorneys' fees. The law firm Klausner, Kaufman, Jensen & Levison also is serving as "Of Counsel" in a number of the actions.
17. See Allison Frankel, *Shareholder Lawyers Sue Over Delaware Forum-selection Bylaws*, Feb. 8, 2012, Thomson Reuters News & Insight, available at <http://newsandinsight.thomsonreuters.com/Legal/News/2012/02 - February/Shareholder lawyers sue over Delaware forum-selection bylaws/>.
18. *Boilermakers Local 154 Retirement Fund and Key West Police & Fire Pension Fund v. Danaher Corp.*, 2012 WL 381847 (Del. Ch. Feb. 6, 2012) (trial pleading).
19. Steven M. Haas, *Talking Points: The Significant of Exclusive Forum Bylaws*, www.boardmember.com (Feb. 29, 2012), available at <http://www.hunton.com/files/News/9130bcff-5a2f-478e-a1c4-1ba30b21391e/Presentation/NewsAttachment/2a48a255-b6d5-4488-a170-1ffeaada088a/Corp Board Member Talking Points Haas.pdf>.

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