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Standstill Agreements: Enterra Validates the Use of Standstill Agreements to Govern Minority Investment Programs

STANDSTILL AGREEMENTS: *ENTERRA* VALIDATES THE USE OF STANDSTILL AGREEMENTS TO GOVERN MINORITY INVESTMENT PROGRAMS

The proliferation of corporate takeover activity in recent years[1] has spurred an increase in the use of standstill agreements to avert corporate control battles.[2] Standstill agreements are voluntarily negotiated contracts between corporate management and a substantial shareholder which prohibit the shareholder from acquiring more than a specified number of shares in the corporation.[3] The most common function of a standstill agreement is to define the terms of an investor's acquisition of a minority interest in an issuing corporation.[4] Standstill agreements currently govern minority invest-

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1. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS § 1.01 at 1-3 (1984) (brief overview of increase in corporate takeover activity in recent years). *See generally* Toy, *The Raiders,* BUS. WK., March 4, 1985, at 80 (informative discussion of corporate takeover phenomenon, highlighting individuals instrumental in effecting recent major corporate takeovers).

2. *See* Memorandum Regarding Standstill Agreements: Checklist of Key Issues, *reprinted in* 2 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS A-43 (1984) (companies increasingly have acquired minority positions in target companies and then agreed to execute standstill agreements) [hereinafter cited as Standstill Agreement Memorandum].

3. *See* Bialkin, *The Use of Standstill Agreements in Corporate Transactions,* in PLI, THIRTEENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 91, 93, 96 (A. Fleischer & M. Lipton eds. 1981) (PLI Corporate Law & Practice Handbook Series No. 373) (defining standstill agreement); Fleischer & Sternberg, *Corporate Acquisitions,* 12 REV. SEC. REG. 937 (1979) (under standstill agreement investor agrees to maintain its position in target corporation for specific period and subject to certain conditions). The parties to standstill agreements usually are corporate entities. Bartlett & Andrews, *The Standstill Agreement: Legal and Business Considerations Underlying a Corporate Peace Treaty,* 62 B.U. L. REV. 143 n.2 (1982); *see infra* note 5 (listing examples of standstill agreements between corporate entities).

4. *See* Bartlett & Andrews, *supra* note 3, at 144 n.5. The generic term for a corporate investor's acquisition of a significant minority investment in an issuing corporation is a "minority investment program." Nathan, *Corporate Stock Repurchases And Stock Issuances In the Context of Unsolicited Takeover Bids,* in PLI ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 299, 342 (A. Fleischer & M. Lipton eds. 1981) (PLI Corporate Law & Practice Course Handbook Series No. 373). An investor may acquire a minority position in an issuing corporation through direct purchases from the issuer, through negotiated purchases with a third party, or through an accumulation of the issuer's stock on the open market. *See id.* at 343; *see also* 1 A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING 112-13 (1984). An investor may accumulate the issuing corporation's shares through negotiated purchases or on the open market as a means of securing a passive investment situation or as a first step toward the acquisition of the issuer. *See* Nathan, *supra,* at 393, 366; FLEISCHER, *supra,* at 112-15. Typically, corporate management will be alerted to a single investor's significant accumulation of shares when the investor sends management and the Securities and Exchange Commission (SEC) a Schedule 13D. FLEISCHER, *supra,* at 116 n.38; *see* 15 U.S.C. § 78m(d) (Supp. V 1981) (Securities Exchange Act of 1934). Section 13d-1(a) of the Securities Exchange Act of 1934 requires any person or group acquiring more than 5% of any class of registered equity security

ment programs in several prominent, publicly held corporations.[5] As an instrument governing a minority investment program, a standstill agreement permits an investor to acquire a significant number of shares in the issuing corporation up to a specified limit without interference from corporate management while providing management assurance that an investor's mi-

to file a Schedule 13D with the issuer and the SEC within 10 days after reaching the 5% threshold. 15 U.S.C. § 78m(d)(1). A Schedule 13D filed pursuant to § 13d-1 must disclose among other things the identity and background of the investor, the source of funds used to acquire the stock, and the purpose of the acquisition. *See* 15 U.S.C. § 78m(d)(1)(A),(B),(C).

In response to an investor's significant accumulation of an issuing corporation's stock, the issuing corporation and the investor may negotiate on amicable terms a standstill agreement to define the terms of a "friendly" minority investment program. *See* FLEISCHER, *supra,* at 116-18; *see also infra* notes 49-54 and accompanying text (discussing facts of *Enterra Corp. v. SGS Associates* giving rise to standstill agreement governing friendly minority investment program). Alternatively, the parties may execute a standstill agreement as a means of settling a dispute between the issuing corporation and the investor which has arisen as a result of the investor's significant accumulation of the issuer's stock. *See* FLEISCHER, *supra,* at 144-45. If litigation commenced by one or both of the parties is pending as a result of the dispute, the execution of a standstill agreement may serve as part of a resolution to the litigation in order to avoid additional litigation costs. *See* Bialkin, *supra* note 3, at 102-04. A standstill agreement executed as part of a resolution to litigation often is accompanied by a repurchase agreement in which the investor agrees to repurchase at a premium all or part of the issuer's stock acquired by the investor. *See id.;* FLEISCHER, *supra,* at 144-45; Agreement between Cities Service Co. and Mesa Petroleum Co. (June 18, 1982) (under terms of repurchase/standstill agreement Cities bought back stock while Mesa agreed not to buy Cities stock for stated period and both parties agreed to dismiss pending litigation), *reprinted in* LIPTON & STEINBERGER, *supra* note 2, at A-76, A-77. Finally, the parties to a standstill agreement governing a minority investment program may have executed the agreement in connection with the issuing corporation's planned solicitation of the investor to act as a "white knight." *See* LIPTON & STEINBERGER, *supra* note 1, at § 6.06[4]; Bialkin, *supra* note 3, at 96. A standstill agreement arising in the context of a white knight arrangement often is the product of an issuing corporation's direct sale to an investor of a significant block of the corporation's stock in order to deter unsolicited third party acquisition bids. *See* LIPTON & STEINBERGER, *supra* note 1, at § 6.06[4]; Nathan, *supra,* at 363-65. Like a standstill agreement resulting from a purely investment situation, a standstill agreement that is the product of a white knight arrangement restricts the investor to a minority position in the issuing corporation and defines the terms of the relationship between the investor and the issuer. *See* Bialkin, *supra* note 3, at 96.

5. *See, e.g.,* Whittaker Corporation—Smith International Inc. Agreement (Jan. 20, 1983) (Exhibit 1 to Schedule 13D (amend. 3), filed with SEC by Whittaker Corp. on January 27, 1983) (on file at Washington & Lee Law Review) [hereinafter cited as Whittaker-Smith Agreement]; Martin Marietta Corporation—Allied Corporation Standstill Agreement (Sept. 24, 1982), *reprinted in* PLI, HOSTILE BATTLES FOR CORPORATE CONTROL 769, 784 (D. Block & H. Pitt eds. 1984) (PLI Corporate Law & Practice Course Handbook Series No. 440) [hereinafter cited as Martin Marietta—Allied Agreement]; Seagram Company, Ltd.—E.I. Du Pont de Nemours and Company Agreement (Oct. 2, 1981) (Exhibit C to Schedule 13D (amend. 3), filed with SEC by E.I. Du Pont de Nemours and Company on Oct. 7, 1981), *reprinted in* 2 LIPTON & STEINBERGER, *supra* note 2, at A-79 [hereinafter cited as Seagram—Du Pont Agreement]; Scott Paper Company—Brascan Limited Agreement (Mar. 21, 1981) (Exhibit A to Schedule 13D (amend. 2), filed with SEC by Brascan Limited on March 27, 1981); City Investing Company—NVF Company Letter Agreement (Aug. 1, 1980) (Exhibit 2 to Schedule 13D (amend. 8), filed with SEC by Sharon Steel Corporation on August 18, 1980) (on file at Washington & Lee Law Review).

nority investment will not operate as a toe-hold for an unsolicited takeover bid.[6] Standstill agreements thus promote peace and stability in the relationship between a major investor and the issuing corporation.[7]

Although the scope and provisions of various standstill agreements differ, a standstill agreement governing a minority investment program typically contains certain characteristic provisions which reflect the divergent interests of the investor and the issuing corporation.[8] From an issuing corporation's point of view, the essential covenant embodied in a standstill agreement is a provision restricting the investor from acquiring shares beyond a negotiated

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6. *See* Bartlett & Andrews, *supra* note 3, at 145-46. Corporate entities may use standstill agreements for purposes other than to govern a minority investment program. *See* Bialkin, *supra* note 3, at 93 (listing various uses of standstill agreements). In connection with a confidentiality agreement which facilitates the exchange of information in order for companies to evaluate each other, the parties may enter into a standstill agreement to freeze their relative stock positions while the companies exchange information under the confidentiality agreement. *See* General Portland, Inc. v. LaFarge Coppee S.A., [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) 99,148 at 95,540 (N.D. Tex. Aug. 28, 1981) (recognizing validity of standstill agreement used in connection with confidentiality agreement); General Portland Inc.—La Farge Letter Agreement (Feb. 5, 1981), *reprinted in* Thirteenth Annual Institute On Securities Regulation, *supra* note 3, at 119 (parties agree to exchange evaluation material for purposes of considering possible combination of companies). Corporations also have executed standstill agreements to facilitate an exchange offer pursuant to a merger agreement. *See* Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 695 (2d Cir. 1980); Bialkin, *supra* note 3, at 93, 99-102. Under the exchange offer, the target company and the acquiring party agree to exchange shares of common stock as the first step in a two-step merger transaction. *See Crouse-Hinds Co.*, 634 F.2d at 695; Bialkin, *supra* note 1, at 99. The standstill provision of the exchange agreement, which places restrictions on the use and disposition of the newly acquired shares, prevents either party to the agreement from acquiring an entire equity interest in the other party in the event that the second step of the merger does not take place. *See Crouse-Hinds Co.*, 634 F.2d at 695; Bialkin, *supra* note 3, at 99; Crouse-Hinds Company—Beldin Corporation Agreement (Sept. 23, 1980), *reprinted in* PLI, Thirteenth Annual Institute on Security Regulation, *supra* note 3, at 123 (Exchange Offer Agreement).

7. *See* Bartlett & Andrews, *supra* note 3, at 144 (standstill agreement essentially is corporate peace treaty).

8. *See id.* at 151 (standstill agreements typically contain distinctive provisions); Nathan, *supra* note 4, at 354. One commentator lists four basic provisions parties commonly include in standstill agreements governing minority investment programs. *See* Nathan, *supra* note 4, at 354. These four provisions typically govern the limitations on the investor's acquisition of additional shares, restrictions imposed on the investor's ability to transfer or dispose of the issuer's shares, the degree of participation in management afforded the investor, and the registration rights granted the investor. Nathan, *supra* note 4, at 354; *see* FLEISCHER, *supra* note 4, at 146-48 (listing provisions typically contained in standstill agreements resulting from creeping acquisitions); *infra* notes 9-37 and accompanying text (discussing various provisions commonly found in standstill agreements).

Beyond a common desire for peaceful coexistence during the term of the standstill agreement, the parties to a standstill agreement have differing objectives. Bartlett & Andrews, *supra* note 3, at 145. *Compare infra* notes 9-13 and accompanying text (stock acquisition limitation provision serves management's objective of averting control battle *and infra* notes 14-17 and accompanying text (right of first refusal provision provides management assurance that stock will not fall into hands of unfriendly third party) *with infra* notes 27-29 and accompanying text (registration rights promote investor's access to public trading market to dispose of issuer's stock).

limit.[9] This stock ownership limitation provision commonly provides that the investor will not acquire more than a specified percentage of the corporation's outstanding shares for a stipulated number of years.[10] In permitting an investor to acquire a significant, although limited amount of an issuing corporation's outstanding shares, the ownership limitation provision of a standstill agreement may facilitate the issuer's objective of avoiding a control battle in one of two ways depending upon whom the issuer views as a potential acquiror.[11] When the issuer's concern is that the investor may attempt a takeover, the limitation provision serves the issuer's objective of retaining control by preventing the investor from gaining working control of the issuing corporation through further acquisitions of the issuer's stock.[12]

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9. *See* FLEISCHER, *supra* note 4, at 374 (key provision in every standstill agreement is restriction on purchase of additional shares by investor); Nathan, *supra* note 4, at 354 (under standstill agreement issuer invariably will limit investor's holdings); Fleischer & Sternberg, *supra* note 3, at 938 (every standstill agreement restricts investor's purchases of issuer's stock).

10. *See, e.g.*, Martin Marietta—Allied Agreement, *supra* note 5, at 771 (20.9% stock ownership limitation, 10 year term); Seagram—DuPont Agreement, *supra* note 5, at A-80 (25% limitation, 10 year term); City Investing—NVF Agreement, *supra* note 5, at 4-5 (21% limitation, 5 year term). To prevent the investor from circumventing the acquisition limitation provision of the standstill agreement, the issuing corporation should define broadly in the limitation provision the term "investor" to include any person or entity associated with the investor. *See* Bartlett & Andrews, *supra* note 3, at 152-53 (defining investor broadly prevents investor from evading ownership limitation through related-entity purchases); City Investing—NVF Agreement, *supra* note 5, at 1 (defining purchaser (investor) to include NVF and its affiliates and other entities under NVF's control or acting on behalf or in concert with NVF). In addition, the acquisition limitation provision should include a definition of the types of securities subject to the limitation provision. *See* Bartlett & Andrews, *supra* note 3, at 153 (issuer will seek comprehensive definition of security while investor will seek limited definition); Standstill Agreement Memorandum, *supra* 2, at A-45 (definition of voting securities should include common stock and any other security possessing voting rights).

In addition to defining investor and security, the ownership limitation provision should provide an adjustment mechanism to maintain the investor's relative investment position in response to increases and decreases in the issuer's outstanding shares. *See* Bartlett & Andrews, *supra* note 3, at 154-55 (discussing "ratchet" provisions which permit investor to retain holdings in excess of limitation figure when reduction in number of issuer's outstanding shares occur, and "antidilution" provisions which enable investor to compensate for increases in issuer's outstanding shares); Nathan, *supra* note 4, at 356 (discussing provisions in standstill agreements which anticipate increases in number of outstanding shares of issuer). The acquisition limitation provision also may provide for termination of the agreement upon the occurrence of certain events. *See* Bartlett & Andrews, *supra* note 3, at 154-56; *see also infra* notes 36-38 and accompanying text (discussing termination provision of standstill agreements).

11. *See* Bartlett & Andrews, *supra* note 3, at 146 (discussing issuer's dual objectives in executing standstill agreement); *infra* notes 12 & 13 and accompanying text (recognizing means by which limitation provision facilitates issuer's objective of retaining control).

12. *See* Bartlett & Andrews, *supra* note 3, at 146 (in executing standstill agreement, issuer may wish to avoid control battle with contracting investor). A standstill agreement that an issuing corporation executes out of a concern that an investor may attempt a takeover, often is the product of the corporation's response to an investor's significant accumulation of the issuer's stock. *See* FLEISCHER, *supra* note 4, at 116-18 (management may execute standstill agreement to oppose investor's creeping accumulation).

Alternatively, the limitation provision indirectly may serve the issuer's desire to discourage control battles with third party bidders by enabling the issuer to place a substantial block of stock with an investor without fear of takeover.[13]

To retain the strategic position which the limitation provision of standstill agreement may afford, corporate management normally seeks to incorporate provisions into a standstill agreement which restrain the investor from freely transferring or disposing of acquired shares.[14] Right of first refusal provisions constitute the preeminent means by which corporate management prevents the investor from transferring a significant number of shares into the hands of an unfriendly third party.[15] Typically, the right of first refusal provision calls for the investor to notify the issuer before disposing of holdings, thereby affording the issuer an opportunity to repurchase some or all of the shares within a specified time period.[16] Providing the issuer the option to repurchase

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13. *See* Bartlett & Andrews, *supra* note 3, at 146 (issuer may execute standstill agreement in connection with white knight arrangement). In placing a block of stock with an investor to deter unwanted takeover bids, the issuer solicits the investor to act as a white knight. *See* LIPTON & STEINBERGER, *supra* note 1, § 6.06[4] at 105 (issuer may place block of stock with investor and then enter into standstill agreement with investor); *see also* FLEISCHER, *supra* note 4, at 372-73 (placement of shares into friendly hands may be accompanied by standstill agreement); *supra* note 4 (discussing standstill agreements arising in context of white knight arrangement).

14. *See* Standstill Agreement Memorandum, *supra* note 2, at A-48, A-49; *see, e.g.*, Whittaker Corporation—Smith Agreement, *supra* note 5, at 6 (containing transfer restriction provision); Martin Marietta—Allied Standstill Agreement, *supra* note 5 at 771-78 (providing provision for restrictions on resale or other dispositions of Martin Marietta stock); City Investing Company—NVF Company Letter Agreement, *supra* note 5, at 1-2 (prohibiting NVF, investor, from selling, transferring, or otherwise disposing of City Investing stock subject to listed exceptions). Commentators have noted that transfer restriction provisions in standstill agreements present potential drafting problems since severely restrictive transfer provisions may be deemed an unreasonable restraint on the alienation of the issuer's shares. *See* Bartlett & Andrews, *supra* note 3, at 157; Note, *The Standstill Agreement: A Case Of Illegal Vote Selling and a Breach of Fiduciary Duty*, 93 YALE L. J. 1093, 1094 n.8 (1984). Several state courts have suggested that although a reasonable restriction on the transfer of stock may be enforceable, an absolute prohibition on the transfer of stock is against public policy and therefore unenforceable. *See, e.g.*, Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 542, 141 N.E.2d 812, 816, 161 N.Y.S.2d 418, 423 (1957) (effective prohibition on transfer of stock is impermissible whereas mere restriction on transfer is permissible under law); Tracey v. Franklin, 31 Del. Ch. 447, 486-87, 67 A.2d 56, 59-60 (1949) (court may relax public policy against restraint on alienation of stock if recognizable proper purpose exists for such restraint); Greene v. E.H. Rollins & Sons, Inc., 22 Del. Ch. 394, 403-04, 2 A.2d 249, 253-54 (1938) (provision in corporate charter providing for compulsory sale to corporation upon demand and to exclusion of all others was unlawful because unreasonable and contrary to public policy).

15. *See* Bartlett & Andrews, *supra* note 3, at 159-60; Nathan, *supra* note 4, at 360 (discussing right of first refusal clauses).

16. *See* Bartlett & Andrews, *supra* note 3, at 159; Seagram—DuPont Agreement, *supra* note 5, at A-85 - A-86 (containing right of first refusal provision setting forth procedure Seagram should follow to afford DuPont opportunity to purchase DuPont's stock prior to Seagram's sale or transfer of stock). Because of unique timing and valuation problems associated with the different methods by which an investor may dispose of shares, the right of first refusal

its shares upon sale by the investor benefits both parties to the standstill agreement because the right of first refusal enables the investor to sell out of the investment program while allaying management's concern that the stock will fall into unfriendly hands.[17] Clauses describing stock transfers which the investor may consummate after the issuer has chosen not to exercise its right of first refusal or those transfers which are exempt from the right of first refusal frequently accompany the right of first refusal provision.[18] An investor's disposition of shares pursuant to a typical broker's transaction on a public trading market, for example, might be exempt from the right of first refusal requirement.[19] Transfers resulting from the issuer's merger or consolidation also commonly are excepted from the issuer's right of first refusal.[20]

Another area of concern to management embodied in standstill agreements is the voting rights of the investor.[21] Like stock limitation and transfer

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provision should distinguish among, and provide tailored procedures for, sales made in the open market, sales made pursuant to third party offers, and sales made pursuant to tender offers. *See* Bartlett & Andrews, *supra* note 3, at 160-63. Authorities generally recognize right of first refusal clauses as a reasonable restriction on the sale of stock, provided the issuing corporation exercises the right within a reasonable time period. *See* Irwin v. West End Development Co., 481 F.2d 34, 38 (10th Cir. 1973) (first refusal provision is valid because provision operates not as absolute prohibition on transferability but as reasonable restriction on transfer), *cert. denied,* 414 U.S. 1158 (1974); Ryan v. J. Walter Thompson Co., 322 F. Supp. 307, 312-13 (S.D.N.Y. 1971) (first option provision is valid when provision does not prevent transfer of stock but merely delays transfer), *aff'd per curiam,* 453 F.2d 444 (2d Cir.), *cert. denied,* 406 U.S. 907 (1972); Del. Code Ann. tit. 8 § 202(c)(1) (1983) (authorizing right of first refusal provision provided issuer exercises first refusal within reasonable time period); *see also* Bialkin, *supra* note 3, at 109-11 (considering legality of right of first refusal provisions in context of standstill agreement governing investor's friendly minority investment).

17. *See* Bartlett & Andrews, *supra* note 3, at 159 (right of first refusal provision permits investor to dispose of holdings while enabling issuer to prevent undesirable transfers of issuer's stock).

18. *See* Nathan, *supra* 4, at 360 (right of first refusal generally does not apply to all resales); Whittaker—Smith Agreement, *supra* note 5, at 7, 15 (permitting investor to sell stock in public offering if issuer does not exercise right of first refusal); Martin Marietta—Allied Standstill agreement, *supra* note 5, at 77-78 (listing described dispositions of issuer's stock which do not require consent of issuer).

19. *See* Nathan, *supra* note 4, at 359. In addition to sales made pursuant to a public offering, sales which typically are exempt from the first refusal right or which the investor may make after the issuer has chosen not to exercise its option to purchase include sales made in accordance with SEC rule 144 permitting resale of certain restricted securities without registration, sales representing only a small percentage of the outstanding shares of the issuer, and sales made to entities agreeing to be bound by the terms of the investor-issuer standstill agreement. *See id.;* Bartlett & Andrews, *supra* note 3, at 158-59; Seagram—DuPont Agreement, *supra* note 4, at A-82, A-83.

20. *See* Standstill Agreement Memorandum, *supra* note 2, at A-48, A-49; Nathan, *supra* note 4, at 359-60.

21. *See, e.g.,* Whittaker Corporation-Smith Agreement, *supra* note 5, at 4-6 (provision limiting investor's voting rights); Martin—Marietta Allied Standstill Agreement, supra note 5, at 779-81 (provision describing matters relating to investor's voting rights); Seagram—DuPont Agreement, *supra* note 5, at A-81, A-82 (prescribing voting restrictions).

restriction provisions, voting provisions in standstill agreements serve to avert control battles by prohibiting the investor from participating in certain voting-related activities with shares acquired under the standstill agreement.[22] Perhaps the most noteworthy type of voting activity often prohibited under standstill agreements is the investor's ability to engage in proxy contests, voting trusts, and other types of voting mechanisms commonly employed to oppose management.[23] Although no court has yet ruled on the validity of restrictive voting provisions commonly found in standstill agreements, commentators have urged that voting restrictions in most standstill agreements present potential problems of legality.[24] Critics of comprehensive voting restrictions in standstill agreements have suggested that the drafters of future standstill agreements restructure voting rights provisions to permit the investor to vote shares freely on issues of particular importance to the investor.[25]

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22. *See* Bartlett & Andrews, *supra* note 2, at 164 (voting restriction provision reinforces provisions designed to avoid control battles).

23. *Id.* at 164-65; Nathan, *supra* note 4, at 362-63. An example of a restrictive voting provision is found in the Seagram—DuPont Agreement which prohibits Seagram from depositing shares in voting trusts, soliciting proxies or becoming a participant in a solicitation of proxies, or joining any other similar voting arrangement with third parties. Seagram—DuPont Agreement, *supra* note 5, at A-82. *See* Martin Marietta—Allied Agreement, *supra* note 5, at 779-80 (voting rights provision); City Investing—NVF Agreements, *supra* note 5, at 1-2 (investor's covenants with respect to limitation of voting privileges).

24. *See* Note, *supra* note 14, at 1097-101 (arguing that restrictive voting provisions of standstill agreements constitute illicit vote selling and therefore are illegal under common law, against public policy, and violative of state statutes); *see* Bartlett & Andrews, *supra* note 3, at 165-67 (raising legal arguments which contracting investors may assert in bargaining for less restrictive voting provisions); *infra* note 25 (arguments and proposals for less restrictive voting provisions in standstill agreements).

25. *See* Bartlett & Andrews, *supra* note 3, at 167. Bartlett and Andrews maintain that investors executing standstill agreements commonly sacrifice leverage over the investment by acceding to comprehensive voting restrictions. *Id.* at 165. Bartlett and Andrews propose three arguments which the investor should assert in bargaining for less restrictive voting provisions. *See id.* First, if the investor qualifies as a controlling shareholder, then the investor should argue that in situations in which management endorses a reckless or fraudulent course of action, an agreement to vote as the issuer dictates may infringe upon the controlling shareholder's fiduciary duty not to oppress or defraud the minority shareholders. *Id.* at 166; *see* Pepper v. Litton, 308 U.S. 295, 306 (1939) (dominant or controlling shareholder is fiduciary); *see generally* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 240 at 653-56 (discussing fiduciary duties of controlling shareholders and oppression of minority shareholders). Second, the investor should assert that restrictive voting may cause the investor's own shareholders to bring derivative suits because the relinquishment of the investor's voting autonomy renders the investor powerless to oppose issuer actions not in the best interest of the investor's own shareholders. Bartlett & Andrews, *supra* note 3, at 166. Finally, the investor should alert the issuer to the possibility that the New York Stock Exchange might prohibit listing of the issuer's shares since the Exchange refuses to list securities constituting nonvoting common stock. *Id.; see* N.Y.S.E. Company Manual § A 15, at A-280 (1981). Another commentator has argued that stock held by an investor under a standstill agreement should be either nonvoting or voted in the same proportion as the shares voted by all other shareholders, thus effectively depriving the issuer of the opportunity to dictate voting of shares subject to a standstill agreement. *See* Note, *supra* note 14, at 1106-08 (proposed solutions to restrictive voting provisions in standstill agreements).

While the purpose of the primary provisions included in standstill agreements is to serve management's objective of retaining corporate control, other provisions frequently incorporated in standstill agreements bestow certain privileges upon the investor.[26] For example, standstill agreements often contain registration rights provisions in which, subject to certain conditions, the issuer promises to register under the Securities Act of 1933 stock held by the investor at the request of the investor.[27] Stock registered pursuant to the Securities Act of 1933 can be traded on the public market.[28] Thus, the inclusion of registration rights in standstill agreements provides added opportunities for the investor to dispose of acquired holdings.[29] The breadth of registration rights allotted under a particular standstill agreement usually is related to the extent of the acquisition limitation and transfer restriction provisions.[30]

In addition to registration rights, standstill agreements usually contain other provisions which management may include in the standstill agreement to induce the investor to execute such an agreement.[31] Although infrequently, standstill agreements may contain a board representation provision which guarantees the investor representation on the issuing corporation's board of directors.[32] Board representation provisions are not prevalent in standstill

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As an alternative to restrictive voting provisions, one critic has suggested that courts reverse the good faith presumption afforded management under the business judgment rule if a standstill agreement contains severe voting restrictions. *See id.* at 1109-11; *infra* notes 72-90 and accompanying text (discussion of standstill agreements in context of business judgment rule in *Enterra Corp. v. SGS Associates).*

26. *See infra* notes 27-38 and accompanying text (discussing provisions incorporated in standstill agreements to induce investors to execute standstill agreements).

27. *See* Nathan, *supra* note 4, at 363; Whittaker—Smith Agreement, *supra* note 5, at 12, Appendix I (issuer will effect registration of stock pursuant to Securities Act of 1933 at request of investor); Martin Marietta—Allied Standstill Agreement, *supra* note 5, at 795 (upon request of investor, issuer will use best efforts to effect registration of stock held by investor).

28. *See* 15 U.S.C. § 78l (registration requirements for securities traded publicly).

29. *See* Bartlett & Andrews, *supra* note 5, at 172; Nathan, *supra* note 4, at 363-64 (exhaustive list of matters which parties to standstill agreement should include in registration rights section). By promoting trading of the issuer's stock on the public market, registration of the issuer's shares can operate in favor of the issuer as well as to the benefit of the investor. *See* Bartlett & Andrews, *supra* note 3, at 172 n.110. The investor's disposal of the issuer's share on the public market normally will result in a broad redistribution of the issuer's shares. *Id.* Thus, redistribution on the open market facilitated by providing the investor registration rights allays the issuer's concern that a large block of stock will fall into the hands of an unfriendly third party. *Id.*

30. *See* Nathan, *supra* note 4, at 363.

31. *See infra* notes 32-38 and accompanying text (additional provisions incorporated in standstill agreements).

32. *See* Bartlett & Andrews, *supra* note 3, at 168-70; Nathan, *supra* note 4, at 326-63; Seagram—DuPont Agreement, *supra* note 5, at A-84, A-85. In standstill agreements containing board representation provisions, the parties may agree to recommend to the shareholders certain persons as nominees to be elected to each others' board of directors. *See* Seagram—DuPont Agreement, *supra* note 2, at A-84, A-85 (DuPont will cause Seagram representative to be elected to DuPont board and Seagram will cause DuPont Representative to be elected to Seagram board).

agreements because of the investor's potential liability arising under both the federal securities laws[33] and the federal antitrust laws[34] which may result from the investor's direct representation on the issuer's board.[35]

More commonly, standstill agreements contain termination clauses which provide the investor an escape from limitations and restrictions of the agreement upon the occurrence of certain disruptive events which may affect adversely the investor's interest.[36] For instance, most standstill agreements afford the investor a contingent release from the stock ownership limitation provision of the agreement, or from the agreement as a whole, in the form of exceptions to the investor's covenant not to acquire additional shares in the issuing corporation.[37] Events constituting exceptions to the stock owner-

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33. *See* Bartlett & Andrews, *supra* note 5, at 168-69; Nathan, *supra* note 4, at 346-47. Under § 16(b) of the Securities Exchange Act of 1934 ('34 Act), an investor may incur short-swing profit liability by virtue either of the investor's 10% holdings of a registered security or the investor's ability to designate a director under the standstill agreement, if the investor realized a profit through a purchase and sale within a six month period. *See id.;* 15 U.S.C. § 78p(a), (b) (authorizing suits to recover profits realized by either 10% holder of equity security or director in purchase and sale, or sale and purchase, of equity security within six month period). An investor also may incur liability under rule 10b-5 promulgated under § 10(b) of the '34 Act for trading in the issuer's stock while represented on the issuer's board. *See* Bartlett & Andrews, *supra* note 3, at 169; Nathan, *supra* note 4, at 347-48; 17 C.F.R. § 240.10b-5 (1984) (making unlawful any manipulative or deceptive device or contrivance, including fraud or deceit, in connection with purchase or sale of any security); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 236-37 (2d Cir. 1974) (granting private right of action for defrauded shareholders under rule 10b-5 when investor sitting on corporation's board of directors and in possession of material information failed to either disclose information to public or abstain from trading). Finally, an investor represented on the issuer's board risks liability under rule 10b-6 if during a market distribution of the issuer's securities the investor purchases the issuers stock. Bartlett & Andrews, *supra* note 3, at 169; Nathan, *supra* note 4, at 348; *see* 17 C:F.R. § 240.10b-6 (1984). Rule 10b-6 prohibits an issuer, or any person in a control relationship with the issuer, from trading in the issuer's securities during an ongoing market distribution. *See* 17 C.F.R. § 240.10b-6 (1984); Nathan, *supra* note 4, at 348.

34. *See* Bartlett & Andrews, *supra* note 3, at 169; Nathan, *supra* note 4, at 350-51. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the H-S-R Act), an investor acquiring up to 10% of an issuer's outstanding voting securities solely for the purpose of investment is exempt from the H-S-R Act's notification requirement. *See* 15 U.S.C. § 7A(c)(9) (1981); 16 C.F.R. § 802.9 (1985). An investor represented on an issuer's board, relying on the "solely for investment" exemption, may be in violation of the H-S-R Act's notification requirement because the Federal Trade Commission has determined that a shareholder's nomination of a candidate to the issuer's board of directors is inconsistent with the solely for purposes of investment exemption. *See* Nathan, *supra* note 4, at 350-51; Bartlett & Andrews, *supra* note 3, at 169 n.100; 15 U.S.C. § 18a(c)(9) (1983); 16 C.F.R. § 802.9 (1985).

35. *See* Bartlett & Andrews, *supra* note 3, at 168-69 (few standstill agreements contain board representation provisions); *supra* notes 33 & 34 (investor's representation on issuer's board may be violative of federal securities and federal antitrust laws).

36. *See* FLEISCHER, *supra* note 4, at 148 (discussing termination of standstill agreements); *infra* notes 37-39 and accompanying text (recognizing termination provisions in standstill agreements and events causing termination).

37. *See* Nathan, *supra* note 4, at 355-57 (discussing exceptions to stock ownership limitation in standstill agreements); Standstill Agreement Memorandum, *supra* note 2, at A-52, A-53 (suggesting possible exceptions to the stock ownership limitation, including acquisition of

ship limitation typically include a substantial change in control of the corporation resulting from a merger or acquisition, a sale by the issuer of a significant portion of the assets of the corporation, or a public announcement of a third party tender offer for a significant amount of the issuer's shares.[38] In addition to releases in the form of exceptions to the stock ownership limitation, standstill agreements may contain an additional termination provision which permits either party to terminate the entire agreement upon the occurrence of specified events not already recognized as exceptions to the owernship limitation such as material breaches of any of the core provisions of the standstill agreement.[39] Finally, standstill agreements usually include a miscellaneous provision which often contains an expression of the issuer's entitlement to judicial enforcement of the provisions of the agreement.[40]

Although standstill agreements governing minority investment programs generally include several characteristic provisions, the scope of the terms and

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additional stock, tender offers, open-market or block accumulations, and mergers); Bartlett & Andrews, *supra* note 3, at 155-56 (discussing termination provisions in standstill agreements); *infra* note 38 and accompanying text (events typically representing exceptions to investor's covenant not to acquire additional shares in issuing corporation); *supra* notes 9-13 and accompanying text (discussion of stock ownership limitation).

38. *See* Bartlett and Andrews, *supra* note 3, at 155-56; Nathan, *supra* note 4, at 355-57; Standstill Agreement Memorandum, *supra* note 2, at A-52; *see also* Seagram—DuPont Agreement, *supra* note 5, at A-80, A-81 (investor may acquire issuer's stock without regard to stated limitation of 25% if tender offer is commenced for up to 20% of issuer's stock, acquisition of up to 20% occurs, or any person or 13D group becomes beneficial owner of either 20% of issuer's stock or amount greater than that held by investor); City Investing—NVF Letter Agreement, *supra* note 5, at 3-4 (ownership limitation of 21% shall terminate if successful tender offer results in entity holding in excess of 21% of issuer's securities, if an entity files under federal securities laws to acquire more than 10% of outstanding shares of issuer, or if issuer merges, consolidates or sells substantially all of its assets).

39. *See* Seagram—DuPont Agreement, *supra* note 5, at A-87 (termination provision providing that either party may terminate agreement if other party breaches one of that party's covenants, if specified nominees are not elected to each others boards, or if release of ownership limitation occurs pursuant to provided exceptions).

40. *See* Nathan, *supra* note 4, at 357; Bartlett & Andrews, *supra* note 3, at 173 n.113; Standstill Agreement Memorandum, *supra* note 2, at A-54. The miscellaneous provision of a standstill agreement, or its equivalent, commonly includes a statement by the issuer that the issuer will be irreparably damaged if the investor breaches any of the provisions of the agreement, and that the issuer accordingly will be entitled to seek injunctive relief to prevent further breaches and to specifically enforce the provisions of the agreement. *See* Nathan, *supra* note 4, at 357; Standstill Agreement Memorandum, *supra* note 2, at A-54; Whittaker—Smith Agreement, *supra* note 5, at 29. Other standstill agreements recognize both parties to the agreement as having access to the courts to enforce the provision of the agreement. *See* Seagram—DuPont Agreement, *supra* note 5, at A-88. Also within the miscellaneous provision, or in addition to that provision, standstill agreements often embody a severability clause. *See* Bartlett & Andrews, *supra* note 3, at 173 n.113; Martin Marietta—Allied Standstill Agreement, *supra* note 4, at 792 (severability clause). A severability clause typically provides that if a court finds any of the provisions of the standstill agreement unenforceable, the remainder of the provisions and covenants of the agreement remain in full force and effect. *See* Bartlett & Andrews, *supra* note 3, at 173 n.113; Martin Marietta—Allied Standstill Agreement, *supra* note 5, at 792 (severability clause).

provisions of a particular standstill agreement will vary depending upon both the objectives and the bargaining strengths of the parties to the agreement.[41] Invariably, however, standstill agreements restrict the investor from acquiring shares in the issuer beyond the negotiated limit.[42] When the issuer executes a standstill agreement to prevent either the investor or a third party from acquiring control of the issuing corporation,[43] the standstill agreement operates as a defensive measure to a takeover.[44] Defensive measures taken by corporate boards of directors to resist takeover attempts are subject to shareholder challenge because only those defensive measures having a proper corporate purpose are a valid exercise of the directors' business judgment.[45]

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41. *See* Bartlett & Andrews, *supra* note 3, at 15 (contents of standstill agreement vary with peculiarities of deal and bargaining strengths of parties); Fleischer & Sternberg, *Corporate Acquisitions,* 12 REV. SEC. REG. 937 (1979) (component provisions of standstill agreements differ depending upon circumstances of parties, their bargaining strengths, and imagination of drafters). *See also* Nathan, *supra* note 4, at 364-74 (discussion of strategic, legal, and related implications of both preventive and defensive minority investment programs).

42. *See* Nathan, *supra* note 4, at 354 (under standstill agreement issuer invariably will seek to limit investor's holdings); Felischer & Sternberg, *supra* note 41, at 938 (every standstill agreement will restrict investor's purchaser of issuer's securities); *supra* notes 9-13 and accompanying text (discussion of investor's ownership limitation).

43. *See supra* notes 4, 10-13 and accompanying text (examining issuer's objectives in executing standstill agreement).

44. *See* FLEISCHER, *supra* note 4, at 144-48, 372-74 (issuer's execution of standstill agreement in context of creeping acquisition, and issuer's transfer of shares into friendly hands accompanied by standstill agreement, are defensive tactics to avoid unwanted acquisition); LIPTON & STEINBERGER, *supra* note 1, at § 6.06[4] (management has used standstill agreements to defend against takeovers); Pitt, *Fiduciary Duties of Officers and Directors In Control Contests,* in PLI, HOSTILE BATTLES FOR CORPORATE CONTROL 387, 478 (D. Block & H. Pitt eds. 1984) (PLI Corporate Law & Practice Handbook Series No. 439) (categorizing issuance of stock into friendly hands accompanied by standstill agreement as defensive measure). *See also* Note, *supra* note 14, at 1102 (arguing that standstill agreements are defensive tactics).

45. *See* Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 383-84 (2d Cir. 1980) (upholding director's decision to oppose corporate takeover against allegedly improper primary purpose challenge); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 702 (2d Cir. 1980) (ruling that plaintiff failed to show improper motive on part of directors in effecting merger and opposing tender offer). Corporate directors have a fiduciary duty to act in the best interest of the corporation and its shareholders. *See* Pepper v. Litton, 308 U.S. 295, 306 (1939). Corporate directors therefore must implement measures to deter corporate takeovers that in the director's best judgment are detrimental to the interests of the corporation and shareholders. *See* Panter v. Marshall Field & Co., 646 F.2d 271, 288 (7th Cir.), *cert. denied,* 454 U.S. 1092 (1981); Heit v. Baird, 567 F.2d 1157, 1161 (1st Cir. 1977); Northwest Industries, Inc. v. B.F. Goodrich Co., 301 F. Supp. 706, 712 (N.D. Ill. 1969). Corporate directors, in fulfilling their fiduciary duties, must act in good faith, upon an ascertainment of relevant facts and law, and devoid of self interest in the transaction. Whittaker Corp. v. Edgar, 535 F. Supp. 933, 950 (N.D. Ill. 1982); Kaplan v. Goldsamt, 380 A.2d 556, 568 (Del. Ch. 1977). In recognition that a corporation's board of directors is peculiarly suited to making business decisions on behalf of the corporation, courts afford corporate directors a rebuttable presumption that the directors' action is valid. Auerbach v. Bennett, 47 N.Y.2d 619, 630-31, 419 N.Y.S.2d 902, 926-27, 393 N.E.2d 994, 1000 (N.Y.C.A. 1979); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. Supr., 1971). The rebuttable presumption courts accord the business decisions of corporate directors is known as the business judgment rule. *See generally* Johnson & Osborne, *The Role of the*

Until recently, no court had ruled on the validity of the use of standstill agreements to avoid control contests while governing an investor's substantial minority interest in an issuing corporation.[46] In *Enterra Corporation v. SGS Associates,*[47] however, the United States District Court for the Eastern District of Pennsylvania endorsed the use of standstill agreements to promote stability between a corporation and a substantial shareholder when a valid corporate purpose exists for executing an agreement.[48]

In *Enterra,* SGS Associates (SGS), an investment partnership, accumu-

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Business Judgment Rule In A Litigious Society, 15 VAL. U. L. REV. 49, 51-23 (1980) (discussion of business judgment rule as shield for insulating corporate directors from personal liability for errors in business judgment); Arsht, *The Business Judgment Rule Revisited,* 8 HOFSTRA L. REV. 93 (1979) (comprehensive discussion of business judgment rule). Under the business judgment rule, courts allocate the burden of proof to the plaintiff to show either fraud, bad faith, abuse of discretion, or self dealing on the part of board of directors. *See* Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980) (plaintiff has burden of demonstrating that director had self interest in transaction); Johnson v. Trueblood, 629 F.2d 287, 293 (3rd Cir. 1980) (under Delaware law plaintiff must show at minimum bad faith of directors), *cert. denied,* 450 U.S. 999 (1981); Whittaker Corp v. Edgar, 535 F. Supp. 933, 950 (N.D. Ill. 1982) (burden rests with plaintiff to show director's bad faith or abuse of discretion); Northwest Industries, Inc. v. B.F. Goodrich Co., 301 F. Supp. 706, 712 (N.D. Ill. 1969) (plaintiff must prove fraud or oppressive conduct to set aside director's action). Once the plaintiff has made a showing to rebut the presumption in favor of the board of directors, the burden shifts to the board of directors to demonstrate the validity of the transaction. Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980); Johnson v. Trueblood, 629 F.2d 287, 293 (3d Cir. 1980), *cert. denied,* 450 U.S. 999 (1981). In reviewing actions that directors may take to deter takeovers, courts have relied on a "primary purpose" test as an alternative to, or in conjunction with, the business judgment rule. Pitt, *supra* note 44, at 452, 459; *see, e.g.,* Panter v. Marshall Field & Co. 646 F.2d 271, 296-97 (7th Cir.) (reading primary purpose test into business judgment rule), *cert. denied,* 454 U.S. 1092 (1981); Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382-83 (2d Cir. 1980) (integrating primary purpose test and business judgment rule); Heit v. Baird, 567 F.2d 1157, 1161-62 (1st Cir. 1977) (applying primary purpose test). Under the primary purpose test, courts consider whether corporate directors, in taking corporate action, primarily intended to effect a proper corporate purpose or to entrench the existing board of directors. *See* Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 702-03 (under primary purpose test, finding insufficient proof that directors motivation for consummating merger was retention of control). Courts have required plaintiffs to show that the directors' desire to remain in office was the sole or primary motive for the directors' action. *See* Johnson v. Trueblood, 629 F.2d 287, 292-93 (3d Cir. 1980) (plaintiffs must show retention of control was sole or primary purpose of directors' action to overcome presumption of validity), *cert. denied,* 450 U.S. 999 (1981); Warner Communications, Inc. v. Murdoch, 581 F. Supp. 1482, 1491 (D. Del. 1984) (directors' defensive measures are legitimate unless executed for the primary purpose of entrenchment); *but see* Norlin Corp. v. Rooney, Pace Inc., [1984 Transfer Binder] FED. SEC. L. REP. (CCH) 91,564 at 98,867-98, 868 n.7 (retreating from primary purpose test in requiring directors to prove that transaction was fair and reasonable once self dealing or bad faith is demonstrated).

46. Bartlett & Andrews, *supra* note 3, at 147; *see* Enterra Corporation v. SGS Associates, 600 F. Supp. 678, 688 (E.D. Pa. 1985) (recognizing that no court had challenged general validity of standstill agreements).

47. 600 F. Supp. 678 (E.D. Pa. 1985).

48. *See id.* at 688 (approving use of standstill agreements when valid corporate purpose exists).

lated nearly five percent of the outstanding common stock of Enterra Corporation (Enterra).[49] Desiring to acquire additional stock in Enterra at a more favorable price, SGS partners met with Enterra's chairman and expressed the partnership's interest in purchasing additional shares in Enterra for investment purposes.[50] At the meeting, SGS did not convey to Enterra's chairman any desire to acquire control of Enterra.[51] Through negotiations following the initial meeting, Enterra and SGS executed a standstill agreement.[52] The standstill agreement, which was to remain in effect for ten years from the time of execution, prohibited SGS from acquiring more than fifteen percent of Enterra's outstanding common stock except under certain limited circumstances provided in the agreement.[53] The standstill agreement also prohibited SGS from making a tender offer for Enterra stock and from aiding and abetting a third party tender offer.[54]

Approximately one year after the parties executed the standstill agreement, SGS requested that Enterra amend the agreement to allow SGS to acquire more than fifteen percent of Enterra's outstanding shares.[55] Several months later at a meeting with Enterra's chairman, SGS again requested that Enterra amend the standstill agreement to allow SGS to purchase more shares than the agreement permitted.[57] Enterra's chairman stated that the Enterra board did not favor amending the agreement.[58] SGS responded with a written

49. *Id.* at 682. The plaintiff in *Enterra*, Enterra Corporation, is a Pennsylvania corporation which provides services and products to the petroleum industry. *Id.* at 681. Enterra's common stock is traded on the New York and Philadelphia stock exchanges. *Id.*

50. *Id.* at 682.

51. *Id.*

52. *Id. See* Enterra—SGS Agreement (Nov. 30, 1982) (filed with SEC by SGS on February 10, 1983) (on file at Washington and Lee Law Review) [hereinafter cited as Enterra—SGS Agreement]. In *Enterra*, the plaintiffs disclosed the terms of the standstill agreement in a press release and in Enterra's 1983 and 1984 proxy statements mailed to shareholders. 600 F. Supp. at 682. Upon acquiring 5 percent of Enterra's outstanding shares, SGS filed a Schedule 13D with the SEC with a copy of the standstill agreement attached. *Id.*; *see* 15 U.S.C. 78m(d)(1) (requiring any person who acquires more than 5% of any class of equity securities to file Schedule 13D with SEC and with exchanges on which issuer's securities are traded).

53. 600 F. Supp. at 682; *see* Enterra—SGS Agreement, *supra* note 52, at 6 (stating that no member of SGS shall acquire greater than 15% of Enterra voting securities).

54. 600 F. Supp. at 682; *see* Enterra—SGS Agreement, *supra* note 52, at 11 (stating that SGS shall not acquire or offer to acquire Enterra voting securities by means of tender offer or suggest or announce SGS' willingness or desire to have third party make tender offer).

55. 600 F. Supp. at 682.

56. *Id.* Following the Enterra board's refusal to amend the standstill agreement in *Enterra*, a breakdown in the relations between Enterra and SGS occurred. *Id.*

57. *Id.* In *Enterra*, SGS' request to amend the standstill agreement included a demand for representation on Enterra's board and a request to permit an increase in SGS' holdings above 15%. *See id.*; Brief of Plaintiffs in Opposition to Defendants' Motion for a Mandatory Preliminary Injunction at 17, Enterra Corporation v. SGS Associates, 600 F. Supp. 678 (E.D. Pa. 1985) [hereinafter cited as Plaintiff's Brief]; *supra* notes 32-35 and accompanying text (discussing board representation provisions in standstill agreements).

58. 600 F. Supp. at 682.

proposal stating that SGS would offer to acquire any and all outstanding shares of Enterra at a price of twenty-one dollars per share if Enterra's board approved.[59]

After considering the SGS proposal, the Enterra board declined to approve the offer or to amend the agreement.[60] In response to the Enterra Board's decision, SGS filed an amendment to SGS' Schedule 13D[61] and attached a copy of the proposal.[62] A disruption in the trading market for Enterra stock resulted, and the New York Stock Exchange halted trading of Enterra stock.[63] Soon thereafter, the Enterra board reconsidered the SGS proposal and, with the assistance of a financial advisor, concluded that in the best interest of the shareholders, Enterra should neither accept the SGS proposal nor amend the standstill agreement.[64]

Enterra filed suit against SGS seeking permanent injunctive relief prohibiting SGS from acquiring or offering to acquire Enterra common stock in violation of the standstill agreement.[65] Enterra alleged that SGS breached the standstill agreement and violated various federal and state securities laws by demanding that the Enterra board either amend the standstill agreement or approve SGS' offer to acquire any and all outstanding shares.[66] SGS filed various counterclaims seeking a mandatory preliminary injunction.[67] SGS sought an order from the court requiring that Enterra consider the adequacy of any SGS proposal, convey to each shareholder of record any such proposal the Enterra board had rejected, and allow each shareholder to decide whether to accept or reject the offer described in SGS' proposal.[68] In support of its

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59. *Id.* Prior to making an offer to purchase Enterra shares at a price of $21 per share, SGS had filed an amendment to the partnership's Schedule 13D indicating that SGS had decided to explore other alternatives with respect to the Enterra investment. *Id.; see* 15 U.S.C. m(d)(2) (requiring investor holding more than 5% of an equity to file amendment to investor's Schedule 13D if change occurs in facts set forth in investor's Schedule 13D). Enterra and the investment community interpreted SGS' expression of a desire to explore other alternatives as an intentional attempt by SGS to make Enterra the potential target of a takeover. Plaintiff's Brief, *supra* note 57, at 18. At the time SGS set forth the proposal to offer $21 per share, Enterra common stock was selling for $16 per share. 600 F. Supp. at 682; Memorandum in Support of Defendants' Motion for Mandatory Preliminary Injunction at 8, Enterra Corporation v. SGS Associates, 600 F. Supp. 678 (E.D. Pa. 1985) [hereinafter cited as Defendants' Memorandum].

60. 600 F. Supp. at 683.

61. *See* 15 U.S.C. 78m(d)(2) (requiring person holding more than 5% of an outstanding equity security in a publicly held corporation to file amendment to investor's Schedule 13D if change occurs in facts set forth in investor's Schedule 13D); *supra* note 4 (explaining Schedule 13D requirement).

62. 600 F. Supp. at 683.

63. *Id.*

64. *Id.*

65. *Id.* at 678, 683.

66. *Id.* at 680; Plaintiff's Brief *supra* note 57, at 21-22. In addition to alleging that SGS' actions violated the securities laws, the plaintiffs in *Enterra* asserted that SGS committed fraud, breach of contract, and violations of the Racketeer Influenced and Corrupt Organization Act (RICO). 600 F. Supp. at 680; *see* 18 U.S.C. § 1961 *et seq.* (RICO).

67. 600 F. Supp. at 680-81 *see infra* note 70 (discussing preliminary injunction standards).

68. 600 F. Supp. at 681.

motion for a mandatory preliminary injunction, SGS asserted that its inability under the terms of the standstill to make offers directly to Enterra shareholders imposed on the Enterra board a further fiduciary duty to convey to Enterra shareholders the facts and terms of any SGS offer extended through the Enterra board.[69]

In considering whether to grant injunctive relief against the Enterra board,[70] the *Enterra* court first examined standards of conduct for officers and directors of a corporation in managing the business affairs of a corporation.[71] Primarily focusing on application of the business judgment rule, the *Enterra* court observed that the business judgment rule operates as a shield to protect corporate directors from liability with respect to business decisions made in conducting the affairs of the corporation.[72] The business judgment rule permits a presumption that in making a business decision the directors acted on an informed basis, in good faith, and in the interests of the corporation and shareholders.[73] The *Enterra* court noted that the good faith presumption the business judgment rule affords is strengthened when

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69. *Id.; see* Defendant's Memorandum, *supra* note 59, at 13-14 (arguing that fiduciary duty that directors of corporations owe shareholders requires Enterra board to consider adequacy of proposals, to inform shareholders of specifics of proposal, and to permit shareholders to accept proposals board rejects because standstill agreement prohibits SGS from making offer directly to shareholders).

70. *See* 600 F. Supp. at 681. In *Enterra,* subsequent to SGS' request for a preliminary injunction, an individual shareholder of Enterra filed a shareholders' derivative action against the Enterra board. *Id.* In seeking relief identical to that sought by SGS, the Enterra shareholder alleged that the Enterra board breached the board's fiduciary duty to the corporation and shareholders in executing a standstill agreement which restricted SGS' ability to purchase Enterra stock. *Id.* The district court consolidated SGS' claim and the shareholder's derivative claim for argument on whether to grant injunctive relief against the Enterra board. *Id.* Preceeding discussion of the merits of both the movants' claims with a review of preliminary injunction standards, the *Enterra* court observed that in order for the movants to obtain a preliminary injunction, the movants must demonstrate both a likelihood of success on the merits and irreparable harm absent injunctive relief. *Id.* at 683; *see* Klitzman & Gallagher v. Kurt, 744 F.2d 955, 958-59 (3d Cir. 1984). Noting that SGS sought a mandatory preliminary injunction, the district court added that a court should exercise sparingly the power to issue a mandatory injunction. *Id.* at 684; *see* United States v. Spectro Food Corporation, 544 F.2d 1175, 1181 (3d Cir. 1981); *see also* 7 J. MOORE, MOORE'S FEDERAL PRACTICE 65.04[1] (2ND ED. 1984) (preliminary injunction serves purpose of preserving status quo pending final determination of action whereas mandatory preliminary injunction requires subject of mandatory injunction to take affirmative action).

71. *See* 600 F. Supp. at 684-87 (Enterra court's discussion of director's fiduciary duty and business judgment rule).

72. *See id.* at 685 (business judgment rule protects corporate directors from shareholder interference in discharging director's fiduciary duties to corporation); *see also supra* note 45 (discussion of business judgment rule and primary purpose test). In *Enterra,* the district court remarked that shareholders unsatisfied with the directors judgment in effectuating a corporate action should replace the directors through the corporate voting process. 600 F. Supp. at 685; *see* M. Lipton, *Takeover Bids and the Targets' Boardroom,* 35 BUS. LAW. 101, 116 (1979).

73. *See* 600 F. Supp. at 685 (quoting Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred,* 97 HARV. L. REV. 1964, 1969 (1984); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (providing clear statement of business

the board of directors consists of independent directors and when the board has consulted with outside experts.[74] The court also explained that to overcome the presumption in favor of the directors, the plaintiff must show that the directors' sole or primary purpose for the transaction was to retain control of the corporation.[75] Implicitly recognizing that the execution of a standstill agreement may operate as a defensive measure to avert a control battle, the district court considered the applicabilty of the business judgment rule to defensive tactics used to resist takeover attempts.[76] The court concluded that even in the context of defensive tactics, the business judgment rule insulates directors from liability unless the directors employed the defensive strategy for the primary purpose of assuring their continuance in office.[77]

Applying the business judgment rule to the Enterra board's decision to execute the standstill agreement,[78] the *Enterra* court noted that Enterra's chairman submitted an affidavit which revealed a number of valid corporate

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judgment rule in context of applying rule to dismissal of derivative litigation); *supra* note 45 (discussion of business judgment rule and primary purpose test).

74. 600 F. Supp. at 685; *see* Panter v. Marshall Field & Co., 646 F.2d 271, 277, 294 (7th Cir.) (presence of majority of independent directors on corporation's board strengthens good faith presumption of business judgment rule), *cert. denied,* 454 U.S. 1092 (1981); *cf.* Bartlett & Andrews, *supra* note 3, at 150 n.25 (supporting use of standstill agreements if directors have consulted legal and business advisors before consummating agreement).

75. 600 F. Supp. at 686; *see* Johnson v. Trueblood, 629 F.2d 287, 293 (3d Cir. 1980) (in order to overcome presumption in favor of directors, plaintiff must establish that directors' sole or primary motive was retention of control), *cert. denied,* 450 U.S. 999 (1981); *see also* Panter v. Marshall Field & Co., 646 F.2d at 294 (plaintiffs must show under business judgment rule that improper motives predominated director's action), *cert. denied,* 454 U.S. 1092 (1981); *cf.* Heit v. Baird, 567 F.2d 1157, 1161 (1st Cir. 1977) (directors may not utilize defensive tactic of issuing large block of corporation's stock for sole purpose of retaining control); *supra* note 45 (discussion of business judgment rule and primary purpose test).

76. *See* 600 F. Supp. at 686-87 (considering applicability of business judgment rule to defensive measures directors employ to resist takeover); *supra* note 45 (discussion of business judgment rule and primary purpose test); *see also supra* note 44 and accompanying text (standstill agreements may operate as defensive measure against takeover).

77. *See* 600 F. Supp. at 686-87; Bartlett & Andrews, *supra* note 3, at 148-49 (citing cases supporting proposition that courts applying business judgment rule have approved director's defensive tactics under shareholder challenge); *see also* Warner Communications v. Murdoch, 581 F. Supp. 1482, 1491 (D. Del. 1984) (director's defensive tactics are legitimate provided directors do not employ such tactics for primary purpose of entrenchment). In considering the applicability of the business judgment rule to director's defensive tactics, the *Enterra* court recognized that the directors' fiduciary duty may obligate the directors to oppose takeovers that the directors perceive as detrimental to the corporation. 600 F. Supp. at 686; *see* Panter v. Marshall Field & Co., 646 F.2d 271, 298-99 (7th Cir.) (directors must evaluate and oppose those tender offers which directors believe are detrimental to corporation even if opposition is at expense of shareholders short term interests), *cert. denied,* 454 U.S. 1092 (1981); Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 381 (2d Cir. 1980) (determining that director's opposition to takeover was reasonable).

78. *See supra* notes 72-77 and accompanying text (Enterra court's discussion of business judgment rule). Like many courts considering shareholder challenges to director's anti-takeover maneuvers, the *Enterra* court applied a combination of the business judgment rule and primary

purposes for executing the standstill agreement with SGS.[79] The court added that Enterra had not executed the agreement in response to a takeover threat because at the time of contracting, neither SGS nor a third party had expressed a desire to obtain control of Enterra.[80] Although the *Enterra* court conceded that retention of control was a motive for executing the agreement, the court maintained that other valid motives supported the Enterra board's decision to enter into the standstill agreement.[81] The court accordingly concluded that SGS could not demonstrate a likelihood of success on the merits of the claim that the Enterra board breached its fiduciary duty in executing the standstill agreement.[82]

Consistent with the court's conclusion that the execution of the standstill agreement was not a breach of the board's fiduciary duty, the *Enterra* court chose not to examine the merits of the terms and provisions of the Enterra—SGS standstill agreement.[83] Instead, the court approved of the use of standstill agreements to govern minority investment programs.[84] The court noted that commentators have viewed the use of standstill agreements favorably.[85] The

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purpose test. *See* 600 F. Supp. at 685-87; *supra* note 45 (discussion of business judgment rule and primary purpose test).

79. 600 F. Supp. at 688-89. Relying on the affidavit of Enterra's chairman, the district court in *Enterra* observed that the standstill agreement provided numerous corporate benefits including the retention of key employees, the stabilization of the day-to-day business of the corporation, the settling of the trading market for Enterra stock, and the preservation of the directors' ability to sell the corporation under more favorable circumstances. *Id.* at 689.

80. *See id.* at 682, 689; *supra* text accompanying note 51 (SGS did not convey desire to acquire control of Enterra at meeting preceeding execution of standstill agreement).

81. 600 F. Supp. at 689. The *Enterra* court concluded that the Enterra board's primary purpose in executing the standstill agreement was to establish a stable relationship with SGS. *See id.* at 689 (standstill agreements create stable relationship between issuer and substantial shareholder); *see also* Johnson v. Trueblood, 629 F.2d 287, 292-93 (3d Cir. 1980), *cert. denied,* 450 U.S. 999 (1981). In *Johnson,* the Third Circuit explained that a plaintiff seeking to overcome the good faith presumption of the business judgment must demonstrate that the directors desire to retain control was more than just one of several motives behind the director's action. *Id.* Recognizing that retention of control always might be one of the motives in any action a director takes, the Third Circuit concluded that a plaintiff cannot rebut the presumption under the business judgment rule unless he can show that the directors' desire to retain control was the primary motive for the directors' action. *Id.*

82. 600 F. Supp. at 689.

83. *See id.* at 687-88 (Enterra court's discussion of validity of standstill agreement).

84. *See id.* at 688 (citing Bartlett & Andrews, *supra* note 3, at 150, for conclusion that courts should not second guess director's decision to execute standstill agreement pursuant to proper corporate objective if directors have consulted expert advice).

85. *Id.* at 687. *See* Bartlett & Andrews, *supra* note 3, at 143 (in depth examination of standstill agreements as instrument used to govern investor's substantial minority investment); Bialkin, *supra* note 3, at 91 (outlining various uses of standstill agreements in corporate transactions); Fleischer & Sternberg, *supra* note 3, at 937 (overview of relevant matters concerning standstill agreements). *But see* Note, *supra* note 14, at 1097-1110 (arguing that restrictive voting provisions commonly found in standstill agreements constitute illicit vote selling and therefore are illegal under common law, against public policy, and violative of state statutes).

court then summarized briefly the essential provisions[86] and purpose[87] of a standstill agreement. Observing that standstill agreements may confer benefits on both the issuing corporation and the investing shareholder, the court determined that under the business judgment rule courts should not second-guess a board of directors' decision to execute a standstill agreement which facilitates a valid corporate purpose when the directors have consulted expert advisors before consummating the agreement.[88] Finally, the *Enterra* court recognized that no court has considered the general validity of the type of standstill agreement Enterra and SGS had executed or the authority of a corporate board of directors to execute such an agreement.[89] In support of the validity of standstill agreements, however, the *Enterra* court relied on several recent cases which suggest or imply that a standstill agreement is a valid and enforceable contract.[90]

The district court in *Enterra* lastly addressed the merits of SGS' claim

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86. *See* 600 F. Supp. at 687 (recognizing stock ownership limitation and transfer restriction provisions in standstill agreements); *see also supra* notes 8-40 and accompanying text (discussing distinct provisions commonly found in standstill agreements).

87. *See* 600 F. Supp. at 687. In *Enterra*, the district court observed that standstill agreements facilitate the objectives of the issuing corporation's directors to define the relationship with a significant investor and to avoid the unsettling impact on the corporation's business caused by the threat of a takeover. *Id.* The court added that in executing a standstill agreement, the directors of a corporation may seek to prevent a costly control battle with either the contracting shareholder or potential third party bidders. *Id.; see supra* notes 10-13 and accompanying text (describing means by which ownership limitation provisions of standstill agreements facilitate issuer's objective of avoiding control battle). The *Enterra* court also recognized that standstill agreements may permit the contracting shareholder to acquire shares in the issuer at a lower price than the investor would incur absent the standstill agreement. 600 F. Supp. at 687; *see infra* notes 104-106 (explaining effect of standstill agreement on price of issuer's stock in regard to contracting shareholder's further acquisitions).

88. 600 F. Supp. at 688 (citing Bartlett & Andrews, *supra* note 3, at 150).

89. *Id.* While recognizing that no court had challenged the general validity of standstill agreements, the district court in *Enterra* noted that the court probably would question the enforceability of the voting restrictions provision of a standstill agreement if such a provision were at issue. *See id.; supra* notes 21-25 and accompanying text (discussing voting provisions in standstill agreements); *see also* Note, *supra* note 14, at 1093 (arguing that restrictive voting provisions in standstill agreements constitute illicit vote selling and therefore are illegal under common law, against public policy, and violative of state statutes). The plaintiff's brief, however, indicated that because a severance clause governed the various provisions of the standstill agreement, the remainder of the agreement would remain in effect even if the court found that the voting provision of the agreement was unenforceable. *See* Plaintiff's Brief, *supra* note 57, at 38-39; Enterra—SGS Agreement, *supra* note 52, at 32-33 (severability provision); *supra* note 40 (addressing severability clause).

90. *See* 600 F. Supp. at 688; *see also* Biechele v. Cedar Point, Inc., 747 F.2d 209, 216 (6th Cir. 1984) (standstill agreement having effect of keeping friendly third party in minority stockholder position held not violative of federal securities laws); General Portland, Inc. v. LaFarge Coppee S.A., [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) 99,148 AT 95,540 (N.D. TEX. AUG. 28, 1981) (standstill agreement used in connection with exchange of confidential information as prelude to possible merger held valid and enforceable contract); *cf.* Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707, 711, 714-15 (5th Cir. 1984) (oral standstill agreement presumed binding and enforceable).

that the Enterra board owed a fiduciary duty to the corporation's shareholders to convey to those shareholders any offer that SGS extended through the Enterra aboard.[91] The court acknowledged that under normal circumstances a shareholder is free to approach another shareholder and to extend an offer to purchase that shareholder's interest.[92] The court noted, however, that if SGS were to make an offer directly to Enterra shareholders, SGS would be in violation of the standstill agreement.[93] In considering the validity of SGS' claim that the Enterra board of directors owed a fiduciary duty to the shareholders of Enterra to convey the SGS proposal, the district court found that no federal, state, or common law standard imposed a duty on the board to disclose the terms of an offer.[94] To the contrary, the court cited authority suggesting that the directors of a corporation need not disclose to the corporation's shareholders the status of negotiations between the corporation and a potential bidder until such time as the directors have approved a proposal.[95] The *Enterra* court observed, however, that SGS' request in fact was moot because the Enterra board had included in the corporation's 1984 Quarterly Report the SGS proposal along with the board's reason for rejecting the offer.[96] Recognizing that the Enterra board's alleged duty to consider and disclose the terms of the SGS proposal was no longer at issue, the district court surmised that SGS' primary purpose in seeking the injunctive relief was to procure an effective means of communicating the offer to Enterra shareholders without incurring liability for breaching the standstill

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91. *See* 600 F. Supp. at 689-91 (Enterra court's discussion of Enterra board's alleged duty to convey offers to shareholders). The *Enterra* court observed that SGS might lack standing to assert a claim of breach of fiduciary duty on the part of the directors because such a claim gives rise to a derivative action and should be brought as such. *See id.* at 689. *See generally* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 360 at 1044-53 (distinguishing derivative actions from direct actions). The court decided to address the merits of SGS' claim, however, since an Enterra shareholder had brought a derivative action seeking relief identical to that of SGS. *Enterra,* 600 F. Supp. at 689; *see supra* note 70 (noting that Enterra shareholder's derivative action consolidated with SGS' claim).

92. 600 F. Supp. at 690.

93. *Id.; see* Enterra—SGS Agreement, *supra* note 52, at 6, 11 (prohibiting SGS from offering to acquire Enterra stock beyond 15% limit through direct purchases or tender offers).

94. 600 F. Supp. at 691.

95. *See id.* at 690; *see also* Greenfield v. Heublein, Inc., 742 F.2d 751, 756-57 (3d Cir. 1984) (target corporation's duty to disclose merger to shareholers arises when agreement in principle has been reached but not during preliminary merger discussions); 15 PA. CONS. STAT. ANN § 1902 (Purdon's Supp. 1985) (upon approving plan of merger or consolidation board of directors shall submit plan to shareholders for vote); Panter v. Marshall Field & Co., 646 F.2d 271, 296-97 (7th Cir.) (directors are under no fiduciary duty to reveal to shareholders requisition of merger offers), *cert. denied,* 454 U.S. 1092 (1981). In *Enterra,* the court noted that the Enterra board had no duty to disclose the SGS proposal sine the board had not approved the proposal. *See* 600 F. Supp. at 690. In addition, the court observed that had SGS made a tender offer to acquire all of Enterra's outstanding shares, the Enterra board would be required under the Williams Act to make certain disclosures to shareholders. *Id.; see* 15 U.S.C. §§ 78m(d), 78n(d) & (e) (1982) (Williams Act); *infra* note 122 (discussing directors' duties under Williams Act).

96. 600 F. Supp. at 691.

agreement.[97] Having rejected SGS' duty to convey theory, the court concluded that the movants had not satisfied the requirements for sustaining the grant of a preliminary injunction and accordingly denied the motion.[98] Importantly, the *Enterra* court denied the motion fearing that granting the injunction would cast doubt on the validity of standstill agreements and thus create uncertainty between corporations and shareholders privy to standstill agreements as well as disrupt trading markets listing those corporations' shares.[99]

The Enterra board's execution of a standstill agreement in *Enterra* typifies an issuer's use of a standstill agreement to respond to an investor's significant accumulation of the issuer's stock.[100] The accumulation of a significant number of the issuer's shares in the hands of a single investing entity presents a threat to the issuer because the investor may use the substantial investment as leverage for a takeover.[101] The issuer's execution of a standstill agreement with the investor, which limits the investor's ownership interest in the issuer, reduces the possibility of a takeover and thus promotes a stable relationship between the issuer and the investor.[102] From an investor's perspective, however, the execution of a standstill agreement may permit the investor to acquire shares in the issuer up to the negotiated limit at a lower price than would be attainable absent a standstill agreement.[103] An investor's significant accumulations of an issuer's shares may drive up the price of the stock because the significant purchases may create public speculation in the trading market for the issuer's stock that a takeover of the issuer is impending.[104] The execution of a standstill agreement,

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97. *Id.*

98. *Id.* at 692; *see supra* note 70 (movant must demonstrate both likelihood of success on merits and irreparable harm to obtain preliminary injunction).

99. *See* 600 F. Supp. at 692.

100. *See id.* at 681-82 (Enterra and SGS executed standstill agreement in response to SGS' significant accumulation of Enterra common stock); FLEISCHER, *supra* note 4, at 115-119 (issuer may execute standstill agreement once investor has accumulated substantial number of shares in issuer); *supra* note 4 (considering standstill agreements arising in context of investor's significant accumulation of issuer's stock through open market and negotiated purchases).

101. *See* LIPTON & STEINBERGER, *supra* note 1, § 1.04[4][a] at 1-25 (investor may effectuate takeover by purchasing large block of stock in issuer). An investor accumulating an issuer's stock as a first step toward the acquisition of the issuer typically acquires the stock through negotiated purchases with a third party or through open market purchases. *See id.;* FLEISCHER, *supra* note 4, at 112-13; Nathan, *supra* note 4, at 343. Once an investor has acquired a substantial equity position in an issuer, the investor's complete acquisition of the issuer often follows. LIPTON & STEINBERGER, *supra* note 1, § 1.04[a] at 1-26.

102. *See* Bartlett & Andrews, *supra* note 3, at 146 (in executing standstill agreement issuer may wish to avoid control battle with contracting shareholder); Nathan, *supra* note 4, at 354 (limiting investor's holdings in issuer prevents investor from obtaining working control of issuer); *Enterra,* 600 F. Supp. at 687 (recognizing usefulness of standstill agreement to avert control battle with investor and promote stability in relationship with investor).

103. *See infra* notes 105 & 106 and accompanying text (execution of standstill agreement often causes market price of issuer's stock to decrease, thereby enabling investor to purchase issuer's stock at lower price).

104. *See Enterra,* 600 F. Supp. at 687 (dictum); Plaintiff's Brief, *supra* note 57, at 29-30

however, may quell any public speculation that a takeover of the issuer is imminent, thus stabilizing or decreasing the market price of the issuer's stock and thereby enabling the investor to acquire additional although a limited number of shares in the issuer at a lower praise than would be attainable absent the standstill agreement.[105]

In *Enterra,* SGS executed the standstill agreement with Enterra to acquire at a favorable price additional shares in Enterra, purportedly for investment purposes.[106] Despite the existence of the standstill agreement, SGS nonetheless attempted to acquire Enterra, maintaining that the Enterra board had a duty to communicate to Enterra shareholders the terms of any SGS offer.[107] The effect of SGS' attempt to circumvent the prohibitions of the standstill agreement was to test judicially the validity of an issuer's use of a standstill agreement to prevent an investor's creeping or toe-hold acquisition.[108] In rejecting the duty to convey theory that SGS advanced to effectuate the acquisition of Enterra, the *Enterra* court validated the use of standstill agreements as an appropriate technique which an issuer's board of directors may utilize to avert a control battle with a major investor.[109] Certainly after *Enterra,* an investor accumulating shares as a toe-hold for a future acquisition of the issuer should not submit to a long term standstill agreement because standstill agreements have the effect of eliminating the leverage for an acquisition that an investor would otherwise obtain from acquiring a minority interest.[110] Indeed, in light of *Enterra,* the willingness of an investor to accede

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(noting that SGS member's purchase of 4.6% of Enterra common stock caused increase in trading activity and increase in price of Enterra common stock); *see also* Jensen and Ruback, *The Market For Corporate Control: The Scientific Evidence,* 11 J. FIN. ECON. 5, 8-15 (1983). An increase in a target corporation's stock price often will occur before the first public announcement of a takeover. *See id.* at 10. Empirical studies indicate that successful takeovers generally result in a significant increase in the price of the target's stock. *See id.* at 10-14. Unsuccessful takeovers also generally reflect an increase in the price of the target's stock at least up through the period immediately following the unsuccessful takeover. *Id.* at 14-16.

105. *See* Dann & DeAngelo, *Standstill Agreements, Privately Negotiated Stock Repurchases, and the Market for Corporate Control,* 11 J. FIN. ECON. 275, 299 (1983) (concluding that standstill agreements reduce price of issuer's stock); *see infra* note 118 (discussing Dann & DeAngelo study in relation to negative effect of standstill agreements on wealth of nonparticipating stockholders).

106. *Enterra,* 600 F. Supp. at 682.

107. *See id.* at 682-83; *see also supra* notes 49-59 and accompanying text (discussing SGS' attempt to acquire Enterra through $21 per share proposal).

108. *See* 600 F. Supp. at 684 (Enterra court's statement of issue in *Enterra).*

109. *See id.* at 688, 692 (Enterra court's conclusion that standstill agreements are valid and enforceable contracts).

110. *See id.;* Nathan, *supra* note 4, at 368 (practical effect of standstill agreement is to eliminate leverage for acquisition of issuer which investor would otherwise secure through investor's minority investment). An investor acquiring a minority interest in an issuing corporation as a means of gaining a toe-hold for a future acquisition of the issuer generally will not accept a long-term standstill agreement contemplating a term of 5 to 10 years. *See* Nathan, *supra* note 4, at 366; *see also* LIPTON & STEINBERGER, *supra* note 1, § 1.04[4] at 1-25 (discussing investor's purchase of block of issuer's stock as takeover approach).

to a long-term standstill agreement should establish dispositively the intentions of the investor.[111]

For an investor primarily seeking to reap the profits of purchasing a large block of stock in a strong company whose stock is undervalued, the execution of a standstill agreement may facilitate this goal.[112] Nevertheless, in negotiating a standstill agreement with the issuer, the investor should bargain for a standstill agreement that provides the investor with input into a variety of the issuer's significant corporate actions affecting the investor's minority interest.[113] In particular, an investor should demand voting rights with respect to shares held under the standstill agreement.[114] In addition, the investor should insist upon including in the standstill agreement provisions which permit the investor an escape from the agreement upon the occurence of certain events adversely affecting the investor's interest.[115] A standstill agreement that provides the investor with input into corporate decisions important to the investor and permits the investor an escape from the

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111. *See supra* note 110 and accompanying text (investor seeking toe-hold for acquisition will not execute long-term standstill agreement).

112. *See supra* notes 105-106 and accompanying text (execution of standstill agreement causes market price of issuer's stock to decrease, thereby enabling investor to purchase shares at lower price). An investor acquiring directly or indirectly holdings of at least 20% of an issuing corporation's outstanding stock may be entitled to use the equity method of accounting because the investor is presumed to exercise significant influence over the issuer. *See* The Equity Method of Accounting for Investment in Common Stock § .17, 4 AICPA PROF. STANDS. (CCH) §§ 5131.03, 5131.17, 5131.19 (1974). The equity system of accounting provides an investor with financial reporting advantages. Bartlett & Andrews, *supra* note 3, at 145 n.7; *see* AICPA PROF. STANDS., *supra*, at § 5131.19. The existence of a standstill agreement, however, may rebut the presumption that the investor exercises significant influence over the issuer. Bialkin, *supra* note 3, at 113 (citing Financial Accounting Standards Bd. Interpretation No. 35, at 6-7 (May 1981)). Whether the equity method of accounting is appropriate given the existence of a standstill agreement depends upon the particular facts and circumstances surrounding the agreement. *See id.*

113. *See* Bartlett & Andrews, *supra* note 3, at 168-72 (carefully drafted board representation provisions permitting investor input into corporate decisions may enhance and protect investor's investment interest); *id.* at 164-67 (investor should bargain for less restrictive voting provisions, particularly with respect to voting shares freely on matters of particular importance to investor); *supra* notes 32-35 and accompanying text (discussing board representation provisions and potential problems arising out of investor's direct representation on issuer's board); *supra* note 25 and accompanying text (arguments and proposals for less restrictive voting provisions in standstill agreements).

114. *See* Bartlett & Andrews, *supra* note 3, at 167 (investor should demand right to vote freely on certain issues deemed vital to investor); *see also* Seagram—DuPont Agreement, *supra* note 5, at A-82 (prohibiting Seagram from soliciting proxies or becoming participant in solicitation except with respect to "significant events" which includes variety of events causing structural change in corporation and matters out of ordinary course of business of corporation); Note, *supra* 14, at 1106-08 (proposing solutions to restrictive voting provisions in standstill agreements); *supra* note 25 (discussing arguments and proposals for less restrictive voting provisions in standstill agreements).

115. *See supra* notes 36-39 and accompanying text (discussing termination provisions in standstill agreements and events causing termination).

agreement in the event of material changes in the structure of the issuer, benefits the investor as well as the issuer.[116]

Although standstill agreements may confer substantial benefits on both the issuer and the investor, consideration of the market effect that the execution of a standstill agreement has on the value of the issuer's stock indicates that standstill agreements reduce the wealth of nonparticipating shareholders.[117] The threat of a takeover of an issuer normally elicits a substantial increase in the market value of the issuer's stock.[118] Because standstill agreements reduce the threat of takeover, the execution of a standstill agreement may cause the short-term price of the issuer's stock to remain low and thus adversely affect the wealth of nonparticipating shareholders.[119] As *Enterra* suggests, shareholders bringing derivative suits based on the negative valuation consequences of the execution of a standstill agreement should be largely unsuccessful because of the deference which courts accord the business decisions of corporate directors under the business judgment rule.[120] Provided an issuing corporation's directors can articulate

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116. *See supra* notes 27-38 & 113-117 and accompanying text (provisions commonly incorporated in standstill agreements providing benefits to investor); *see also supra* notes 104-106 and accompanying text (execution of standstill agreement reduces market price of issuer's stock, thereby enabling investor to purchase stock in issuer at lower price); *supra* notes 9-23 and accompanying text (provisions in standstill agreements benefiting issuer).

117. *See* Dann & DeAngelo, *supra* note 105, at 299. The Dann and DeAngelo study examined the common stock price impact associated with standstill agreements for a sample of firms executing standstill agreements during the period 1977-80. *See id.* at 282-83. The study tested two competing hypotheses, both of which attempt to explain the effect of standstill agreements on the wealth of nonparticipating shareholders. *See id.* at 277. The managerial entrenchment hypothesis predicted that standstill agreements decrease the wealth of nonparticipating shareholders. *Id.* at 278. The stockholder interest hypothesis, on the other had, predicted that standstill agreements increase the wealth of nonparticipating shareholders. *Id.* at 280. The empirical results of the Dann and DeAngelo study were consistent with the managerial entrenchment hypothesis and therefore indicated that standstill agreements reduce the wealth of nonparticipating shareholders. *Id.* at 292, 299; *see also* Jensen & Ruback, *supra* note 104, at 39 (empirical evidence indicates that directors' opposition which prevents takeover attempts decreases wealth of nonparticipating shareholders). The Dann and DeAngelo study attributed the reduction in nonparticipating shareholders' wealth to managerial inefficiency resulting from the reduced takeover threat. *See id.* at 278, 280. However, the reduction of the price of an issuer's stock following the execution of a standstill agreement also may result from the decrease in public speculation that a takeover of the issuer is impending. *Cf.* Jensen & Ruback, *supra* note 105, at 8-10, 22 (increase in price of target's stock occurs on or before first public announcement of takeover).

118. *See* Jensen & Ruback, *supra* note 104, at 8 (in both successful and unsuccessful tender offers, target's stock price typically remains substantially above pre-offer level); *Enterra,* 600 F. Supp. at 687 (dictum) (investor's significant purchases of issuer's stock often will cause price of issuer's stock to rise); Plaintiff's Brief, *supra* note 57, at 29-30 (noting that SGS member's purchase of 4.6% of Enterra common stock caused increase in trading activity and price of Enterra common stock).

119. *See* Dann & DeAngelo, *supra* note 105, at 292, 299 (empirical analysis indicates that standstill agreements reduce wealth of nonparticipating stockholders); *see also supra* note 117 (explaining Dann & DeAngelo study).

120. *See Enterra,* 600 F. Supp. at 688 (quoting Bartlett & Andrews, *supra* note 3, at 150,

bona fide corporate objectives for executing a standstill agreement, courts likely will continue to approve the use of standstill agreements notwithstanding the negative effect which standstill agreements may have on nonparticipating stockholders' wealth.[121]

While standstill agreements may survive judicial scrutiny despite reducing the wealth of nonparticipating shareholders, standstill agreements should not deprive shareholders of the opportunity to tender their shares at a substantial premium in response to third party tender offers.[122] In *Biechele v. Cedar Point, Inc.*,[123] the Sixth Circuit, in ruling that a standstill agreement was not a manipulative device in violation of the federal securities laws, recognized that the standstill agreement at issue did not interfere with competitive

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for conclusion that court should not second-guess directors' decision to execute standstill agreement for valid corporate purpose if directors have consulted business and legal advisors); *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. Supr. Ct. 1984) (business judgment rule permits presumption that in making business decision directors acted on informed basis, in good faith, and in the interests of corporation and shareholders); *supra* note 45 (discussion of business judgment rule and primary purpose test).

In *Enterra,* the district court observed that a shareholder cannot bring a derivative suit requesting injunctive relief based on the diminution in value of the shareholder's stock allegedly resulting from the board of directors' actions. *See* 600 F. Supp. at 691-92. Recognizing that a party seeking injunctive relief must demonstrate irreparable injury, the *Enterra* court reasoned that a shareholder seeking injunctive relief based on diminution in the value of the shareholder's stock would be unable to demonstrate irreparable harm because an action at law is available for recovery of money damages for financial loss. *See id.* at 691-92; *see also In Re* Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1145-46 (3d Cir. 1982) (injunctive relief is inappropriate when movant claims monetary loss because movant can recoup loss in proper action at law); Northwest Industries, Inc. v. B.F. Goodrich Company, 301 F. Supp. 706, 710-12 (N.D. Ill. 1969) (refusing to grant injunctive relief to shareholder alleging diminished value of holdings due to board action on grounds that shareholder had adequate remedy at law).

121. *See supra* note 45 and accompanying text (courts will uphold directors' defensive measures having valid corporate purpose); *supra* notes 78-82 and accompanying text (*Enterra* court observed that Enterra board advanced valid corporate purposes for executing standstill agreement with SGS); *see also* Panter v. Marshall Field & Co., 646 F.2d 271, 298-99 (7th Cir.) (directors may take defensive measures to oppose takeovers which directors believe are detrimental to corporation even if at expense of short term interests of shareholders), *cert. denied,* 454 U.S. 1092 (1981).

122. *See infra* notes 123-125 (standstill agreements should allow nonparticipating shareholders to tender their stock). A tender offer is a public announcement directed to the shareholders of a corporation expressing the willingness of the offeror to purchase the shareholders' stock at a specified price. *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934,* 86 HARV. L. REV. 1250, 1251 (1973). Sections 14(d) and 14(e) of the Williams Act regulate tender offers. 15 U.S.C. § 78n(d) & (e); Pub. L. No. 90-439, 82 Stat. 454, 455 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1981 & Supp. 1985) (Williams Act). Under the Williams Act, no later than 10 business days from the date of the offer, the directors of a target corporation must respond to the tender offer by disclosing to the shareholders that the directors either recommend acceptance or rejection of the offer, express no opinion on the offer, or are unable to take a position on the offer. 17 C.F.R. § 240.14e-2 (1985). Tender offers typically trigger a substantial increase in the price of the target corporation's stock. *See* Jensen & Ruback, *supra* note 104, at 15.

123. 747 F.2d 209 (6th Cir. 1984).

bidding by third parties.[124] The *Biechele* court implied that standstill agreements should not inhibit third parties from making tender offers.[125] Although often the purpose and effect of a standstill agreement is to impair or discourage third party bidders, standstill agreements generally anticipate that a third party may make a tender offer for a significant block of the issuer's securities.[126]

At least one court has suggested that the board of directors of a corporation should not execute a standstill agreement that has the effect of depriving the corporation's shareholders of the opportunity to consider tender offers that the directors may oppose.[127] In *Conoco Inc. V. Seagram Co. Ltd.*,[128] the United States District Court for the Southern District of New York considered the enforceability of an oral agreement which contemplated the execution of a standstill agreement under a "white knight" arrangement.[129] In *Conoco,* Dome Petroleum Ltd. made a tender offer for Conoco Inc. (Conoco) which Conoco resisted.[130] Seagram Company, Ltd. (Seagram),

124. *See id.* at 216 (standstill agreement at issue did not inhibit third party bidders). In *Biechele,* Cedar Point, Inc. (Cedar Point) executed a standstill agreement with Pearson and Son Limited (Pearson) in connection with Pearson's tender offer for up to 15.3% of Cedar Point common stock. *Id.* at 211. The standstill agreement provided that absent special circumstances, Pearson would not acquire in excess of 30% of Cedar Point common stock for a period of five years. *Id.* In addition to asserting other claims related to the standstill agreement between Cedar Point and Pearson, the plaintiff-shareholders of Cedar Point asserted that the standstill agreement was a manipulative device in violation of the federal securities laws. *See id.* at 211-12, 215. The plaintiffs maintained that the standstill agreement impeded normal, healthy trading of Cedar Point's common stock by locking up stock held by Pearson under the standstill agreement. *Id.* at 215. In rejecting the plaintiffs' claim that the standstill agreement constituted an impermissible lock up of Cedar Point stock, the Sixth Circuit emphasized that the standstill agreement did not inhibit third party tender offers. *See id.* at 215-16; *see also* Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 374 (6th Cir. 1981)) (ruling that "lock up" arrangement constitutes manipulative device under federal securities law); Nelson, *Mobil Corp. v. Marathon Oil Co.—The Decision and Its Implications for Future Tender Offers,* 7 CORP. L. REV. 233 (1984) (contending that lock up arrangement in *Mobil Corp v. Marathon Oil Co.* was both manipulative under federal securities laws and breach of directors fiduciary duty).

125. *See Biechele,* 747 F.2d at 216 (standstill agreement was not manipulative under federal securities laws because agreement only limited contracting shareholder to minority position and did not inhibit third party bidders).

126. *See, e.g.,* Whittaker—Smith Agreement, *supra* note 5, at 8 (permitting investor to tender shares pursuant to third party tender offer provided third party acquires at least 30% of issuer's voting securities and investor affords issuer right of first refusal before tendering shares); Enterra—SGS Agreement, *supra* note 25, at 11-13 (provision setting forth obligations and right of parties to agreement in event of third party tender offer); City Investing—NVF Letter Agreement, *supra* note 5, at 3 (clause providing for investor's release from ownership limitation if third party makes successful tender offer for greater than 21% of issuer's stock).

127. *See* Conco Inc. v. Seagram Co. Ltd., 517 F. Supp. 1299 (S.D.N.Y. 1981); *infra* notes 130-149 and accompanying text (discussion of *Conoco).*

128. 517 F. Supp. 1299 (S.D.N.Y. 1981).

129. *See* 517 F. Supp. at 1301-02. *See also supra* note 4 (parties may execute standstill agreement in connection with "white knight" arrangement).

130. 517 F. Supp. at 1301.

acting as a white knight for Conoco, proposed in the course of negotiations with Conoco a friendly tender for thirty-five percent of Conoco stock.[131] Seagram allegedly promised to limit the tender offer to thirty-five percent of Conoco stock and to refrain from making any further tender offers should the negotiations fail.[132] Seagram agreed to subject the proposed acquisition of thirty-five percent of Conoco stock to a standstill agreement.[133] During the period of negotiations with Seagram, Conoco, unknown to Seagram, also was engaged in negotiations with Cities Service Company (Cities Service).[134] Conoco eventually decided to merge with Cities Service.[135] In response to Conoco's merger decision, Seagram launched a hostile tender offer for up to 40 percent of Conoco stock, causing Cities Service to withdraw from merger negotiations with Conoco.[136] Conoco then sought a preliminary injunction to enjoin Seagram's tender offer.[137] Subsequently, E.I. duPont de Nemours & Co. (DuPont) extended an offer to purchase Conoco shares under terms more favorable to Conoco than the Seagram tender offer.[138] Seagram responded by escalating its original offer.[139] In its amended motion for a preliminary injunction to enjoin Seagram's tender offer, Conoco contended that Seagram should be estopped from making any tender offer on the basis of the oral agreement Seagram made during negotiations.[140] Conoco asserted as an alternative claim that if the court permitted Seagram to proceed with the tender offer, the court should require Seagram to hold acquired stock subject to the terms and restrictions of the standstill agreement proposed during negotiations.[141]

In considering Conoco's motion for a preliminary injunction, the district court in *Conoco* rejected Conoco's claims, maintaining that the ultimate decision whether to accept Seagram's or DuPont's tender offer rested not

131. *Id.*

132. *Id.*

133. *Id.* In *Conoco,* Seagram agreed to a standstill agreement which would remain in effect for 15 years. *Id.* The standstill agreement also would impose voting limitations and transfer restrictions on Conoco stock held by Seagram under the agreement. *See id.; see also supra* notes 14-25 and accompanying text (discussing transfer restriction provisions and voting limitations in standstill agreements).

134. 517 F. Supp. at 1301.

135. *Id.*

136. *Id.* The Seagram tender offer in *Conoco* contemplated an acquisition of up to 40% of Conoco common stock at a price of $73 per share. *Id.*

137. *Id.* at 1300, 1301.

138. *Id.* In *Conoco,* DuPont made a tender offer for Conoco common stock pursuant to a merger agreement with Conoco. *Id.* at 1300. Under the merger agreement, DuPont was to purchase 40% of Conoco stock at $87.50 per share and exchange DuPont shares for the remaining Conoco stock. *Id.* Conoco also extended DuPont the option of purchasing 15.9 million unissued shares of Conoco stock. *Id.* Conoco then would merge into a DuPont subsidiary. *Id.*

139. In *Conoco,* following DuPont's tender offer, Seagram amended its original tender offer of 35% to approximately 51% of Conoco stock at $85 per share. *Id.*

140. *Id.* at 1301.

141. *Id.*

with Conoco's directors but with the corporation's shareholders.[142] The *Conoco* court refused to accept Conoco's estoppel claim, observing that enforcement of Seagram's promise of a limited tender offer subject to the terms of the standstill agreement would deprive Conoco shareholders of the opportunity to accept DuPont's offer.[143] The *Conoco* court added that although the Conoco directors were free to communicate to the shareholders their dissatisfaction with the Seagram proposal, the directors were not free to deny the shareholders the opportunity to pass upon the Seagram offer or any other offer.[144]

Despite not having addressed the merits of the proposed standstill agreement, *Conoco* demonstrates the significance of a board of directors' timing of the execution of a standstill agreement.[145] As *Conoco* suggests, standstill agreements executed in response to or anticipating tender offers may deprive shareholders of the opportunity to exercise their own judgment in deciding whether to tender shares when faced with an offer.[146] A board of directors responding to a hostile tender offer by executing a standstill agreement should be prepared to advance a proper corporate purpose for the standstill agreement because the impression likely to be created is that the undertaking served primarily to perpetuate the director's control.[147] In

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142. *See id.* at 1303. The district court in *Conoco* recognized that Conoco, favoring the DuPont offer, sought to limit the Conoco stockholders to the DuPont offer by restraining the Seagram offer through an injunction. *See id.* at 1303. To this end, Conoco asserted that Seagram should be estopped from making any tender offer to Conoco shareholders based on Seagram's promise during negotiations that Seagram would make only a limited tender offer subject to the terms of a standstill agreement. *See id.* at 1300, 1301.

143. *See id.* at 1303. The *Conoco* court stated that the directors of a corporation owe a duty to exercise their best judgment in evaluating proposals such as tender offers. *Id.* The court maintained, however, that the directors judgment is not binding upon the shareholders. *Id.* The *Conoco* court insisted that shareholders, once informed of the facts, maintain the right to accept an outstanding tender offer for their stock. *Id.*

144. *See id.* at 1303-04 (directors should not deprive shareholders of opportunity to accept offer); *see also* Armour & Co. v. General Host Corp., 296 F. Supp. 470, 475 (S.D.N.Y. 1969) (when faced with competing offers, decision whether to accept one offer over another or reject both rests with each individual stock-holder); American Crystal Sugar Co. v. Cuban-American Sugar Co., 276 F. Supp. 45, 50 (S.D.N.Y. 1967) (same).

145. *See infra* notes 147-149 and accompanying text (standstill agreements executed in response to tender offers may infringe upon shareholders' right to tender their shares).

146. *See* 517 F. Supp. at 1302-03. In an effort to thwart an unwanted tender offer, the directors of a corporation may utilize a standstill agreement in connection with a "white knight" arrangement. *See* LIPTON & STEINBERGER, *supra* note 1, § 6.04[4] at 6-51. The investor acting as a "white knight" may acquire the issuer's stock through a direct purchase of issuer's authorized but unissued stock or by making a competing tender offer at a higher price. *See id.* (direct purchase); 517 F. Supp. at 1301 (competing tender offer). The parties may then agree to subject the investor's acquisition to a standstill agreement. *See* 517 F. Supp. at 1301, 1302 (Seagram would acquire 35% of Conoco stock through tender offer and then subject that acquisition to terms and restrictions of standstill agreement); *see also supra* note 4 (parties may execute standstill agreement in context of white knight arrangement).

147. *See* Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382-83 (2d Cir. 1980) (stock transactions affecting corporate control necessarily raise inference that directors had self

sum, *Conoco* favors the position that courts should not permit corporate directors, when anticipating or in the midst of a tender offer, to utilize defensive tactics such as standstill agreements which have the effect of preempting the shareholders' decision to tender their stock.[148]

Thus, while the *Enterra* ruling endorses the use of standstill agreements, *Conoco* illustrates the potential problems with executing a standstill agreement after the issuing corporation has become the subject of a tender offer.[149]

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interest in transaction and therefore directors must show proper corporate purpose for transaction); Crane Co. v. Harsco Corp., 511 F. Supp 294, 305 (D. Del. 1981) (with respect to stock purchase in context of tender offer, directors have inherent conflict of interest and therefore must bear burden of justifying transaction); Northwest Industries, Inc. v. B.F. Goodrich Company, 301 F. Supp. 706 (N.D. Ill. 1969) (directors may be accused of attempting to retain their positions at expense of shareholders whenever directors resist tender offers, but nevertheless, directors must oppose offers which directors believe are detrimental to corporation and shareholders); *see also supra* note 45 and accompanying text (discussion of business judgment rule and primary purpose test).

148. *See* 517 F. Supp. at 1303-04; *see also* Note, *Developments in Corporate Takeover Techniques: Creeping Tender Offers, Lockup Arrangements, and Standstill Agreements,* 39 WASH. & LEE L. REV. 1095, 1120-21 (1982) (Conoco represents policy determination that corporate directors should not be permitted to contract away shareholders' right to consider tender offers). Considerable debate exists concerning the proper role of corporate directors in responding to tender offers. Courts, applying the business judgment rule, generally have upheld the use of defensive measures by corporate directors to resist unwanted tender offers. *See, e.g.,* Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 759-60 (2d Cir.) (upholding director sale of treasury stock to one of two competing bidders in effort to thwart unsatisfactory offer), *cert. denied,* 104 S.Ct. 271 (1983). Panter v. Marshall Field & Co., 646 F.2d 271, 293-299 (7th Cir.) (approving directors' defensive stock aquisitions exercised to resist takeover), *cert. denied,* 454 U.S. 1092 (1981); Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382-84 (2d Cir. 1980) (upholding directors' sale of stock to white knight); *see also supra* note 45 (discussion of business judgment rule and primary purpose test). Commentators, however, have expressed criticism and disapproval of the courts' present application of the business judgment rule to defensive actions that corporate directors may undertake to resist hostile tender offers. *See* Steinberg, *Some Thoughts on Regulation of Tender Offers,* 43 MD. L. REV. 240, 241-50 (1984) (disapproving of courts' application of business judgment when directors' defensive tactics preclude shareholders from tendering their stock in response to tender offer); Easterbrook & Fischel, *The Proper Role of a Target's Management In Responding to a Tender Offer,* 94 HARV. L. REV. 1161 (1981) (arguing that because directors' resistance to tender offers ultimately decreases shareholder welfare, directors should exercise managerial passivity in responding to tender offers); Note, *Tender Offer Defensive Tactics and the Business Judgment Rule,* 58 N.Y.U.L. REV. 621 (1983) (proposing less deferential version of business judgment rule which considers directors' inevitable self interest in resisting takeovers); *but see* Lipton, *Takeover Bids in the Target's Boardroom,* 35 BUS. LAW. 101, 130-31 (1979) (maintaining that directors' resistance to tender offers improves shareholders welfare and that courts should apply business judgment rule to directors' defensive actions in same manner as courts apply rule to directors' other major business decisions). *See also* Note, *supra* note 14, at 1109-11 (proposing that courts reverse good faith presumption of business judgment rule when directors execute standstill agreement containing restrictive voting provisions).

149. *See supra* notes 79-90 and accompanying text (*Enterra* court's approval of use of standstill agreements); *supra* notes 130-149 and accompanying text (directors' use of standstill agreements in context of resisting hostile tender offer may deprive shareholders of opportunity to accept or refuse third party offers).

Once executed, however, standstill agreements governing an investor's minority interest may confer benefits on both the issuer and the investor.[150] Nonetheless, standstill agreements may reduce the wealth of nonparticipating shareholders.[151] As long as courts continue to apply the business judgment rule in considering corporate directors' defensive actions, standstill agreements, regardless of when executed, should continue to survive judicial scrutiny provided a valid corporate purpose exists for executing the agreement.[152]

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150. *See supra* notes 26-40 and accompanying text (provisions commonly incorporated in standstill agreements potentially benefiting investor); *supra* notes 113-117 and accompanying text (standstill agreements permit investor to acquire issuer's stock at reduced price); *supra* notes 9-23 and accompanying text (provisions in standstill agreements benefiting issuer).

151. *See supra* notes 118-120 and accompanying text (standstill agreements reduce wealth of nonparticipating shareholders).

152. *See supra* notes 45 & 70-83 and accompanying text (business judgment rule protects directors' business decisions exercised in good faith).