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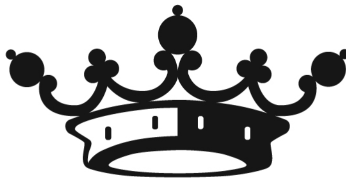
Managing Corporate Governance Issues in M&A

Leading Lawyers on Identifying Issues in M&A Negotiations, Understanding Risk in a Down Economy, and Assimilating Governance Standards in a Merger



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The Litigator's Role in M&A Transactions

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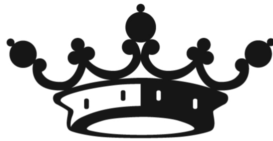

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Identifying Corporate Governance Issues in M&A Negotiations

Merger and acquisition (M&A) litigators work seamlessly with their corporate counterparts to advise companies, along with special committees, on fiduciary duties, director independence, liability risks, and potential avenues of litigation. M&A corporate and litigation counsel must ensure that the board of directors is fully informed with respect to its fiduciary obligations. The M&A litigator can also assist at the outset of a proposed transaction in evaluating the corporate strategy and in shaping representation, discovery, and disclosure strategies to maximize the probability of success if the transaction is challenged.

Directors' Duties

As an initial matter, counsel is responsible for advising the board on the basic standards of judicial inquiry with respect to the board's decisions—for example, the business judgment rule, the *Unocal* standard, the *Revlon* standard, and the entire fairness standard. Under each standard, directors must act with adequate information and active involvement in the decision-making process to ultimately defend the transaction in court, if necessary.

Under the business judgment rule, there is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). In other words, courts "will not invalidate a board's decision or question its reasonableness, so long as its decision can be attributed to a rational business purpose." *Robotti & Co., LLC v. Liddell*, C.A. No. 3128-VCN, 2010 WL 157474, at *11 (Del. Ch. Jan. 14, 2010). Under this rule, the directors' decision is protected unless a plaintiff can show that the board did not satisfy its duty of care or loyalty.[1]

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[1] The duty of care requires that directors act on an informed basis, including the input of legal and financial advisors. Id.; see also *Emerald Partners v. Berlin*, 787 A.2d 85, 90-91 (Del. 2001); *Cede & Co. v. Technicolor Inc.,* 634 A.2d 345, 360-61 (Del. 1993). Directors must make sure they have the information necessary to take action, devote enough time to considering such information, and obtain, where necessary, advice from legal and financial advisors. To show a violation of the duty of care, a plaintiff must prove gross negligence. See *Smith v. Van Gorkum*, 488 A.2d 858, 874 (Del. 1985) (holding that directors breached their duty of care where they approved a sale despite the fact that they "were uninformed as to the

Counsel must also determine whether the company's articles of incorporation or applicable law exculpate directors for particular conduct. See *Wood v. Baum*, 953 A.2d. 136, 141 (Del. 2008); see also *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 648 (Del. Ch. 2008).[2] For instance, Delaware law permits complaints for breach of the duty of care to be dismissed based on an exculpatory clause.[3] In such cases, pleading facts supporting an inference of gross negligence is not enough; the plaintiff must plead a non-exculpated claim. See *Lear*, 967 A.2d at 648; see also *Wood*, 953 A.2d at 141. "Such a claim cannot rest on facts that simply support the notion that the directors made an unreasonable or even grossly unreasonable judgment. Rather, it must rest on facts that support a fair inference that the directors consciously acted in a manner contrary to the interests of [the company] and its stockholders." *Lear*, 967 A.2d at 652. This is important to the M&A litigator, who can consider raising appropriate exculpatory clause defenses at the earliest possible opportunity, should litigation challenging a proposed transaction arise.

Enhanced judicial review applies in certain circumstances, at which point deference under the traditional business judgment rule is inapplicable. The *Unocal* or *Revlon* standards apply when defending against a change of control or engaging in a sale of control. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173 (Del. 1986). Specifically, in *Unocal*, the Delaware Supreme Court recognized that in the change of control context, there is an "omnipresent

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intrinsic value of the Company" and engaged in only "two hours' consideration, without prior notice, and without the exigency of a crisis or emergency"). To show a violation of the duty of loyalty, a plaintiff must demonstrate that board members acted in bad faith and engaged in self-dealing, which means they appeared on both sides of a transaction, or derived an improper benefit from it. See *Robotti & Co. LLC*, 2010 WL 157474, at *11; *Lyondell Chem. Co. v. Ryan,* 970 A.2d 235, 239 (Del. 2009).

[2] When "directors are contractually or otherwise exculpated from liability for certain conduct, 'then a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts.'" *Wood*, 953 A.2d. at 141 (quoting *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003)); see also *In re Lear Corp. S'holder Litig.*, 967 A.2d at 648 (where charter contains a provision limiting director liability, plaintiff "cannot sustain [its] complaint even by pleading facts supporting an inference of gross negligence; [it] must plead a non-exculpated claim").

[3] See, e.g., *Wood*, 953 A.2d at 141 (dismissing complaint for failure to state intentional wrongdoing); *In re Citigroup Inc. S'holder Litig.*, 964 A.2d 106, 135 (Del. Ch. 2009) (dismissing claims for failure to plead intentional wrongdoing or bad faith); *In re Lear Corp. S'holder Litig.*, 967 A.2d at 652-53 (dismissing complaint for failure to state intentional wrongdoing).

specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Unocal*, 493 A.2d at 954. The court held that directors who actively oppose a would-be acquirer are subject to "an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred." *Id.* In *Revlon*, the Delaware Supreme Court held that once a change in control of a corporation becomes inevitable, its board has a duty to "maximiz[e]…the company's value at a sale for the stockholders' benefit… The directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182.[4] Finally, in transactions involving conflicts of interest, the most exacting level of scrutiny, the "entire fairness" standard of review, applies. See *In re John Q. Hammons Hotels Inc. S'holder Litig.*, C.A. No. 758-CC, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009); *Kahn v. Lynch Commc'n Sys. Inc.*, 638 A.2d 1110 (Del. 1994); *Weinberger v. UOP Inc.*, 457 A.2d 701 (Del. 1983).

Finally, the M&A litigator is uniquely skilled to evaluate issues relating to the fairness of the proposed transaction to the parties involved. Specifically, litigators consider whether there are attributes of the transaction, whether it is the break-up fee, the no-shop provisions, or fiduciary outs, that somehow constrain one party or another's ability to act in the best interests of its stakeholders and render the transaction subject to attack under various legal theories.[5]

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[4] As the Delaware Chancery Court explained, *Revlon* established that "once directors decide to sell the corporation…[they] must seek the highest value deal that can be secured for stockholders." *In re Toys "R" Us, Inc., S'holder Litig.*, 877 A.2d 975, 999 (Del. Ch. 2005). This situational duty carries with it a more stringent standard of review: "courts…subject directors subject to *Revlon* duties to a heightened standard of reasonableness review, rather than the laxer standard of rationality review applicable under the business judgment rule." *Id.* at 1000.

[5] For example, litigation often arises concerning deal protection devices, including the size of a termination or break-up fee. Generally, such fees are designed to compensate a party if a transaction is not consummated because a bid is made for the other party. Recently, the Delaware Chancery Court held that a $99 million termination fee that, along with a $10 million expense reimbursement fee, represents over 4 percent of the equity value of the merger, was not unreasonable and did not constitute a breach of fiduciary duty. *In re 3Com S'holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009). Courts have found similar provisions to be standard and not *per se* unreasonable. See, e.g., *In re MONY Group Inc. S'holders Litig.*, 852 A.2d 9, 24 (Del. Ch. 2004) (upholding termination fee of 3.3 percent of company's total equity value and 2.4 percent of total transaction value); *In re Toys "R" Us Inc. S'holder Litig.*, 877 A.2d 975, 980 (Del. Ch. 2005) (holding termination

Representation Issues

The M&A litigator must consider whether all relevant persons and entities are appropriately represented. This means an exhaustive evaluation of stakeholders involved in the transaction to determine who might have individual interests that could become material and potentially adverse to other stakeholders in the proposed transaction.

This starts with a review of the board of directors. When an M&A transaction arises, counsel must consider whether there should be a special committee of independent directors to evaluate certain issues. Generally, a special committee's role is to protect shareholder interests in cases where the interests of management directors or other interested directors are significantly different from shareholders' interests. The selection of special committee members must be carefully undertaken: even if directors do not have a direct interest in the subject matter at issue, they still cannot be beholden to a controlling shareholder or management. See, e.g., *Emerging Commc'ns Inc. S'holders Litig.*, C.A. No. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004). Whether there is a need for a special committee can change during an M&A process. For instance, if a third-party acquirer becomes affiliated with members of management, a special committee may become necessary. If a controlling shareholder transaction is involved, a special committee is necessary. See *In re Digex Inc. S'holders Litig.,* 789 A.2d 1176 (Del. Ch. 2000); *McMullin v. Beran*, 765 A.2d 910 (Del. 2000).

If a special committee is created, the best practice is for it to have its own separate financial and legal advisers. See, e.g., *Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130 (Del. Ch. 2006); *In re Tele-Commc'ns Inc. S'holders Litig.*, C.A. No. 16470, 2005 WL 3642727 (Del. Ch. Dec. 21, 2005). These advisers should be free of influence from interested parties, and well informed about the company. The special committee and its advisers must be proactive in seeking information and negotiating on behalf of shareholders. M&A

fee of 3.75 percent and the presence of matching rights "do not act as a serious barrier" to other potential bidders); *In re Pennaco Energy Inc.*, 787 A.2d 691, 707 (Del. 2001) (holding a 3 percent termination fee was modest and reasonable); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000) (noting "it is difficult to see how a 3.5 percent fee would have deterred a rival bidder who wished to pay materially more."). See also *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *7 n.37 (collecting cases).

litigation counsel should carefully review any minutes or other records of the special committee's deliberations. At each stage, counsel must carefully reevaluate whether any new representation issues are raised by ongoing events in the proposed transaction.

M&A litigators should routinely consider other potential conflicts. For instance, management's own interests can diverge from the corporation's interests during M&A negotiations. If management is negotiating an incentive plan, counsel should consider whether separate counsel for management should be retained. Unique ownership structures may require separate counsel for the various factions involved. There are an infinite variety of factual paradigms, and all that can be generalized is that the M&A litigator needs to exhaustively consider the potential for conflicts and the resulting need for separate counsel.

Discovery Issues

The M&A litigator also is helpful with preparation for discovery in potential future litigation challenging the proposed transaction. Litigation, which is often viewed by transactional attorneys as an unwelcome threat, is better viewed as an integral part of accomplishing the transaction. If counsel is unprepared, massive electronic document discovery and depositions may prevent a transaction from closing on the schedule the company has set. The M&A litigator identifies potential witnesses and document custodians at the earliest opportunity in a matter, and works with the company to preserve and produce relevant materials.

The M&A litigator must also anticipate a motion for expedited litigation, including expedited discovery and a preliminary injunction motion. Expedited discovery can be permitted upon a strong showing of good cause justifying its necessity. For instance, Delaware courts have recognized that, "[t]o make the necessary showing, a plaintiff must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding." *In re SunGard Data Sys. Inc. Shareholders Litig.*, C.A. No. 1221-N, 2005 WL 1653975 (Del. Ch. 2005).

M&A litigators must be prepared to oppose such requests when they are not appropriate. Motions for expedited discovery are denied when "the moving papers fail to articulate a colorable claim of irreparable harm and any wrongful conduct can be adequately remedied by a money damages award." *In re Int'l Jensen Inc. S'holders Litig.*, C.A. No. 14992, 1996 WL 422345, at *1 (Del. Ch. July 13, 1996). If a plaintiff cannot show any basis for a preliminary injunction, it cannot meet its burden of demonstrating good cause for expedited discovery.[6] Moreover, courts have denied expedited discovery when plaintiffs are not currently seeking a preliminary injunction, but only contemplating whether to seek one.[7] Courts also routinely decline to permit expedited proceedings when plaintiffs do not act with diligence.[8] Finally, courts consider the scope of the requested discovery, and have denied relief where the requests were burdensome.[9]

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[6] See, e.g., *Giammargo v. Snapple Beverage Corp.*, Civ. A 13845, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994) (expedited proceedings should be denied "where there clearly is no demonstrable need for the remedy of preliminary injunction or, in the rarer case when there is not even any colorable claim pleaded); see also *Wand Equity Portfolio II L.P. v. AMFM Internet Holding Inc.*, C.A. No. 18162, 2001 WL 167720, at *2 (Del. Ch. Feb. 7, 2001) ("[T]his Court must assess, preliminarily, whether the moving party has articulated a sufficiently colorable claim together with a sufficient possibility of a threatened irreparable injury to justify the imposition of the expense and inconvenience of an expedited preliminary injunction proceeding."); *Jasinover v. The Rouse Co.*, No. 13-C-04-59594, 2004 WL 2747382, at *3 (Md. Cir. Ct. Oct. 25, 2004) ("[B]efore setting this Court and the other parties on an extraordinary course of rigorous and rushed discovery, it is incumbent on the Plaintiff to make some demonstration that the voyage would likely lead to a worthwhile destination.").

[7] See, e.g., *Qwest Commc'ns Int'l v. WorldQuest Networks Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003) (denying plaintiff's request for "expedited discovery to determine whether to seek preliminary injunctive relief); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 4, 6-7 (D.D.C. 2006) (denying request for expedited discovery in furtherance of future, unscheduled motion for preliminary injunction where there was no basis for injunctive relief and requests were overbroad and burdensome); *Dimension Data N. Am. Inc. v. NetStar-1 Inc.*, 226 F.R.D. 528, 531-32 (E.D.N.C. 2005) ("[P]laintiff's motion for expedited discovery is not reasonably timed, where, as here, plaintiff has not yet filed a temporary restraining order or a motion for preliminary injunction, setting out in detail the areas in which discovery is necessary in advance of a determination of preliminary injunctive relief.").

[8] See, e.g., *In re Gen. Motors (Hughes) S'holders Litig.*, C.A. No. 20269, 2003 WL 25279064 (Del. Ch. Oct. 2, 2003) (explaining that, "[c]ritical to this inquiry" of whether to allow expedited proceedings "is whether a true exigency exists that is not caused by a lack of diligence of the plaintiff" and denying relief based on lack of diligence); *Wand Equity Portfolio*, 2001 WL 167720, at *2 (denying request for expedited proceedings where plaintiffs delayed for months after announcement of merger to bring motion); *In re U.S. Robotics Corp. S'holders Litig.*, C.A. No. 15580, 1999 WL 160154, at *13 (Del. Ch. Mar. 15, 1999) (denying request for expedited discovery because of the "lack of

While M&A counsel may have many arguments that can foreclose expedited discovery, the simple fact is that the lawyers must prepare the company to quickly go forward if required so as not to jeopardize the timing of closing on the proposed transaction.

Finally, the corporate transaction team should anticipate that lawsuits challenging a proposed transaction might be filed in multiple forums. Over the last several years, it has been common for plaintiffs' attorneys to file lawsuits in the state of incorporation (i.e., Delaware), and for others to file lawsuits in places where the company does business (i.e., California, Illinois, Tennessee, etc.). Where there is diversity jurisdiction, federal questions, federal disclosure claims, or constitutional challenges, the lawsuits may be filed in federal courts. The M&A litigator should identify where these suits may be filed and develop a strategy for consolidating, staying, or dismissing the actions. The M&A litigator can also engage local counsel in the relevant jurisdictions at an early stage to determine the best course of action for defending a challenge to the proposed transaction.

Disclosure Issues

In cases involving proxy materials, the M&A litigator can anticipate disclosure objections and work with corporate attorneys and the company to foreclose certain arguments. M&A litigators who are skilled at issue spotting can assist in

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expedition by movants in filing this motion" in support of which they desired expedited discovery); *Union Pac. Corp. v. Santa Fe Pac. Corp.*, C.A. Nos. 13778, 13587, 1995 WL 54428, at *3 (Del. Ch. Jan. 30, 1995) (denying motion for preliminary injunction and expedited discovery where a plaintiff brought its motion nine days after learning of shareholder vote and where document discovery would have to be completed in a week); *In re Blockbuster Entm't Corp. S'holders Litig.*, C.A. No. 13319, 1994 WL 89011 (Del. Ch. Mar. 1, 1994) (denying preliminary order enjoining merger where plaintiffs waited seven weeks after announcement of deal to file motion for temporary restraining order and expedited discovery).

[9] See, e.g., *Am. LegalNet Inc. v. Davis*, 2009 WL 4796401, at *4 (C.D. Cal. Nov. 25, 2009) (collecting cases explaining that discovery may be denied outright where requests are "wholly overbroad"); *Qwest*, 213 F.R.D. at 420-21 (denying motion because, among other reasons, requests were burdensome and not tailored to issues for preliminary injunction); *Dimension Data*, 226 F.R.D. at 532 (denying motion to expedite because "the discovery requested is not narrowly tailored to obtain information relevant to a preliminary injunction determination"); *In re Fannie Mae Deriv. Litig.*, 227 F.R.D. 142, 143 (D.D.C. 2005) (denying untailored request for expedited discovery absent showing of irreparable injury).

framing disclosures that may avoid this type of litigation and in marshalling the company's evidence to defend the proposed transaction.

Litigation of disclosure issues is ubiquitous in the context of M&A deals. A review of a few cases involving disclosure issues in two areas illustrates what the M&A litigator can add to the corporate transaction team.

Example One: Projections

One of the most common issues that arise in M&A litigation is the extent to which a company seeking shareholder approval of a proposed transaction is required to include financial projections in its proxy statement. Courts generally focus on whether the projections are "material" in the context of the proposed transaction.[10] The decision on whether to disclose must be based on the facts of each case with a careful examination of the information available to the shareholders, including the professional opinions of the company's financial advisers. There is no "checklist" of the types of information underlying the financial advisers' opinion that must be disclosed. Whether the "fair summary" requirement has been satisfied in a particular situation, therefore, must be decided on a case-by-case basis.

What is important in evaluating any disclosure question in M&A situations is that there be an exhaustive and thoughtful review of the facts of each situation. For example, in *In re Netsmart Technologies Inc. S'holders Litig.*, 924 A.2d 171 (Del. Ch. 2007), the court ordered that additional disclosures of projections was required. Netsmart's board included two sets of projections in the proxy statement, but those projections were not the most current projections and were not even the projections actually relied upon by the company's financial adviser. The omission of those was held to be material in the context of the case. As the court observed, "once a board broaches a topic in its disclosures, a duty attaches to provide information that is

[10] The seminal Delaware case is *Skeen v. Jo-Ann Stores Inc.*, 750 A.2d 1170 (Del. 2000), in which the Delaware Supreme Court held that a corporation seeking approval of a cash-out merger need not disclose "all of the financial data [shareholders] would need if they were making an independent determination of fair value." Two years after *Skeen*, Vice Chancellor Strine issued the *In re Pure Res. Inc. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002), decision. *Pure Resources* explained that a "fair summary" of the substantive work performed by a financial advisor must be disclosed, including (i) the basic valuation exercises, (ii) the key assumptions, and (iii) the range of values generated.

'materially complete and unbiased by the omission of material facts."' *Id.* at 23 (internal citation omitted). In *Netsmart*, projections were disclosed, but they were not the most relevant or the most current.

In contrast, in another case, the underlying fact pattern caused the court to take the opposite direction. In *In re CheckFree Corp. S'holder Litig.*, C.A. No. 3193-CC, 2007 WL 3262188 (Del. Ch. Nov. 1, 2007), the plaintiffs argued that the proxy statement should have contained certain projections that had been shared with the purchaser and reviewed by the company's own financial adviser. The proxy statement disclosed information that allowed one to calculate management's estimated earnings and EBITDA through fiscal year 2009, but did not disclose projections for later years or the "raw" projections themselves. The court recognized that the company's financial adviser had to consider certain "risks that threatened the accuracy of those projections… [t]hese raw, admittedly incomplete projections are not material and may, in fact, be misleading." Id. at *3. The court found that "there is no 'checklist' of the sorts of things that must be disclosed relating to an investment bank fairness opinion," and held that the proxy statement met the "fair summary" test. Id.

Recently, plaintiffs attempted a similar argument to *CheckFree* in *In re 3Com Shareholders Litigation*. The plaintiffs claimed that the proxy did not disclose cash flow measures, EBIT estimates, or EBITDA estimates from which cash flows could be derived; the limited management projections that were disclosed in the proxy differed from the financial adviser's discounted cash flow analysis in that management excluded stock-based compensation expense from its projections but the financial adviser included it in its discounted cash flow analysis; and there was no disclosure of whether the management plan or the revised management plan incorporated the value of value added tax refunds that 3Com expected to receive from the Chinese government. Chancellor Chandler rejected these claims, finding that 3Com management gave a complete description regarding its process to obtain the merger price, why management believed the merger was fair and shareholders should vote in favor of it, and summarizing the financial adviser's work in rendering its fairness opinion. While there was a disagreement with the financial adviser's methodology, no disclosure violations were found.

What these cases point out is that it is essential to involve litigators who are thoroughly familiar with the relevant case law in implementing

disclosure strategies for a proposed transaction. The possible solution to a disclosure issue of more disclosure may not always be the right strategy. Courts have cautioned that the "law does not require 'directors to bury the shareholders in an avalanche of trivial information. Otherwise, shareholder solicitations would become so detailed and voluminous that they will no longer serve their purpose.'" *In re Gen. Motors (Hughes) S'holder Litig.*, C.A. No. 20269, 2005 WL 1089021, at *13 (Del. Ch. May 4, 2005) (quoting *Solomon v. Armstrong*, 747 A.2d 1098, 1130 (Del. Ch. 1999). Counsel must come up with the right disclosure strategy and not necessarily add more disclosure.

<u>Example Two: Intentions</u>

Litigation can also arise to force disclosure of an acquiring company's "true intentions." For instance, in the recent case of *NRG Energy Inc. v. Exelon Corp.*, 646 F.Supp.2d 431 (S.D.N.Y. 2009), a target claimed that the potential acquirer harbored a secret intent not to close an exchange offer even if all of the conditions of the exchange offer were satisfied. The target argued that the exchange offer was simply a bargaining tactic to pressure its board into agreeing to a consensual merger that would be far less costly than closing the exchange offer, and brought litigation under Section 14(e) of the Williams Act, 15 U.S.C. § 78n(2), seeking a corrective disclosure in the potential acquirer's S-4 to that effect. It also sought an injunction requiring the potential acquirer to withdraw its exchange offer for a period of sixty to ninety days, after which it could recommence a new offer that it "genuinely intended to close." Following a trial, the court found there was no evidence that the potential acquirer harbored a secret intent, and dismissed the target's complaint.

Governance Issues and Responsibilities for Insolvent Firms

There are a multitude of opportunities in bankruptcy that may not be available outside of that process—to either reduce debt, restructure assets, or improve the financial performance of the company. When a firm is insolvent, the M&A litigator must ensure that the board understands its fiduciary duties to include all appropriate stakeholders in the decision-making process. Stakeholders that are normally excluded from the corporate governance process may have a role to play when the company is

insolvent. Any analysis of corporate governance issues in the context of insolvent companies requires a consultation with experienced bankruptcy counsel. From a litigator's perspective, two particularly interesting groups of issues arise when there is potential M&A activity surrounding an insolvent or troubled company: (1) representation and privilege issues, and (2) protection of valuation materials.

Representation and Privilege Issues

From an M&A litigator's perspective, the potential acquisition of an insolvent or troubled company raises various representation and privilege concerns. If parties that, at one point, were jointly represented subsequently turn on each other, both may have access to the documents of their former joint counsel.

The Third Circuit Court of Appeal's decision in *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3d Cir. 2007), illustrates the scope of the attorney-client privilege in the context of formerly jointly represented parties who find themselves in insolvency. *Teleglobe* involved litigation arising from the decision of a parent corporation to stop funding the operations of its subsidiaries. When the parent and its subsidiaries filed for bankruptcy, the subsidiaries sued the parent for fraud and breach of fiduciary duty in connection with the parent's funding decision. The subsidiaries sought access to documents containing the legal advice provided jointly to the parent and the subsidiaries prior to the funding termination, claiming that, as a result of the joint representation, and because the entities all shared the same corporate counsel, the documents were not protected under the attorney-client privilege. The court held that the subsidiaries were entitled to this information, finding that the joint client relationship arose when the parent and its subsidiaries hired the same attorney to represent them on the same matter. Id. at 362. In a later dispute between these parties, communications made during and within the scope of the joint representation become discoverable as between them while at the same time remaining privileged as to third parties. Id. at 363. Whether a parent and its subsidiaries jointly agreed to seek legal advice from counsel, and whether counsel represented the corporate affiliates on the issue on which they are now adverse, are questions of fact that must be examined on a case-by-case basis.

Teleglobe provides an important roadmap both before and during insolvency proceedings. The M&A litigator needs to carefully evaluate the positions of all parties to determine who may need separate counsel. If joint representation is appropriate, the *Teleglobe* court emphasized that it was permissible for the members of the corporate family and the in-house attorneys "to limit the scope of a joint representation in a sophisticated manner; nothing requires construing the scope of a joint representation more broadly than the parties to it intend." Id. at 373. Moreover, because it is inevitable that parent and subsidiary companies may find that their interests have diverged, particularly in situations involving insolvency, the parent should consider securing separate representation for the subsidiary, as creating a joint representation could risk the waiver of privileged communications in adverse litigation.[11]

Protection of Valuation Materials

Another issue M&A litigators confront when dealing with insolvent companies is protecting confidential financial and strategic business plans and valuation information from being disclosed in the course of negotiations. Strategies relying on the work product doctrine and business strategy immunity can be employed to avoid disclosure of this information until it is absolutely necessary in the proceeding.

Work Product Protection

The work of valuation experts who are working on a corporate transaction concerning a company in insolvency proceedings may be protected by the work product doctrine, provided their testimony as an expert witness is not required in any litigation proceedings. Valuation materials and analyses prepared in bankruptcy proceedings are often considered privileged work product until disclosed by the debtor in the course of the proceeding. For instance, in *Matter of Celotex Corp.*, 196 B.R.

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[11] See also *In re Grand Jury Subpoena*, 274 Fed. Appx. 306, 311 (4th Cir. 2008) ("the scope of the joint client or co-client privilege is circumscribed by the 'limited congruence of the clients' interests,'" and therefore, no joint privilege existed where the "Subsidiary failed to demonstrate that the withheld communications pertained to a matter in which both Parent and Subsidiary shared a common legal interest.") (citing *Teleglobe*, 493 F.3d at 362-63).

596, 599 (Bankr. M.D. Fla. 1996), the bankruptcy court held that valuation documents prepared in anticipation of litigation by the debtor's financial consultants were not discoverable because the documents were protected by the work product doctrine.[12]

The treatment of valuation materials as work product has its limits, and courts have discretion to deny that treatment where it might create the appearance of impropriety. For example, in *In re Asousa Partnership*, the debtor brought a motion to compel the production of a creditor's documents in an adversary proceeding. *In re Asousa P'ship*, Bankr. No. 01-12295 DWS, 2005 WL 3299823 (Bankr. E.D. Pa. Nov. 17, 2005). The court held that the draft appraisal report authored by the creditor's valuation consultant addressed to creditor's outside counsel was discoverable because the law firm's involvement in the valuation work "was artifice, used solely to create the appearance of the now-asserted attorney-client privilege." Id. at *5.[13] To preserve work product protection over such materials, it is important to ensure that outside counsel's involvement is real and substantial.

Business Strategy Immunity

Several federal and state courts have recognized a limited evidentiary privilege known as the "business strategy immunity" or "white knight privilege." See, e.g., *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 418-20 (M.D.N.C. 1992); *Temple Holdings Ltd. v. Sea Containers Ltd.*, 131 F.R.D.

[12] Parties seeking discovery of valuation information must show a "substantial need" to avoid the work product doctrine. Relying on Federal Rule of Civil Procedure 26(b)(3), the bankruptcy court in *In re Tri State Outdoor Media Group, Inc*. explained that "[d]ocuments and tangible things created in anticipation of litigation are only subject to discovery if the party seeking discovery can show a substantial need for the materials and cannot without undue hardship get a substantial equivalent of the materials." 283 B.R. 358, 364 (Bankr. M.D. Ga. 2002) (citing Fed. R. Civ. P. 26(b)(3)).

[13] The court explained: "[w]hile the appraisal report states [the valuation consultant's] belief that it will be used as a basis for, *inter alia*, 'potential litigation purposes,' this reference is too vague to support a claim of work product… Moreover, the assertion conflicts with [the consultant's] proposal letter, which states only that the report will be used only for 'management planning' purposes… Given the artifice surrounding the…appraisal, I find it more likely that the reference to 'potential litigation,' like [the law firm's] involvement, was added solely to give rise to a colorable claim that the report is a protected document." *Id*. at *6 (citing *In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183 (D.N.J. 2003).)

360, 360-61 (D.D.C. 1989); *BNS Inc. v. Koppers Co. Inc.*, 683 F. Supp. 454, 457-58 (D. Del. 1988); *Grand Metropolitan PLC v. Pillsbury Co.*, C.A. Nos. 10319, 10323, 1988 WL 130637 (Del. Ch. Nov. 22, 1988); *Dedde v. Orrox Corp.*, C.A. No. 6409, 1981 WL 15121 (Del. Ch. Apr. 8, 1981). This privilege was initially recognized in the context of target companies defending against hostile contests for corporate control, and it protects against the disclosure of business plans, proposals, or alternatives actively under consideration by the target company or the acquirer. It is designed to protect the party's ongoing deliberations against the risk that the information disclosed will undermine the party's competitive position in ongoing negotiations. See *Grand Metro. PLC*,1988 WL 130637. To invoke this doctrine, federal courts rely upon the protections of Rule 26(c) of the Federal Rule of Civil Procedure and balance "the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the [other party] if discovery is permitted; and the stage of the company's efforts, as well as the stage of the litigation." Id. at *2.

The business strategy doctrine is really not a privilege, but an immunity from production at certain times and under limited circumstances.[14] The protection lasts only as long as the court determines it to be necessary in light of the balancing test. In other words, the party seeking discovery "will not be denied the documents forever." *BNS Inc*, 683 F. Supp. at 458. Once a particular strategy is no longer extant, or once the documents become relevant to the litigation, as when valuation becomes an actively litigated issue at a later stage of the proceedings, the documents may become subject to production. See, e.g., *In re Unitrin, Inc. Shareholders Litig. v. Unitrin, Inc.*, C.A. No. 13656, 1994 WL 507859 (Del. Ch. Sept. 7, 1994).[15]

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[14] Id. ("The 'business strategy privilege' or 'white knight privilege' is not technically a privilege in the sense that proof of certain elements creates something akin to an entitlement, but is in the nature of a qualified immunity to discovery similar to the attorney's work product doctrine.")

[15] See also *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 (Del. Ch. 2000) (holding that a party cannot use the business strategy privilege to shield discovery of commercially sensitive information while at the same time using that information as a sword at trial and refusing to consider such information as evidence).

Corporate counsel should consider what types of information the insolvent company or debtor has that are so sensitive that the company will be severely harmed by premature, or any, disclosure. This may include valuation materials, but more likely will involve ongoing or potential M&A inquiries, potential synergies with M&A counterparties, detailed customer- or supplier-specific business plan information, and intellectual property. See, e.g., *Dolphin Ltd. P'ship I, L.P. v. InfoUSA Inc.*, C.A. No. 1709-N., 2006 WL 1071518 (Del. Ch. Apr. 11, 2006); *NiSource Capital Markets Inc. v. Columbia Energy Group*, C.A. No. 17341, 1999 WL 959183 (Del. Ch. Sept. 24, 1999). The premature, uncontrolled, or unnecessary disclosure of these types of information can be devastating to the interests of the corporation. The security of this information often must be protected beyond the standard professional's eyes-only confidentiality or protective order.

The potential merger parties likely will have documents and business strategies that need to be protected in discovery by a professional's eyes only protective order, which also provides some limitations as to what client employees may review the information. A sample of such an order is included as Appendix A. The sample also contains a strong claw-back provision for privileged or confidential documents that is essential in expedited litigation involving the production of electronic materials.

Some information may be so sensitive that even these restrictions are not enough to protect the clients' interest in confidentiality. The parties may decide to seek a professional's eyes only confidentiality agreement, which can be drafted as a supplement to an existing confidentiality agreement, that prevents any client employees from reviewing the information, such as that included as Appendix B.[16]

[16] While certain types of commercial information may be protected by professional eyes only (or attorney's eyes only) confidentiality or protective orders, some information is of a type that can never be disclosed without harming the producing party. See, e.g., *Gioia v. Texas Air Corp.*, C.A. No. 9500, 1988 WL 18224, at *3 (Del. Ch. Mar. 3, 1988) ("I do not regard confidentiality orders as providing absolute protection. If they did, there would be no need to attempt to evaluate competing claims in this setting, for the words written on a page would afford the protection of a guarded vault. We must operate, however, in a world more closely aligned with a reality in which mistakes occur and in which trust is sometimes abused for advantage."). For instance, a professional who works in the same industry as the producing party cannot erase from his or her memory information about

Improving and Assimilating Governance Standards in a Merger

During the merger process, each company continues to be responsible for monitoring its own corporate governance compliance. Once the merger is consummated, the final merged company may have multiple, or even inconsistent, sets of corporate governance standards. The general counsel, or corporate counsel, of the merged company should engage in a comprehensive review of the standards employed by the predecessor companies and document the corporate governance strategy for the merged company. This counsel should also be advised on best practices to the extent he or she is dealing with inconsistent practices. Once the merged company's standards are compiled, the best practice would be for counsel to provide a set to the merged company's board of directors for their review, adoption, and approval. Once approved, counsel should engage in periodic reporting to the board of directors regarding compliance and best practices. A company's adopted governance standards may be widely disseminated to all employees and posted to a company's Web site.

Final Thoughts

M&A corporate counsel should recognize the importance of engaging an experienced M&A litigator at the outset of consideration of a proposed transaction to evaluate the corporate strategy and assist in shaping litigation, representation, privilege, and disclosure strategies that will maximize the probability of the success of the proposed transaction if challenged by stakeholders. M&A litigators can develop a strategy for document preservation and discovery so that expedited litigation, if ordered, can proceed efficiently and consistent with the timetable associated with closing the proposed transaction. They can also anticipate litigation being filed in multiple jurisdictions and develop a team of local counsel and strategy to deal with such possibilities.

M&A litigators can also anticipate representation issues or privilege challenges that could result in the unnecessary disclosure of material related to the proposed transaction. This can be particularly sensitive when dealing

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potential merger counterparties, synergies, or unique applications of intellectual property, and this can be particularly harmful if his or her next engagement is for one of the company's competitors.

with insolvent companies, and courts have recognized certain protections for valuation and other business-sensitive materials in insolvency proceedings.

Finally, through the M&A process, M&A counsel (whether corporate or litigation) must ensure that the board is complying with its fiduciary duties and is well informed about all the facts and circumstances surrounding the proposed transaction. Counsel also must carefully consider (and perhaps reconsider) potential disclosure issues at each stage of the transaction. This requires not only a sophisticated knowledge of the relevant case law, but also careful consideration of the facts and circumstances as they arise.

Courtney A. Rosen is a partner in Sidley Austin LLP's Chicago office. She counsels and litigates on behalf of firm clients on a wide range of merger and acquisition, breach of fiduciary duty, securities fraud, and bankruptcy matters. She has experience conducting trials and expedited proceedings in various forums common to business transactions and corporate restructuring. She has also conducted internal investigations concerning corporate governance issues, and represented clients in matters before the Securities and Exchange Commission and other regulatory agencies.

Ms. Rosen has co-authored a number of articles concerning fiduciary duties and privilege issues in the context of mergers and acquisitions and insolvency proceedings. She is also active in a number of charitable and civic organizations.

APPENDIX A

STIPULATION AND PROPOSED PROTECTIVE ORDER GOVERNING THE PRODUCTION AND EXCHANGE OF DISCOVERY MATERIALS

WHEREAS, the parties to the above-captioned action (the "Litigation") are engaged in expedited discovery proceedings, which include, among other things, the production of documents; and

WHEREAS, these expedited discovery proceedings necessarily involve the production of certain information which the parties believe to be confidential and sensitive commercial, financial, business or personal information:

IT IS HEREBY STIPULATED AND AGREED, by and among the parties hereto through their undersigned counsel, subject to the approval of the Court, that this Stipulation and Proposed Protective Order Governing the Production and Exchange of Discovery Materials (the "Stipulation and Order") shall govern the handling of documents, depositions, deposition exhibits, and any other information produced, given or exchanged by and among any and all of the parties (individually, the "Producing Party") to the Litigation in connection with discovery or voluntary exchange of information in the Litigation (this information hereinafter referred to as "Discovery Material").

DESIGNATION AS "CONFIDENTIAL" OR "ATTORNEYS' EYES ONLY"

1. A Producing Party may designate any Discovery Material which it has provided as "Confidential" that counsel in good faith believes contains or reflects non-public, confidential, proprietary or otherwise commercially sensitive information.

2. A Producing Party may designate any Discovery Material which it has provided as "Attorneys' Eyes Only" that counsel believes in good faith contains or reflects information so commercially sensitive that disclosure may cause significant harm to the Producing Party.

3. Discovery Material, or information derived therefrom, shall be used by any party receiving such information (the "Receiving Party") solely for purposes of the Litigation and shall not be used for any other purpose, including, without limitation, any business or commercial purpose.

4. The designation of Discovery Material as "Confidential" or "Attorneys' Eyes Only" pursuant to this Stipulation and Order shall be made in the following manner by the Producing Party:

> a. In the case of documents or other materials (apart from depositions or other pretrial testimony): by affixing the legend "Confidential" or "Attorneys' Eyes Only" to each page; where a document is produced in an electronic medium (such as a computer disk) the medium shall be marked as set forth above and when reasonably practicable, "Confidential" or "Attorneys' Eyes Only" shall be electronically labeled into each electronic document so designated;
>
> b. In the case of documents or other materials (apart from depositions or other pretrial testimony), only a single designation of "Confidential" or "Attorneys' Eyes Only" should be made for a given document and the highest level of confidentiality applicable to any portion of such document or other materials shall apply to the entire document; and
>
> c. In the case of depositions or other pretrial testimony: by (i) a statement on the record, by counsel, that certain information or testimony is "Confidential" or "Attorneys' Eyes Only," or (ii) written notice, sent by counsel to all parties within two (2) business days of the receipt of the final transcript, providing that the entire deposition transcript or testimony, or part thereof, is so designated. Unless a statement is made on the record by counsel at the time of the deposition or other pretrial testimony, all deposition and other pretrial testimony shall be deemed to be "Attorneys' Eyes Only" until the expiration of the fifth business day after counsel receive a copy of the final transcript thereof. Only those portions of the transcripts or testimony designated as "Confidential" or "Attorneys' Eyes Only" in the Litigation shall be so deemed. Counsel shall not

permit deposition transcripts to be distributed to persons beyond those authorized herein to receive "Attorneys' Eyes Only" materials during the two-day period for the designation.

5. Inadvertent failure to designate material as "Confidential" or "Attorneys' Eyes Only" shall not constitute a waiver of such claim and may be corrected by prompt supplemental written notice designating such material as "Confidential" or "Attorneys' Eyes Only" in a manner consistent with this Paragraph 5, in which event the Producing Party shall, at its own expense, provide new copies of the newly designated materials to the Receiving Party. The party receiving such supplemental written notice shall thereafter treat materials so designated as "Confidential" or "Attorneys' Eyes Only," and such materials shall be fully subject to this Order as if they had been initially so designated. A person disclosing Discovery Material that is subsequently designated as "Confidential" or "Attorneys' Eyes Only" shall in good faith assist the Producing Party in retrieving such material from all recipients, who as a result of that subsequent designation, are not entitled to receive such material under the terms of this Stipulation and Order and prevent further disclosures except as authorized under the terms or this Stipulation and Order.

6. The parties reserve the right to apply for an Order seeking additional safeguards with respect to the use and handling of Discovery Material.

DISCLOSURE OF "CONFIDENTIAL" OR "ATTORNEYS' EYES ONLY" DISCOVERY MATERIAL

7. Discovery Material designated "Confidential" may be disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part by the party to whom such materials are produced or disclosed only to the following persons, who shall be bound thereby by the terms of this Stipulation and Order:

a. Counsel who represent parties in this Litigation and whose law firm has entered an appearance in this Litigation and regular and temporary employees and service vendors of such counsel (including outside copying and litigation support services) assisting in the conduct of the Litigation;

b. The officers of the parties and any subsidiary or affiliate thereof, who are assisting the parties in this Litigation, provided that such officers shall sign an undertaking in the form of Exhibit A (attached hereto) prior to such disclosure;

c. Any person indicated on the face of a document to be the author, addressee, or a copy recipient of the document;

d. The Court and its employees;

e. Court reporters employed in connection with this Litigation; and

f. Any other person only upon order of the Court or stipulation of the Producing Party.

8. Any Discovery Material designated as "Attorneys' Eyes Only" may be disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part by the party to whom such materials are produced or disclosed only to the following persons who shall be bound thereby, by the terms of this Stipulation and Order:

a. Individual attorneys who are counsel of record ("Counsel") in this Litigation (other attorneys and personnel affiliated with Counsel who are working on the transactional matters described in the Litigation shall have no access to any such material or its contents) and temporary employees and service vendors of such Counsel (including outside supply and litigation support services) assisting in the conduct of the Litigation;

b. The persons listed in Paragraph 7, subparagraphs (c), (d), (e) and (f).

c. One lawyer employed by the Receiving Party, whose name shall be supplied to the Producing Party prior to such disclosure (the "Client Representative"). The Client Representative shall not include any person working in any substantial respect on the transactional aspects of the matters described in the Litigation. The Client Representative shall sign an undertaking in the form of Exhibit A (attached hereto) prior to such disclosure.

9. Any deponent or witness who currently is - or at the time of the creation of the relevant Discovery Material was - employed by a party, including directors, officers, and employees of the party, or any subsidiary or affiliate thereof, may be shown "Confidential" or "Attorneys' Eyes Only" Discovery Material so designated by that party during the course of his/her examination if counsel for the examining party believes in good faith that such a witness has a need to review such material.

LIMITATION ON DISCLOSURE AND USE

10. "Confidential" or "Attorneys' Eyes Only" Discovery Material shall not be made available to any person except as authorized under this Stipulation and Order. "Confidential" or "Attorneys' Eyes Only" Discovery Material shall not be used for any purpose other than the prosecution or defense of claims asserted in this Litigation. In no event shall any person receiving "Confidential" or "Attorneys' Eyes Only" Discovery Material use it for commercial or competitive proposes or make any public or private disclosure of its contents.

SUBMISSION OF "CONFIDENTIAL" OR "ATTORNEYS' EYES ONLY" DISCOVERY MATERIAL TO THE COURT

11. The submission of all documents and pleadings to be filed with this Court, including, but not limited to, transcripts of depositions or trial testimony, exhibits, physical evidence, answers to interrogatories, document requests, or requests for admission, briefs and memoranda, which comprise or contain "Confidential" or "Attorneys' Eyes Only" Discovery Material shall proceed as follows:

> a. Prior to making a submission to the Court that reflects or contains "Confidential" or "Attorneys' Eyes Only" Discovery Material, the parties to this Litigation shall confer regarding the use of that Discovery Material in such submission, and, following such conferral, should any party wish to include in a submission material still designated as "Confidential" or "Attorneys' Eyes Only" Discovery Material, subparagraphs (b), (c), (d), (e) and (f) hereto shall apply;

b. The submitting party shall provide a complete and unredacted version of such submission directly to Chambers, accompanied by a redacted version of such submission excluding those portions that contain or reflect "Confidential" or "Attorneys' Eyes Only" Discovery Material;

c. The submitting party shall deliver to the Clerk of this Court for filing in the public record the redacted version of such submission, and shall provide the Clerk of this Court with an unredacted version of the submission that shall be filed under seal until further order of this Court;

d. Both the redacted and unredacted versions of such submission shall be served on Counsel for the parties in this Litigation and treated in accordance with the terms of this Stipulation and Order;

e. Following any such submission, the parties agree to confer to determine whether any additional material may be unredacted for purposes of the public record and will be available to address any questions or concerns that the Court may have regarding the redactions applied; and

f. In the event of a failure of the attorney for the submitting party to redact "Confidential" or "Attorneys' Eyes Only" Discovery Material, attorneys for any Producing Party may seek relief of the Court to order appropriate redactions.

12. Nothing in this Stipulation and Order shall prevent a party from using any "Confidential" or "Attorneys' Eyes Only" Discovery Material at trial or a hearing. In advance of or at any such hearing or trial, a party may seek relief from the Court, including relief limiting disclosure of "Confidential" or "Attorneys' Eyes Only" Discovery Material during the course of any such proceeding to persons authorized to receive disclosure by this Stipulation and Order. In the event that Discovery Material containing "Confidential" or "Attorneys' Eyes Only" information is used at trial or is otherwise submitted to this Court, it shall not lose its confidential status through such use, and the party using the Discovery Material shall take all reasonable steps necessary to maintain its confidentiality during such use.

OBJECTIONS TO DISCLOSING PARTY'S DESIGNATION

13. During the pendency of this Litigation, any party objecting to the designation of any Discovery Material or testimony as "Confidential" or "Attorneys' Eyes Only" or the application of any provision of this Stipulation and Order may, after making a good faith effort to resolve any such objection, move promptly for an order vacating the designation or the application of said provision. While such an application is pending, the Discovery Material or testimony in question shall be treated as designated by the Producing Party pursuant to this Stipulation and Order.

NO ADMISSION

14. Entering into, agreeing to and/or producing or receiving "Confidential" or "Attorneys' Eyes Only" Discovery Material or otherwise complying with the terms of this Stipulation and Order shall not:

a. Constitute an admission that any document designated "Confidential" or "Attorneys' Eyes Only" contains or reflects trade secrets or any other type of confidential information;

b. Prejudice in any way the rights of the parties to object to the production of documents they consider not subject to discovery, or operate as an admission by any party that the restrictions and procedures set forth herein constitute adequate protection for any particular information deemed by any party to be "Confidential" or "Attorneys' Eyes Only";

c. Prevent the parties from agreeing in writing to alter or waive the provisions or protections provided herein with respect to any particular Discovery Material;

d. Prejudice in any way the rights of any party to object to the authenticity or admissibility into evidence of any document, testimony or other evidence subject to this Stipulation and Order; or

e. Prejudice in any way the rights of a party to seek further protection or a determination by the Court whether any Discovery Material

designated as "Confidential" or "Attorneys' Eyes Only" should be subject to the terms of this Stipulation and Order, except that when a party objects to the designation of Discovery Material as "Confidential" or "Attorneys' Eyes Only", compliance with paragraph 13 is required.

INADVERTENT PRODUCTION

15. The inadvertent production of any Discovery Material shall be without prejudice to any claim that such Discovery Material is privileged or protected from discovery as attorney work-product or by reason of any other applicable privilege, protection or immunity, including without limitation the attorney-client privilege, and the business strategy privilege or immunity, and no party shall be held to have waived any rights by such inadvertent production. If a claim of inadvertent production is made by the Producing Party with respect to certain Discovery Material pursuant to this Paragraph 15, the Receiving Party shall immediately return to the Producing Party the material as to which the claim of inadvertent production has been made and all copies thereof (including any and all copies from any litigation-support or other database), and the Receiving Party shall destroy all notes or other work product reflecting the contents of such material, and shall not use such information for any purpose other than in connection with a motion to compel. The Receiving Party shall return the inadvertently produced Discovery Material to the Producing Party regardless of whether there exists any dispute about (i) the designation of such Discovery Material as "Confidential" or "Attorneys' Eyes Only" or the designation of any other applicable privilege, protection or immunity; or (ii) the inadvertence of the production of that Discovery Material; or (iii) any other matter. Only after returning the requested Discovery Material, the Receiving Party may move the Court for an Order compelling production of the material, but said motion shall not assert as a ground for entering said Order the fact or circumstance of the inadvertent production.

INDEPENDENTLY OBTAINED MATERIAL

16. Nothing herein shall impose any restrictions on the use or disclosure by a party of documents, materials or information designated as "Confidential" or "Attorneys' Eyes Only" that have been obtained lawfully by such party independently of the discovery proceedings in this Litigation.

CONCLUSION OF LITIGATION AND RETURN OF DISCOVERY MATERIAL

17. The provisions of this Stipulation and Order shall, absent written permission of the Producing Party or further order of the Court, continue to be binding throughout and after the conclusion of the Litigation, including without limitation any appeals therefrom. Within thirty (30) days after receiving notice of the entry of an order, judgment or decree finally disposing of this Litigation in which "Confidential" or "Attorneys' Eyes Only" Discovery Material is permitted to be used, including the exhaustion of all possible appeals, all persons having received "Confidential" or "Attorneys' Eyes Only" Discovery Material shall either make a good faith effort to return such material and all copies thereof (including summaries and excerpts) to counsel for the party that produced it or destroy all such Discovery Material and certify that fact to counsel for the Producing Parties. Outside counsel for the parties shall be entitled to retain court papers, depositions and trial transcripts and attorney work product that contain or reflect "Confidential" or "Attorneys' Eyes Only" Discovery Material, provided that such outside counsel, and employees of such outside counsel, shall maintain the confidentiality thereof and shall not disclose such court papers or attorney work product to any person except pursuant to court order or agreement in writing by the undersigned outside counsel to the Producing Party.

VIOLATION

18. The parties to the Litigation agree to be bound by the terms of this Stipulation and Order pending its entry by the Court, or pending the entry of an alternative thereto which is satisfactory to all parties, and any violation of the Stipulation and Order's terms shall be subject to the same sanctions and penalties as if the Stipulation and Order had been entered by the Court.

19. In the event any legal or natural person violates or threatens to violate the terms of this Stipulation and Order, an aggrieved party may immediately apply to obtain injunctive relief against any such person violating or threatening to violate any of the terms of this Stipulation and Order. The parties and any other person subject to the terms of this Stipulation and Order agree that this Court shall retain jurisdiction over it and them for

purposes of enforcing this Stipulation and Order. If "Confidential" or "Attorneys' Eyes Only" Discovery Material is disclosed in violation of this Stipulation and Order, the party or other person who caused, permitted or was otherwise responsible for the disclosure shall immediately inform the Producing Party of all pertinent facts relating to the disclosure, and shall make every effort to prevent any further disclosure, including any disclosure by any person who received any "Confidential" or "Attorneys' Eyes Only" Discovery Material in violation of this Stipulation and Order.

20. Nothing in this Stipulation and Order shall preclude any party from seeking judicial relief, upon notice to the other parties with regard to any provision hereof.

AMENDMENT

21. Any paragraph, provision, or procedure set forth in this Stipulation and Order may be amended or modified by the Court, upon written consent of all parties to the Litigation or upon motion by any party upon notice to all other parties.

MISCELLANEOUS

22. This Stipulation and Order has no effect upon, and shall not apply to, the parties' use of their own "Confidential" or "Attorneys' Eyes Only" Discovery Material for any purpose.

23. If any Receiving Party is subpoenaed in another action or proceeding or served with a document demand, and such subpoena or document demand seeks Discovery Material which was produced or designated as "Confidential" or "Attorneys' Eyes Only" by someone other than the Receiving Party, the Receiving Party shall (i) give prompt written notice by email and hand or facsimile transmission within three (3) business days of receipt of such subpoena or document demand to those who produced or designated the material "Confidential" or "Attorneys' Eyes Only" and (ii) refrain from producing any Discovery Material that has been designated "Confidential" or "Attorneys' Eyes Only" in response to such a subpoena or document demand until the earlier of (a) receipt of written notice from the Producing Party that such party does not object to production of the

designated Discovery Material or (b) resolution of any objection asserted by the Producing Party either by agreement or by final order of the court with jurisdiction over the objection of the Producing Party. The burden of opposing the enforcement of the subpoena shall fall solely upon the party who produced or designated the "Confidential" or "Attorneys' Eyes Only" Discovery Material. Unless the party who produced or designated the "Confidential" or "Attorneys' Eyes Only" Discovery Material submits a timely objection seeking an order that the subpoena not be complied with, and serves such objection upon the Receiving Party by hand delivery prior to production pursuant to the subpoena, the Receiving Party shall be permitted to produce documents responsive to the subpoena on the subpoena response date. Compliance by the Receiving Party with any order directing production pursuant to the subpoena of any "Confidential" or "Attorneys' Eyes Only" Discovery Material shall not constitute a violation of this Stipulation and Order. Nothing herein shall be construed as requiring the Receiving Party or anyone else covered by this Stipulation and Order to challenge or appeal any order directing production of "Confidential" or "Attorneys' Eyes Only" Discovery Material covered by this Stipulation and Order, or to subject himself or itself to any penalties for non-compliance with legal process or order, or to seek any relief from this Court.

24. In the event additional parties join or are joined in this Litigation, they shall not have access to "Confidential" or "Attorneys' Eyes Only" Discovery Material until the newly joined party by its counsel has executed and filed with the Court its agreement to be fully bound by this Stipulation and Order.

25. It is the intention of the parties that the provisions of this Stipulation and Order shall govern discovery in this Litigation. Nonetheless, each of the parties hereto shall be entitled to seek modification of this Stipulation and Order, or relief therefrom, by application to the Court on notice to the other parties hereto.

AGREEMENT CONCERNING STIPULATION AND ORDER

_______________ who maintains his (her) address at _______________ and is employed by _______________ hereby acknowledges that:

(1) He/she has read the Stipulation and Order dated ____ ("Stipulation and Order") and understands the terms thereof and agrees to be bound by such terms;

(2) He/she will not reveal the contents of "Confidential" or "Attorneys Eyes Only" material to any unauthorized person as defined in the Stipulation and Order;

(3) He/she will use "Confidential" or "Attorneys Eyes Only" material only in accordance with the terms of the Stipulation and Order and will not use such material for any purpose other than for the Litigation; and

(4) He/she consents and submits to the personal jurisdiction of the U.S. District Court for the Southern District of New York for purposes of enforcement of the Stipulation and Order.

Dated: _________________________________

New York, New York

____

[signature]

APPENDIX B

PROFESSIONAL EYES ONLY CONFIDENTIALITY AGREEMENT

This Agreement, by and between PARTIES (collectively, the "Recipients") and COMPANY, on behalf of itself and each of its subsidiaries (collectively, the "Company"), sets forth the terms and conditions of the confidential disclosure, directly or indirectly, of certain information regarding the Company to the Recipients. The Recipients represent WHO in connection with matters relating to the DESCRIBE PROCEEDING. In connection with the PROCEEDING, the Recipients have requested that the Company produce highly confidential information relating to merger and acquisition activities, including but not limited to, indications of interest, letters of intent, non-disclosure agreements and/or proposals.

1. <u>Defined Terms</u>.

a. "Case" means PROCEEDING.

b. "Merger and Acquisition Materials" means materials which are expressly marked "MERGER AND ACQUISITION MATERIALS" relating to merger and acquisition activities, including but not limited to, indications of interest, letters of intent, non-disclosure agreements and/or proposals, the fact that such Merger and Acquisition Materials do or do not exist, any terms, conditions, or other facts with respect to the Merger and Acquisition Materials (including any court filings, agreements or other documents prepared in connection with such Merger and Acquisition Materials or the Motion), and all notes or other documents prepared by the Recipients that contain, reflect, or are based upon the information furnished by the Company or any of its financial or legal advisors, agents, or employees (collectively, "Company Agents"); provided, however, that the term "Merger and Acquisition Materials" does not include:

> (1) information that is at the time of disclosure, or that subsequently becomes, publicly available, other than as the result of an unauthorized disclosure by the Recipients;

(2) information that was known to the Recipients and was in the Recipients' possession, without any obligation to keep such information confidential, prior to disclosure of such information by the Company;

(3) information that the Recipients receive from a third party, who the Recipients believe in good faith has legitimate possession of such information and who, to Recipients' knowledge, is not under any obligation in favor of the Company to keep such information confidential; and

(4) information that is developed by the Recipients independently of any disclosure made to it by the Company or any Company Agent.

c. "Person" means an individual, firm, trust, association, corporation, company, limited liability company, partnership, government (whether federal, state, local or other political subdivision, or any agency, division or bureau of any of them) or other entity.

d. "Protective Order" means the Stipulated Protective Order Governing The Production Of Confidential Materials, dated X and entered in the JURISDICTION on that date.

2. <u>Non-Use and Nondisclosure of Confidential Information</u>.

a. The Recipients will keep the Merger and Acquisition Materials confidential and will use it solely, in the Recipients' capacity as advisors for the PARTIES, for the purpose of evaluating the Plan of Reorganization. The Recipients agree that during the one-year period commencing on the date hereof, (i) the Recipients will maintain in confidence all Merger and Acquisition Materials and will not disclose any Merger and Acquisition Materials to any Person (including, without limitation, any other Equity Security Interest Holder unless such Equity Security Interest Holder has entered into a confidentiality agreement with the Company), except as expressly permitted under this Agreement, and will provide the same care to avoid disclosure or unauthorized use of the Merger and Acquisition Materials as it provides to protect its own similar proprietary information;

and (ii) the Recipients will not use the Merger and Acquisition Materials for any purpose other than for purposes of the Confirmation Hearing. Recipients may provide strategic, financial and legal advice to the Common Owners, including but not limited to, the fact that it has received or will receive the Merger and Acquisition Materials. Recipients may disclose the Merger and Acquisition Materials to their partners, employees and advisors who (a) need to know such information for the sole purpose of the Confirmation Hearing and (b) agree to keep the Merger and Acquisition Materials confidential in accordance with the terms of this Agreement.

b. PARAGRAPH of the Protective Order is hereby expressly incorporated into this Agreement as if set forth fully herein, and shall apply to any Merger and Acquisition Materials produced to Recipients by the Company and designated "Advisors Eyes Only." No Person shall be deemed to have received such Merger and Acquisition Materials other than Recipients.

c. With respect to any Merger and Acquisition Materials that Recipients intend to file with the APPLICABLE JURISDICTION/COURT, or that Recipients intend to otherwise offer as evidence or utilize in the PROCEEDING, the terms of PARAGRAPHS of the Protective Order shall apply to the use of such Merger and Acquisition Materials as if set forth fully herein. The Company shall not unreasonably withhold its consent to any reasonable measures proposed by Recipients to maintain the confidentiality of such Merger and Acquisition Materials, including, without limitation, the filing of such Merger and Acquisition Materials under seal with the Court.

d. In the event that the Company and Recipients disagree as to whether any documents or information have been properly designated Merger and Acquisition Materials, Paragraphs 19 and 20 of the Protective Order shall apply to such disputed documents or information as if set forth fully herein.

e. Recipients agree and acknowledge that the Company is and shall remain the exclusive owner of the Merger and Acquisition Materials and all intellectual property rights therein, and that no license or conveyance of any intellectual property rights to Recipients is granted or implied under this Confidentiality Agreement or otherwise with respect to the Merger and Acquisition Materials. Recipients shall not remove, overprint or deface any

notice of confidentiality, copyright, trademark, logo or other notices of ownership or confidentiality from any originals or copies of the Merger and Acquisition Materials for a purpose inconsistent with the terms of this Agreement.

3. Disclosure Required by Law. In the event that the Recipients are requested or become legally compelled (by applicable law, regulation, deposition, interrogatory, request for documents, subpoena, civil investigative demand, order or similar process (each, a "Legal Proceeding")) to disclose any Merger and Acquisition Materials, then the Company agrees that Recipients may do so without liability, provided that Recipients will, in advance of such disclosure and if legally permitted, provide the Company with prompt written notice of such request or requirement. The Recipients (at no expense to themselves) agree to reasonably cooperate with the Company to the extent the Company may seek to limit such disclosure. If, in the absence of a protective order or the receipt of a waiver from the Company, the Recipients are legally required to disclose Merger and Acquisition Materials in connection with any Legal Proceeding, the Recipients may disclose such information without liability hereunder; provided, however, that the Recipients shall furnish only that portion of the Merger and Acquisition Materials that Recipients believe is legally required, and the Recipients use reasonable efforts to cooperate with the Company in its efforts to obtain assurances that confidential treatment will be accorded to such Merger and Acquisition Materials.

4. Return and Destruction of Confidential Information. The Company may terminate this Agreement and upon written notice to the Recipients of such termination, Recipients will promptly (i) return or destroy all Merger and Acquisition Materials (and all copies thereof) furnished to the Recipients, or (ii) destroy any analyses, compilations, studies or other documents prepared by or for internal use by the Recipients which include, utilize or reflect the Merger and Acquisition Materials, provided that Recipients may use commercially reasonable efforts to expunge any such Merger and Acquisition Materials, analyses, compilations, studies and other documents from any computer, word processor or other device containing such information. Within thirty (30) business days, the Recipients will confirm in writing to the Company that all such material has been so delivered or destroyed in compliance herewith. Notwithstanding the return or destruction of the Merger and Acquisition

Materials, the Recipients may retain on a confidential basis one copy of the Merger and Acquisition Materials in order to comply with legal or regulatory requirements, as well as any and all (i) e-mails and any attachments contained in such e-mails, (ii) any electronic files, each of which are automatically saved pursuant to legal or regulatory requirements, and (iii) attorney-work product that may contain some portion of the Merger and Acquisition Materials; provided, however, that with respect to such information, the Recipients will continue to be bound by any obligations of confidentiality hereunder, even if the Recipients return or destroy the Merger and Acquisition Materials as required hereby.

5. Remedies. The Recipients agree that breach of this Agreement would cause irreparable damage to the Company and that money damages would not be a sufficient remedy in the event of any such breach by the Recipients. Accordingly, the Company may enforce the Recipients' obligations pursuant to this Agreement and shall be entitled to seek specific performance and injunctive relief and any other appropriate equitable remedies (in addition to any other remedies available under applicable law or in equity) for any breach or threatened breach hereof by the Recipients in the JURISDICTION.

6. Several Obligations. The parties acknowledge and agree that (i) the obligations of the Recipients under this Agreement are several (and not joint and several) with each agreement made by a Recipient made with only respect to itself, and (ii) each Recipient is only responsible for its breach of its obligations under this Agreement.

7. Miscellaneous.

a. It is the intention of the Company and the Recipients that the provisions of this Agreement will be enforced to the fullest extent permissible under the laws and public policies of each state and jurisdiction in which such enforcement is sought. It is understood and agreed that if any provision contained in this Agreement or the application thereof to the Recipients, the Company, or any other person or circumstance shall be invalid, illegal or unenforceable in any respect under any applicable law as determined by a court of competent jurisdiction, the validity, legality and enforceability of the remaining provisions contained in this Agreement, or the application of

such provision to such persons or circumstances other than those as to which it has been held invalid or unenforceable, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby. In the case of any such invalidity, illegality or unenforceability, such invalid, illegal or unenforceable term shall be replaced with one that most closely approximates the effect of such term that is not invalid, illegal or unenforceable. Should a court refuse to so replace such term, the parties hereto shall negotiate in good faith in an effort to agree upon a suitable and equitable substitute provision to affect the original intent of the parties.

b. It is further understood and agreed that no failure or delay by either party in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

c. Except to the extent the Protective Order is incorporated herein, this Agreement constitutes the full understanding of the parties and a complete and exclusive statement of the terms and conditions of their agreement relating to the subject matter hereof and supersedes any and all prior agreements, whether written or oral, that may exist between the parties with respect thereto. No conditions, usage of trade, course of dealing or performance, understanding or agreement purporting to modify, vary, explain or supplement the terms or conditions of this Agreement will be binding unless hereafter made in writing and signed by the party to be bound, and no modification will be effected by the acknowledgment or acceptance of documents or forms containing terms or conditions at variance with or in addition to those set forth in this Agreement.

d. The restrictions expressed in this Agreement in no way supersede or eliminate any rights which either party has pursuant to state or federal law pertaining to trade secrets or proprietary information, and, in the event any such federal or state law provides greater protections of any Confidential Information than the protections set forth in this Agreement, such greater protections will apply to that Confidential Information.

e. The Recipients agree that neither the Company nor any Company Agent makes any representation or warranty, express or implied, as to the accuracy

or completeness of the Confidential Information, and none of them shall have any liability to the Recipients resulting from the evaluation or use of the Confidential Information.

f. The Recipients acknowledge that they are aware that the United States securities laws prohibit any person who has material non-public information about a company from purchasing or selling securities of such company or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell securities.

g. This Agreement will be governed by and construed in accordance with the laws of the JURISDICTION (except its laws and decisions regarding conflicts of law, which will be disregarded in their entirety).

h. This Agreement will be binding solely upon and inure to the benefit of the parties hereto and their successors and assigns.

i. Unless terminated earlier, this Agreement shall automatically terminate one (1) year from the date hereof.

j. This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed an original, but such counterparts shall together constitute one and the same Agreement. Signatures that are transmitted via electronic mail or in pdf form or facsimile shall have the same force and effect as original signatures.

If the foregoing is acceptable, please indicate your agreement and acceptance by having an authorized representative sign this Agreement where indicated below, whereupon this Agreement will constitute an agreement between the parties with respect to the matters set forth herein.

[Signature Page Follows]

This Agreement may be signed in one or more counterparts which, when taken together, will constitute one and the same instrument.

Very truly yours,

INSERT SIGNATURES

The following Recipients agree to abide by the foregoing terms. This Agreement may be signed in one or more counterparts which, when taken together, will constitute one and the same instrument.

INSERT SIGNATURE LINES NAMES, ADDRESSES

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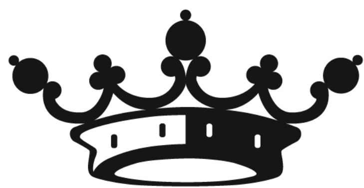

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