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MERGERS AND ACQUISITIONS

Managing the Variables in Minority Buyouts

Recent high-value buyouts by controlling stockholders provide critical guidance on how to manage market reaction, arbitrageurs, special committees, and class action lawsuits in an optimal manner. Recent experience indicates how the timing and contents of public announcements and the terms, conditions and structure of the transaction can make all the difference when it comes to managing these key variables to achieve an efficient outcome.

by Ethan A. Klingsberg

The three key variables for a controlling stockholder to consider when structuring and timing a buyout of the publicly held stock of its subsidiary or controlled affiliate, often referred to as a "minority buyout," are market reaction, target's special committee of independent directors, and class action lawsuits filed by the plaintiffs' bar. Recent experience provides useful guidance on how to manage each variable.

The Constants: Lawsuits and Special Committees

On the heels of almost every announcement of a minority buyout proposal of significant value is an announcement of the filing of class action lawsuits alleging that (1) the target board is at risk of imminently adopting the controlling stockholder's proposal and thereby breaching its fiduciary duties and that the controlling stockholder is improperly coercing the target board, and (2) target's public stockholders into accepting the buyout proposal. The "related party" nature of these transactions and a long history of caselaw about their inherently coercive nature provide fertile material for hyperbolic complaints.

The second constant in recent minority buyout transactions is the appointment by the target board of a special committee of independent directors. Delaware courts have upheld minority buyouts where there were no special committees. For example, in the minority buyout of Aquila by UtiliCorp in 2002,[1] the target board had no directors independent of the controlling stockholder, but the Court of Chancery found that the target board had fulfilled its fiduciary duties by, in place of a reasoned recommendation, disclosing an analysis by an independent financial advisor. In addition, when the buyout is structured as a merger rather than a tender offer, the legal effect of having a special committee, *i.e.*, shifting the burden of proof to the plaintiffs, may be accomplished without a special committee if the merger is conditioned on approval by a majority of "the minority" of public stockholders (*i.e.*, those not affiliated with the controlling stockholder or the target). Nevertheless, in view of the recent focus on the fulfillment of duties by directors and board independence, it would be unusual for a controlling stockholder to propose a

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minority buyout these days without prompting the immediate appointment by the target board of a special committee of independent directors.

Typically, the Delaware courts will stay the class action lawsuits challenging a minority buyout so long as two conditions are satisfied: First, the special committee must still be evaluating the original proposal and/or negotiating a revised proposal with the controlling stockholder. Second, in the event the proposal has taken the form of a commenced tender or exchange offer, the expiration date for the offer must be extended to accommodate the special committee's evaluation and negotiation processes. For example, in the recent Unitedglobalcom-UGC Europe and Cox Entertainment-Cox Communications buyouts, the Court of Chancery stayed the entire proceedings while the special committee did its work.[2] In News Corp's buyout of Fox Entertainment, the Court of Chancery permitted some discovery while the special committee negotiated with News Corp, but granted News Corp's request to impose strict limitations on the production of all analyses that were indicative of its reserve price, including its valuation models, thereby rendering discovery of limited impact.[3] Nevertheless, whenever the expiration date for News Corp's exchange offer was less than a week away, the Court threatened to lift these limitations on discovery and commence an injunction hearing unless News Corp extended the expiration date to give the plaintiffs comfort that News Corp was not going to try to complete the exchange offer before the special committee had completed its evaluation and negotiation efforts. News Corp, of course, complied by extending the expiration date.

> ***"Good special committee process" will typically precede the completion of the minority buyout."***

In most minority buyouts, the special committee and the controlling stockholder either reach an impasse and the proposal is withdrawn or they reach an agreement on an increase in the offer price and other target-favorable modifications to the terms that justify the special committee's recommendation of the transaction. Occasionally the controlling stockholder will elect to continue with a tender or exchange offer notwithstanding the special committee's public position that it would not be in the best interests of the pubic stockholders for them to tender their stock. In either case, a "good special committee process" will typically precede the completion of the minority buyout.

Indeed, the Court of Chancery has provided pretty clear guidelines in recent years on what constitutes a "good special committee process." The special committee must:

- Consist of directors independent of the controlling stockholder, be paid on a well-defined and reasonable basis not linked to the success of the proposed transaction and otherwise be without any vested economic interested in the proposed transaction (other than immaterial security holdings)
- Be authorized and willing to "say no" to the controlling stockholder's proposed terms and otherwise engage energetically in arms-length negotiation (*Indeed, virtually every special committee in recent minority buyouts determines, at least once, that a proposal by the controlling stockholder is inadequate or otherwise not in the best interests of the minority stockholders.*)
- Operate within a committee charter that the committee has aggressively negotiated to assure that its mandate is not too narrow (*Typically these charters give broad latitude to the special committee to make public disclosures, engage advisors and otherwise take actions to facilitate its ability to be an informed opponent of the controlling stockholders proposal, but these charters typically fail to empower the special committee to take actions, such as the adoption of a "poison pill," that would absolutely block the proposed transaction.*)
- Be supported by advisors who are independent of the controlling stockholder and otherwise paid on a basis that is well-defined, reasonable and does not create an incentive for them to skew their analyses in favor or against the proposed transaction (*When reviewing the work of the special committees that negotiated the minority buyouts of Cysive and Emerging Communications, the Court of Chancery praised the idea of the committee's engaging advisors that would be able to use knowledge that they had obtained through prior assignments for the target—notwithstanding the target's*

affiliation with the controlling stockholder during these prior assignments which were not conducted under the supervision of an independent committee.[4] *In contrast, the Court of Chancery earlier this year criticized a special committee for hiring an advisor to the controlled company.*[5] *The one constant in all these cases is that the conclusions about whether prior assignments taint the advisors corresponded to the quality of the advisors' actual work for the special committee—the higher the quality of such work, the greater the likelihood that the court would characterize a prior assignment as a "good fact" rather than a sign of a conflict.*)

- Be given sufficient time for diligence and access to managers and all material data of the target and, if stock consideration is being offered by the controlling stockholder, of the controlling stockholder *(While the controlling stockholder should supply the special committee with all projections it has received from management of the target, the controlling stockholder need not convey its reserve price or valuation analyses. One common problem in minority buyouts is that management loses confidence in internal projections once the officers realize that these figures will play a central role in the negotiation of the transaction and be made public as part of the disclosure by the special committee and the controlling stockholder. Consequently, special committee members may be left scrambling to assure that they are relying on projections that management, as well as the committee itself, feels comfortable endorsing in good faith.*[6])

Once this special committee process culminates, the Delaware courts will permit the class action lawsuits to proceed. There's one twist, however. In many cases, there's no lawsuit left to proceed with at this point. In most minority buyouts, the special committee and the controlling stockholder reach a meeting of the minds on an increase in the bid price and improvements of other terms that would permit the special committee to recommend the transaction and, concurrently, the plaintiffs' bar enters into a memorandum of understanding for a settlement agreement with the controlling stockholder, subject to confirmatory discovery and future court approval. Under the settlement agreement, the controlling stockholder makes an acknowledgment that is of tremendous value to the plaintiffs' lawyers: The increase in the bid price and improvement of other terms were, in part, attributable to the class action suits. This acknowledgement provides a foundation for the submission of a fee petition by the plaintiffs' lawyers—often for a figure approximating or exceeding a million dollars. [*See* sidebar on pages 8 & 9 for summary of recent high profile buyouts.]

The Variables

There is one principal fact scenario, however, when the plaintiffs' lawyers are left behind without a chance for a quick settlement premised on their role in driving up the terms. Moreover, I would argue that, based on the way the Delaware caselaw currently operates, there should more often be a second such scenario. Further, Vice Chancellor Strine has recently argued in extensive dicta that the caselaw should change so that there would be a third such scenario.

Behind the Scenes versus Market Guidance

The first scenario in which the plaintiffs' lawyers are not in a position to pick up a quick fee for a settlement is when the special committee and the controlling stockholder successfully complete their negotiations in private. In this scenario, when the plaintiffs' attorneys first receive word of the transaction, it is already "fully-baked" and no post-announcement price bump is forthcoming. In this scenario, it is too late for the plaintiffs' attorneys to take partial credit for the product of the special committee negotiations and thereby justify a rich fee. This was the case in the recent Liberty Media/Unitedglobalcom and American Bioscience/American Pharmaceutical Partners transactions. Unknown to the public or the plaintiffs' bar, the controlling stockholders in those two transactions were negotiating for a month and five months, respectively, before announcing their fully negotiated merger agreement. The expected legal challenges were filed in the Liberty Media transaction, but no settlement was reached because, after successfully negotiating with the special committee, the controlling stockholder was not prepared to further improve the terms. The lawsuit against Liberty Media is now awaiting trial months after the closing. In the American Bioscience/American Pharmaceutical Partners transaction, the plaintiffs' bar elected not to bother with any challenge. A special committee will typically agree to a "behind the scenes" negotiation of a merger agreement, where the first announcement of the transaction is the announcement of an executed, definitive agreement, only if the controlling stockholder-acquiror makes clear that it will not entertain any alternative transactions and therefore any effort by the special committee to conduct a market check would be futile.

The signing of a long-form merger agreement triggers the heightened "entire fairness" standard of review.

From the perspective of the controlling stockholder-acquiror, a downside of this "behind the scenes" approach to negotiating with the special committee is that this approach leaves no room to attribute any of the results of negotiation to the plaintiffs' attorneys and thereby provide a basis for a quick settlement. But this approach has significant upsides from the perspective of a controlling stockholder. By keeping all negotiations with the special committee confidential, the controlling stockholder avoids the adverse fall-out of a decision to withdraw its proposal in the event of an impasse in negotiations or a change of heart before the completion of negotiations (such as the recent withdrawal of the proposal by the Dolan family to buyout the minority public holders of Cablevision).

Another potential upside of the "behind the scenes" approach to minority buyout negotiations is that the controlling stockholder will cut off the ability of the special committee to listen to investors and watch the market price respond to the proposed minority buy-out. Typically, arbitrageurs buy target stock after the announcement of a minority buy-out proposal and trade the stock up above the controlling stockholder's initially proposed price to indicate a floor that the market expects the controlling stockholder to hit with a post-announcement bump following negotiations with the special committee. Statements by investors and the movement of the market price of target stock provide guidance on the minority stockholders' expectations for an acceptable price that the special committee cannot help but to take into account.

On the other hand, forcing the special committee to "operate in the dark" also increases the risk that the committee will adopt an unrealistically rigid view of what is in the best interests of the stockholders. Moreover, the special committee may well be more prone to insist on a majority of the "minority" approval condition when negotiations occur under circumstances that prevent the special committee from having a real-time sense of market expectations. The majority of the "minority" condition serves as a failsafe that gives the special committee comfort that the transaction will not close if it is out of sync with investor expectations.

Mergers versus Voluntary Tender and Exchange Offers

The second scenario in which controlling stockholders should be bold enough to proceed without worrying about settling the plaintiffs' allegations is in buyouts structured as tender and exchange offers where, although there is a recommendation of the special committee, there is no merger agreement between the target board and the controlling stockholder. In these scenarios, recent caselaw in the Court of Chancery indicates that dismissal on the pleadings (*i.e.*, before any evidentiary hearings) should be available so long as there is no allegation of "particularized facts" that the following criteria, often referred to as the "*Pure Resources* criteria" after the 2002 case of the same name, have not been satisfied:

- A good special committee process;
- A minimum tender condition that requires the tender of at least a majority of the "minority" or publicly held stock (not counting management of target as part of the minority);
- Absence of threats of retribution by the controlling stockholder against the public stockholders to coerce them to accept the offer (*e.g.*, a threat to cease dividends if the offer is not accepted);
- Confirmation from the controlling stockholder that shopping for an alternative, third party bidder would be futile;
- Confirmation by the controlling stockholder that if the tendered stock permits it to reach the 90 percent threshold for a short-form merger, then it will promptly complete a short-form merger in which the untendered stock will con-

vert into the same per share consideration as in the tender offer; and
- No material misstatements or omissions in the disclosure (including long-form, summary disclosure of the fairness opinion and supporting board book provided by the financial advisors to the special committee, as well as the projections used by the financial advisor).[7]

Despite the clarity of the *Pure Resources* criteria and the assurances from the Court of Chancery that dismissal on the pleadings is within reach absent pleading of "particularized facts" indicating a failure to satisfy these criteria, controlling stockholders have nonetheless chosen the route of settling with the plaintiffs at the same time they improve the terms of their proposal and receive the recommendation of the special committee. For example, in both News Corp-Fox Entertainment and Unitedglobalcom-UGC Europe, the controlling stockholder elected to settle with the plaintiffs' bar rather than bother to prevail on a motion to dismiss even though the *Pure Resources* criteria were arguably satisfied on the face of the pleadings in both cases.[8]

The market risk of obtaining approval by a majority of the minority may be completely eliminated in a merger agreement structure.

Interestingly, in the Lafarge-Lafarge North America buyout (which involved a Maryland target), the controlling stockholder elected to "settle," but was able to obtain a settlement while entirely reserving its rights to challenge any fee application made by the plaintiffs' counsel in contrast to the more typical settlement memorandum of understanding where the controlling stockholder agrees not to challenge any fee application below a specified cap that is often higher than the fee of the law firm advising the special committee or the controlling stockholder.[9] While the leverage of the plaintiffs' bar to extract high fees in settlements of challenges to minority buyouts that satisfy the *Pure Resources* criteria may be decreasing, there still has yet to be a reported decision that has relied on the *Pure Resources* criteria to dismiss a challenge to a minority buyout on the pleadings before going through an evidentiary hearing.

Convergence

The third scenario is when a merger agreement has been signed and *Pure resources*-type criteria are satisfied. This is the scenario for which Vice Chancellor Strine has stated in extensive dicta that he would like to see the Delaware caselaw change direction so that controlling stockholders may prevail on motions to dismiss challenges to minority buyouts.[10] In contrast to the tender or exchange offer scenario, when dismissal is feasible based on satisfaction of the *Pure Resources* criteria (or a short-form merger following a tender or exchange offer when the target board has no role and therefore it is very difficult to state a claim for breach of any duty[11]), the signing of a long-form merger agreement triggers the heightened "entire fairness" standard of review. Once the strict scrutiny of entire fairness review applies, the best a defendant may achieve is to flip the burden of proof at trial over to the plaintiffs. Dismissal on the pleadings is out the question when the standard is entire fairness. Vice Chancellor Strine's idea is to modify or evolve the caselaw to permit the Court of Chancery to dismiss, on the pleadings, a challenge to a minority buyout structured as a merger where the merger agreement is accompanied by satisfaction of the *Pure Resources* criteria, especially the criteria of a good special committee process and a majority of the "minority" approval condition.

Why Sign a Merger Agreement?

So long as Vice Chancellor Strine's ideas remain nonbinding dicta, the question remains, why would a controlling stockholder ever sign a merger agreement for a minority buyout of a Delaware target under the current state of the Delaware caselaw? Isn't the controlling stockholder in better shape to launch a tender or exchange offer and eschew the merger agreement even though the controlling stockholder has obtained the recommendation of its proposal by the special committee? After all, the merger agreement simply brings in "entire fairness" and gives the plaintiffs' bar more leverage when milking the controlling stockholder for a settlement

Recent High Profile Minority Buyouts

Controlling Stockholder/Subsidiary Target (Year)	Controlling Stockholder's Pre-Bid Equity Holdings	Structure	Minority Public "Approval" Condition
Lafarge/Lafarge North America (2006)	53 percent	Tender Offer (all cash)	Tender of Majority of Minority (There was also a 90 percent condition but it was waivable.)
New Corporation /Fox Entertainment (2005)	82 percent	Exchange Offer (all-stock)	Tender of majority of the minority (even though less than this threshold was necessary for News Corp to reach 90 percent threshold for short form merger)
Liberty Media/ Unitedglobalcom (2005)	55 percent	Merger Agreement (stock/cash election)	Approval by majority of the minority outstanding
Unitedglobalcom/UGC Europe (2003)	67 percent	Exchange Offer (all-stock)	Supermajority of the minority condition—tender sufficient to reach 90 percent threshold for back-end, short-form merger
American Bioscience/American Pharmaceutical Partners (2005)	64 percent	Merger (all stock) (minority ownership diluted from 36 percent to 16 percent)	None
Cox Enterprises/Cox Communications (2004)	62 percent	Merger Agreement (providing for first-step tender offer followed by back-end merger) (all-cash)	Tender of majority of minority outstanding

payment. There is, however, a potentially huge incentive for the controlling stockholder to take the merger agreement approach.

The benefit of the merger agreement approach for the controlling stockholder is that it carries with it the potential to eliminate all market risk to the success of the transaction. Under the current "entire fairness" caselaw, the burden of proof shifts to the plaintiffs if there is a good special committee process *or* a majority of the "minority" approval condition. If both criteria are satisfied that further aids the ability of the transaction to satisfy the entire fairness standard of review; but, when there has been a good special committee process, a majority of the "minority" condition is not required for either burden shifting or satisfaction of entire fairness. (For an example where the transaction passed "entire fairness" muster without a majority of the "minority" condition, see the buyout of Cysive.[12]) Accordingly, as was the case in the American Pharmaceutical Partners transaction, the market risk of obtaining approval by a majority of the minority may be completely eliminated in a merger agreement structure. In the absence of a majority of the "minority" condition, all that is required for closing is the formality of the majority stockholder itself voting to approve the merger that it proposed in the first place. A merger agreement permits a controlling stockholder to have zero execution risk based on whether public stockholders will vote in favor of the transaction.

Negotiations with Special Committee Completed Before or After Initial Public Announcement of Proposal by Controlling Stockholder	Time from Commencement of Negotiations to Recommendation from Special Committee	Plaintiffs' Litigation
After	10 weeks	Settlement MOU concurrent with recommendation from special committee (no agreement on fee)
After	7 weeks	Settlement MOU concurrent with recommendation from special committee (News Corp agrees not to oppose application by plaintiffs' counsel for fees up to $5.25 million)
Before	5 weeks	Proceeding to trial post-closing
After	8 weeks	Settlement MOU concurrent with recommendation from special committee (Unitedglobalcom agrees not to oppose application by plaintiffs' counsel for fees up to $975,000)
Before	19 weeks	No litigation
After	11 weeks	Settlement MOU concurrent with recommendation from special committee (Cox Enterprises agrees not to oppose application by plaintiffs' counsel for fees up to $4.95 million. Court awards $1.275 million.)

This elimination of market risk under the merger agreement approach can be of tremendous value to a controlling stockholder in today's hedge fund environment. Once a minority buyout proposal is announced, it is not uncommon for like-minded arbitrageurs to snap up a large chunk of the public float, which is often not all that large to start with. A majority of the "minority" condition for many targets gives rise to a significant risk that the arbitrageur community and/or other hedge funds and institutional holders will be able to form an informal alliance that represents a block sufficient to hold the transaction hostage. Indeed, it is not uncommon for a special committee to insist on a majority of the "minority" condition in a merger scenario, as the Cox and Unitedglobalcom special committees did, because they wanted to exploit this ability of the market to "double check" their conclusions as to the advisability of the transaction.

Supermajority of the Minority

In contrast to a minority buyout structured as a merger, a minority buyout structured as a tender or exchange offer *must* have *both* a special committee process *and* a majority of the "minority" condition not only because the benefits—ability to obtain dismissal on the pleadings—are tangible, but also because the failure to satisfy both criteria would likely result in an injunction of the offer as unlawfully coercive. Hence, recent minority buyouts structured as tender and exchange offers simply never fail to have a majority of the "minority" condition.

Indeed, in the News Corp-Fox Entertainment and Toronto Dominion-TD Waterhouse minority buyouts, the controlling stockholders conditioned their offers on the tender of a majority of the "minority" even though both News Corp and Toronto Dominion started out with in excess of 80 percent of the stock and therefore did not even need the tender of a majority of the minority to reach the 90 percent threshold necessary to squeeze out the remaining publicly held stock via a short-form merger (which short form merger, as described above, is a transaction that is very difficult to challenge).

Moreover, in the Unitedglobalcom exchange offer for its 67 percent Delaware subsidiary, UGC Europe, the special committee successfully pressured the controlling stockholder to impose a "supermajority of the minority condition" sufficient to assure that the exchange offer would result in the controlling stockholder's both reaching the 90 percent threshold and completing a short-form merger immediately thereafter for the same per share consideration as in the exchange offer. The UGC Europe special committee was able to obtain this concession by arguing persuasively in its disclosure and to Unitedglobalcom that an exchange offer by a controlling stockholder with a minimum condition of less than 90 percent would be inherently coercive. The reasoning of the UGC Europe special committee was that the non-tendering stockholders would potentially be left as minority stockholders in an illiquid, de-listed subsidiary of the controlling stockholder if these stockholders did not have the assurance, which the 90 percent condition provides, that there would be a short-form merger (for the same consideration) immediately following the exchange offer.

Pick Your Poison: Plaintiffs or Arbs

If Vice Chancellor Strine has his way, majority of the "minority" conditions will become standard fare in all minority buyouts—whether structured as a tender or exchange offer or a merger. Indeed, under the regime envisioned by Vice Chancellor Strine in which all minority buyouts would have majority of the "minority" conditions, controlling stockholders would arguably prefer merger structures over tender offer structures in minority buy-outs whenever the controlling stockholder and the special committee reach a meeting of the minds. Why?

First, the merger structure would eliminate the risk of target special committees' following the UGC Europe special committee's lead to insist on "supermajority of the minority" conditions, which present additional execution risk for bidders. As explained previously, in a tender or exchange offer in which the controlling stockholder owns less than 80 percent of the target, a UGC Europe-style "supermajority of the minority" condition will arguably always be necessary to protect the non-tendering holders from being left behind as stockholders in an illiquid and/or de-listed company. But in a merger, this concern may be addressed with only a simple majority of the "minority" condition. In contrast to a tender offer, a merger results in the automatic conversion of all target stock into the same consideration (subject to dissenters affirmatively electing to forego merger consideration and exercise appraisal rights). Accordingly, a merger will never present the risk that that dissenters or non-participants will be left behind as remedy-less stockholders in an illiquid and/or de-listed subsidiary. In all instances, a merger accomplishes this result without having to add execution risk beyond a simple majority of the "minority" condition. The second reason why mergers would end up being the prevailing format if Vice Chancellor Strine's dicta on minority buyouts were adopted by the Delaware Supreme Court is that, as a technical matter, a majority of the "minority" condition in a merger is sometimes structured as a majority of the "minority"-held stock *casting votes*, as opposed to the higher threshold of majority of the "minority"-held stock *outstanding* that applies in a tender offer.[13]

Then, when all minority buyouts, no matter how structured, are subject to being held up by opposition from a majority of the "minority" in accordance with the Vice Chancellor's wishes, it will be not only a sad day for the plaintiffs' bar (as dismissals will become easily available), but also a day of greater empowerment for the arbitrageurs—as the occasions when controlling stockholders elect to do an end run around the market via a minority buyout structured as a merger without a majority of the "minority" condition will likely become much more rare.

NOTES

1. *In re Aquila Shareholders Litig.*, 805 A.2d 184, (Del. Ch. 2002).

2. *Prince, et al. v. Fries, et al.,* C.A. No. 20598-NC, Stipulation and Order (Del. Ch. Nov. 6, 2003); *In re Cox Communications Shareholders Litig.,* C.A. No. 613-N, Ruling on the Record (Del Ch. August 24, 2004).

3. *In re Fox Entertainment Group, Inc. Shareholders Litigation,* C.A. No. 1033-N, Orders (Del. Ch. Feb. 3, 2005, Feb. 7, 2005 and Feb. 8, 2005).

4. *In re Cysive, Inc. Shareholders Litig.,* 836 A.2d 531, (Del. Ch. 2003); *In re Emerging Communications, Inc. Shareholders Litig.,* 2004 WL 1305745 (Del. Ch., June 4, 2004).

5. *In re Tele-Communications, Inc. Shareholders Litig.,* 2005 WL 3642727 (Del. Ch. Jan. 10, 2006).

6. For a tale of a special committee that kept up with the ever-moving projections of management, see the "Background" section in the Schedule 14D-9/A filed by the special committee of UGC Europe on December 8, 2003. For a tale of a special committee that fell behind, *see Emerging Communications,* 2004 WL 1305745.

7. *See* discussion in *In re Cox Communications,* Inc. Shareholders Litig., 879 A.2d 604 (Del. Ch. 2005). *See also In re Pure Resources, Inc., Shareholders Litig.,* 808 A.2d 421 (Del. Ch. 2002) and *Next Level Communications, Inc. v. Motorola, Inc.,* 834 A.2d 828 (Del. Ch. 2003).

8. *See* the Schedule 14D-9/A filed by the special committee of Fox Entertainment on March 7, 2005 and the Schedule 14D-9/A filed by the special committee of UGC Europe on December 8, 2003.

9. *See* the Schedule 14D-9/A filed by the special committee of Lafarge North America on May 3, 2006.

10. *Cox Communications,* 879 A.2d 604.

11. *In re Unocal Exploration Corp. S'holders Litig.* 777 A.2d 242 (Del. 2001).

12. *Cysive,* 836 A.2d 531.

13. *But see In re PNB Holding Co. Shareholders Litig.,* C.A. No. 28-N (Del. Ch. Aug. 2006) (majority of disinterested voting power *outstanding*, instead of majority of disinterested *votes cast,* needed for stockholder meeting to ratify decision by conflicted board.)

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