ust.

[33]U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, Part II. (Jun. 2011), available at https://www.justice.gov/atr/page/file/1098656/download

[34]U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, Part III.A (Oct. 2004), available at https://www.justice.gov/atr/antitrust-division-policy-guide-merger-remedies-october-2004.

[35]*Id* at 7.

[36]Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Improving the Antitrust Consensus, Remarks Delivered at the New York State Bar Association (Jan. 25, 2018), available at https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar.

[37]*Id* at 3.

[38]*Id*.

[39]*Id.*

[40]*In the Matter of CoreLogic, Inc.*, FTC Docket No. C-4458 (Jun. 15, 2018).

[41]Order to Show Cause and Order Modifying Order, *In the Matter of CoreLogic, Inc.*, FTC Docket No. C-4458 (Jun. 15, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/c4458_corelogic_order_to_show_cause_and_order_modifying_order_06142018.pdf.

[42]David McLaughlin (Bloomberg), Comcast Gets Notice That NBC Antitrust Scrutiny Will Persist (Aug. 28, 2018), *available at* https://www.bloomberg.com/news/articles/2018-08-29/comcast-gets-notice-that-nbc-antitrust-scrutiny-will-persist.

[43]Modified Final Judgment, *United States v. Anheuser-Busch InBev SA/NV, et al.*, Case No. 1:16-cv-01483-EGS (D.D.C. Oct. 22, 2018), *available at* https://www.justice.gov/atr/case-document/file/1104016/download.

[44]Global Competition Review, US DOJ: looser contempt standard has made companies more careful (Apr. 11, 2018), available at https://globalcompetitionreview.com/article/1167857/us-doj-looser-contempt-standard-has-made-companies-more-careful?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=9366311_GCR%20Headlines%2011%2F04%2F2018&dm_i=1KSF,5KR3B,9GQ57R,LNJVJ,1.

[45]*Supra* note 36, at 3.

[46]*Supra* note 2, at 8.

[47]*Supra* note 36, at 3.

[48]Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation (Apr. 26, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-divisions-second.

[49]*Supra* note 36, at 3.

[50]*See United States v. Parker-Hannifin Corp.*, Case No. 1:13-cv-01354 (JEJ) (D.D.C. Dec. 18, 2017), *United States v. Transdigm Group Inc.*, Case No. 1:13-cv-02735 (D.D.C. Dec. 21, 2017), *United States v. Vulcan Materials Partners et al.*, Case No. 1:13-cv-02761 (D.D.C. Dec. 22, 2017).

[51]Ian Conner and Lynda Lao, Bureau of Competition, It takes less time to do a thing right (Sept. 4, 2018), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2018/09/it-takes-less-time-do-thing-right.

[52]*Id.*

DELAWARE COURT OF CHANCERY FINDS DIRECTOR BREACHES OF FIDUCIARY DUTY AND AIDING AND ABETTING LIABILITY FOR ACTIVIST INVESTOR IN SHAREHOLDER CLASS ACTION SUIT

By Richard Brand, Stephen Fraidin, Jonathan Watkins and James Fee

Richard Brand is a partner and co-chairman of the Corporate Group at Cadwalader, Wickersham & Taft LLP. Stephen Fraidin is a partner in the firm's New York office. Jonathan Watkins is a partner in the firm's New York and Charlotte, NC, offices. James Fee is an associate in the firm's New York office. Contact: richard.brand@cwt.com or

stephen.fraidin@cwt.com or jonathan.watkins@cwt.com or james.fee@cwt.com.

On October 16, 2018, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery issued a post-trial opinion in *In re PLX Technology Inc. Stockholder Litigation*, a dispute arising from the August 2014 merger between PLX Technology ("PLX" or the "Company") and Avago Wireless (U.S.A.) Manufacturing Inc. ("Avago"), now known as Broadcom Inc. The Court held that PLX's directors had breached their fiduciar and disclosure duties in connection with the merger, and that Potomac Capital Partners II, L.P. ("Potomac"), an activist hedge fund that pushed for the sale of PLX to Avago, had knowingly participated in that breach. The Court based its conclusions primarily upon the conduct of the PLX directors, Potomac and its principal, Eric Singer, during both Potomac's proxy contest and Singer's subsequent tenure on the PLX Board as the chair of the special committee overseeing the sales process. Critically, the Court reasoned that Singer, whose conduct was imputed to stockholder Potomac, was a dual fiduciar to PLX's stockholders and Potomac's investors, and, as such, had incurable conf icts of interest arising from Potomac's position that the only viable course of action for the Company was a short-term sale.

This decision is significan because the Court made a theme of director susceptibility or acquiescence to what it termed "activist pressure" the basis for its conclusions that f duciary and disclosure duties had been breached. Further, the decision appears to be the f rst occasion that a Delaware court has determined that a conflic of interest attendant to a breach of fidu ciary duty could be present based solely on the Court's perception that a shareholder director had a short term investment outlook absent any additional factors, such as extra or undisclosed compensation or other improper benefits

Background

The Failed IDT Transaction

The relevant events began seven years ago, when PLX f rst began merger discussions with Integrated Device Technology, Inc. ("IDT"). In April 2012, PLX and IDT signed a merger agreement with a price of $7.00 per share. PLX's f nancial advisor, Deutsche Bank, then solicited competitive bids. That process resulted in only one proposal, from Avago: an all-cash deal for $5.75 per share. The PLX Board declined to pursue Avago's offer, and disclosed the competing proposal to shareholders.[1] PLX and IDT eventually abandoned the transaction after the Federal Trade Commission moved to block the merger on antitrust grounds.

Potomac Acquires a Large Stake in PLX

PLX's stock price plummeted after the merger with IDT failed, which attracted the attention of Potomac. After building and disclosing its position in PLX, Potomac's publicly-stated investment thesis for the Company, as consistently set forth in a letter-writing campaign to the PLX Board and shareholders, was that the Company should be sold promptly and that its most likely buyer would be the unnamed competing bidder who emerged during the IDT sales process (*i.e.*, Avago). Singer also personally relayed his position to PLX's CEO and other executives via voicemail, email, telephone calls, and further correspondence. In response, PLX's directors and executives stated that they no longer believed a sale was in the best interests of the Company.

Potomac Launches a Successful Proxy Contest and Singer Shepherds PLX's Sale to Avago

In November 2013, Potomac f led a def nitive proxy statement that sought to replace three of the eight PLX directors with Singer and two independent candidates. Once again, Potomac disclosed its view

that PLX was ripe for a sale, and it urged the other PLX shareholders to support its candidates on that basis. Institutional Shareholder Services ("ISS") endorsed Potomac's slate, and PLX's stockholders subsequently approved Potomac's nominees, who joined the PLX Board on December 18, 2013.

The next day, an Avago executive contacted Deutsche Bank regarding Potomac's presence on the PLX Board. At the time, Deutsche Bank was acting as a financial advisor to both Avago and PLX. The Avago executive told Deutsche Bank that Avago was in a quiet period in connection with a separate transaction, but would be interested in acquiring PLX for about $300 million. Deutsche Bank relayed these points to Singer later that same day, but Singer did not share this information with the other PLX directors.

Singer subsequently was named by the PLX Board as chair of the special committee overseeing the sales process. After the conclusion of the quiet period, Avago and PLX began negotiations in May 2014, and announced the Avago-PLX transaction in June 2014. No competing bidder emerged and, after a vote of the stockholders and the Board, the merger closed on August 12, 2014.

The Litigation

After the announcement of the Avago-PLX merger, plaintiff stockholders alleged the PLX directors had breached their fiduciary duties by approving the merger and breached their disclosure duties in recommending the stockholders approve the merger. Plaintiffs also asserted claims against Avago, Potomac, and Deutsche Bank, which ultimately served as PLX's financial advisor for the sale, for aiding and abetting the directors' breaches of fiduciary duty. The Court subsequently granted motions to dismiss submitted by Avago and two directors. After the close of discovery, all remaining defendants except Potomac reached settlements with plaintiffs. The Court then denied Potomac's motion for summary judgment and the parties proceeded to trial.

The Opinion

The Court found that the PLX directors had breached their fiduciary duties by, in essence, being "susceptible to activist pressure."[2] The Court specifically contrasted the directors' defensive representations during the proxy contest with their post-contest agreement to a sale and a sales process conducted by Singer.[3] The Court also negatively cited the PLX directors' inability to put forth a credible explanation for a series of adjustments to the projections PLX used to justify the deal price,[4] and their choice to use an investment advisor with a "longstanding and thick" relationship to Avago, the buyer.[5] In particular, the Court criticized Singer for concealing from the other directors material information about the sales process that he learned through the investment advisor.[6] The Court deemed PLX's disclosures inadequate on essentially the same grounds, citing Singer's concealment from the stockholders of the early communication of material information and the misleading disclosures regarding the projection adjustments.[7]

The Court then considered whether a stockholder could be held liable for the actions of its agent on a board of directors, and concluded that Singer's relationship with Potomac and "his role in directing and implementing Potomac's strategy" permitted the attribution of his knowledge and actions to Potomac.[8] Delaware law presumes that investors act in their own self-interest, and typically, an investor's control of a large block of shares is presumed to mitigate divergent interest concerns. Here, however, the Court reached the opposite conclusion,[9] and reasoned that Singer, as a dual fiduciary to both PLX's stockholders and Potomac's investors, had incurable conflicts of interest, arising solely from Potomac's position that the only viable course of action for the Company was a short-term sale.[10]

After determining liability, the Court considered damages, and concluded that plaintiffs were unable to prove that the sale price was inadequate or that the

value of PLX as a standalone company was greater than the deal price.[11]

Analysis and Key Takeaways

Both activists intending to advocate for the sale of a target and boards facing or defending an activist campaign should take note of the outcome of this case, in which the Court explicitly concluded that fiduciar and disclosure duties had been breached as a result of directors applying or succumbing to what the Court deemed "activist pressure."[12]

As a general matter, Delaware law does not require incumbent directors to rigidly adhere to their defensive positions after a proxy contest ends.[13] Such a requirement would impermissibly hamper a director in carrying out her f duciary duties, by preventing her from considering new advice or information. In this case, the Court made the contrast between the pre- and post-proxy contest conduct of Potomac and the PLX directors the crux of its liability determinations. Specif cally, the Court scrutinized the public statements and positions of Potomac and the PLX Board during the proxy contest, particularly Potomac's focus on the sale of the Company and repeated threats to sue the directors who questioned its plans,[14] and the PLX directors' responsive representation that it was not the right time to sell.[15] The Court then compared these stances with the post-contest conduct of the PLX Board, now including Potomac's designees, which promptly installed Singer as the chair of the special committee and executed Potomac's investment thesis—a sale of Avago—as quickly as possible after the expiration of Avago's quiet period. The Court also was extremely critical of Singer's failure to disclose Avago's indication of continued interest that he learned through its f nancial advisor, and cited the presence of inconsistent projections,[16] poor and post hoc record keeping,[17] and the engagement of a f nancial advisor with a longstanding relationship with the buyer[18] as further factors in its conclusion that f duciary and disclosure duties had been breached as a result of "activist pressure."

The decision also is notable because it appears to represent the firs time that a Delaware court has found a prevailing conf ict of interest solely on the Court's perception that a hedge fund investor held a short-term investment thesis. This is an unusual result because no additional or aggravating factors were present, such as an extra or gratuitous compensation sought by or given to Potomac,[19] and Potomac received the same price per share as every other PLX stockholder as a result of the merger.[20] Moreover, Potomac's investment thesis—a quick sale to provide profit to PLX's stockholders, including Potomac—was openly disclosed as the sole plank of the platform on which Potomac conducted its proxy contest, which in turn was endorsed by ISS and supported by a majority of PLX stockholder votes.[21]

Importantly, the Court made clear that it was not announcing a completely new standard governing the attribution of the actions of a stockholder director-designee to the stockholder itself, and that the preponderance of the evidence standard was still f rmly in place.[22] The Court's determination that Singer was not a credible witness at trial, particularly with respect to his claim that he considered the pursuit of value enhancement options other than a sale of PLX and his denials of contentious interactions with other directors, as well as the indicia of a poorly managed sales process, also may work to limit the impact of this decision to the facts of the case. Nonetheless, the decision has the potential to open the door to a new wave of shareholder litigation following sales or change of control transactions initiated by activist investors who obtain board representation, alleging that "activist pressure," evidenced by a strong investment thesis in favor of a sale, overcame f duciary and disclosure duties and infected the sales process.

At a minimum, activist investors who succeed in electing designees should be cautioned that Courts prefer to see boards function collegially and professionally, and will take a dim view of incidents of threats or incivility both before and after designees

join the board.[23] Additionally, should a board determine that a sale of the company is in the best interests of the shareholders, directors must recognize and articulate, early and often, that their fiduciar obligation is to all shareholders, and the activist designee should not be permitted to dominate either the consideration of the issue by the board or, once the decision to sell is made, the process itself. Finally, the sale of a company is a unique process that requires directors to conform their behavior to high standards of conduct. It was clear that the Court regarded Singer's failure to share information with the board as both a very serious mistake and a stain on his trustworthiness, which is the essential quality that a Delaware director must have.

ENDNOTES:

[1]PLX Schedule 14D-9, at 1 (June 1, 2012).

[2]Post-Trial Op. at 111.

[3]*See id.* at 110-115.

[4]*See id.* at 93-94.

[5]*See id.* at 106.

[6]*See id.* at 119.

[7]*See id.* at 115-16.

[8]Post-Trial Op., at 103, 120, and 121.

[9]Notably, the Court already had signaled to defendants during early motion practice that, by simultaneously holding a seat on the PLX Board and controlling PLX's largest stockholder, it believed Singer likely faced the dual f duciary problem identif ed *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (holding no dilution of duty of loyalty where director holds a dual fiduciar obligation). *See In re PLX Tech. Stockholders Litig.*, C.A. No. 9880-VCL, 2015 WL 13501398, at 7 (Del. Ch. Sept. 3, 2015).

[10]The Court identifie several instances that, in its view, def nitively indicated Singer's, and transitively Potomac's, divergent interest as a result of this singular focus: "Singer and Potomac argued vehemently that PLX should be sold quickly"; "Singer's thesis for investing in PLX depended entirely on a short-term sale to [Avago]"; "[Singer] never prepared any valuation [of PLX]"; and "[Singer] lacked any idea for generating value [other than selling PLX]." Post-Trial Op. at 103-104. The Court also wrote that after Singer joined the PLX Board he "consistently acted with [the] intent [to sell PLX to Avago]," emphasizing that Singer said the PLX Board was "crazy for turning down $6+ from avago few months ago (sic)." *Id.* at 105. Finally, the Court concluded that Singer "only backed off when he learned that Avago could not re-engage for several months" and "got to a deal within days" when Avago re-engaged. *Id.*

[11]*See id.* at 134-35.

[12]*See id.* at 111.

[13]*Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 128 (Feb 15, 2011) (f nding no breach where independent slate of directors "changed teams" to agree with incumbents after proxy contest).

[14]*See* Post-Trial Op. at 22-23 (Singer threatening to hold directors personally liable). One director testifie at his deposition that Singer "threatened lawsuits all the time . . . [t]hat was his mode of operation at that point." *Id.* at 14, n. 60.

[15]*See id.* at 23.

[16]*See id.* at 114-15.

[17]*See id.* at 47.

[18]*See id.* at 106.

[19]In prior Delaware cases, the Chancery Court has found a divergent interest where a party obtained some sort of side benef t, not merely a return on an investment. For example, in *In Re Southern Peru Copper Corporation Shareholder Derivative Litigation*, the controlling stockholder both orchestrated a sale and successfully pursued registration rights to induce the target company's founding shareholder to agree to sell. *See In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, 30 A.3d 60, 99 (Del. Ch., Oct. 14, 2011). Similarly, in *In re Rural Metro Corporation*, Vice Chancellor Laster found that a director and Royal Bank of Canada ("RBC") aided and abetted the directors' breach of fiduciar duty in the course of facilitating a short-term sale by, among other things, seeking to secure advisory fees for RBC and additional compensation for the buyer, rather than the best deal for the target. *See In re Rural Metro Corp.*, 88 A.3d 54, 91, 95 (Del. Ch. March 7, 2014).

[20]*See* Post-Trial Op. at 60, 70.

[21]*See id.* at 29, 31, 35.

[22]Post-Trial Op. at 120-21.

[23]For example, the Court of Chancery has found

overbearing and objectionable behavior by a controlling shareholder to adequately allege an aiding and abetting claim for a breach of f duciary. In *In re INFOUSA Shareholders Litigation*, the Court found that the founding shareholder of the company, Vinod Gupta, breached his f duciary duty in a "series of related-party transactions and improper benef ts allowed to flo to [Gupta] from a board that was ***dominated and controlled by him***" as well as threatening other directors to vote for him in close board elections. *In re INFOUSA, Inc. Shareholders Litigation*, 953 A.2d 963, 1002 (Del. Ch. Aug. 13, 2007).

M&A-RELATED DEVELOPMENTS IN SHAREHOLDER ACTIVISM

By Warren S. de Wied, Philip Richter and Gail Weinstein

Warren de Wied is a partner in the New York offic of Fried, Frank, Harris, Shriver & Jacobson LLP. Philip Richter is a partner and co-head of the firm s M&A practice. Gail Weinstein is senior counsel in Fried Frank's New York office Contact: philip.richter@friedfrank.com or warren.dewied@friedfrank.com or gail.weinstein@friedfrank.com.

Shareholder activist campaigns have increased in 2018, following a slowing trend in 2016 and 2017 as compared to 2014 and 2015. The most common objective of activist campaigns in 2017 and 2018 has been M&A-related—and, indeed, activism has changed the cadence of M&A activity. However, notably, only one activist (Elliott) has had an M&A objective in more than just a small number of its campaigns. Below, we discuss the M&A-related trends in shareholder activism; provide a chart outlining the 2018 campaigns by the most frequent activists; note certain trends in activism not related to M&A; and offer practice points on preparing for and responding to shareholder activism.[1]

Key Developments: M&A-Related Activism

M&A is the most common objective of activist campaigns. In about one-third of newly announced public activist campaigns in 2017 and 2018 to date, the announced key objective was an M&A-related matter (*i.e.*, suggesting a sale of the company or a division; or seeking to block, or to improve the f nancial terms of, an announced deal). While board change also was a primary publicly stated objective in about one-third of the newly announced public campaigns in this period, a value maximization thesis usually underpins campaigns for board change. The data also ref ects, during this period, notably *fewer* campaigns focused on governance, operations or management change, and notably *more* campaigns focused on business strategy and capital allocation or return (*i.e.*, seeking stock buybacks or increased dividends).

As a result of activism, the cadence of M&A activity has changed. First, the vast majority of M&A transactions (in 2017, over 80%) are now initiated *by a bidder* rather than by a target company's decision to initiate a sale process. Second, concurrent with the increased aggressiveness associated with activism, there has been a significan increase in "hostile" (*i.e.*, unsolicited) M&A bids. Third, the potential for activism has made companies more cautious about rejecting a credible, private acquisition proposal. In this connection, when a bidder chooses to make its interest in a target company known publicly, it can generally count upon activist investors to emerge and increase the pressure if the target company resists the bid. Activists may also surface after a failed unsolicited offer seeking to oust recalcitrant board members. Finally, at the same time, the threat of activist involvement can discourage companies from proposing a sale that may be questioned by shareholders.

In our view, M&A-related activism may become more aggressive. We note that, while some activist funds have been highly profitable the financia results for most activist funds generally have been poor. In addition, activists have been holding their investments for longer periods, and directors appointed in settlement agreements have been serving longer than the period required under the settlement. Further, activists have harvested many of the "low-hanging fruit"