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Case Study: AJRD Successful Takeover Defense



Background

- Aerojet Rocketdyne (AJRD) develops and manufactures advanced propulsion and energetics systems, including Javelin and Stinger missile engines, NASA vehicle propulsion and power systems, and other systems for customers in the United States and abroad.
- In February 2022, Warren Lichtenstein, AJRD's executive chair and founder of an activist hedge fund, launched a proxy fight and litigation aimed at replacing the AJRD directors without ties to his hedge fund.
- The AJRD's eight-member Board was evenly split between (1) Mr. Lichtenstein and his three allies, and (2) CEO Eileen Drake, who was supported by three independent directors.
- Each side nominated a separate slate of directors for shareholder consideration at the 2022 annual meeting.



Strategic Considerations

- Mr. Lichtenstein's ultimate goal was to take control of the Board and to install a new CEO.
- Due to the deadlocked Board and a court-issued order, Ms. Drake had to quickly assemble an independent slate of highly qualified directors and a professional team of advisors without relying on company funds.
- In April 2022, facing resistance from the Lichtenstein faction to call the regular annual meeting, the Drake Slate made the tide-turning strategic decision to solicit and obtain shareholder consents necessary to call a special meeting of shareholders to elect a new Board.
- In May 2022, Ms. Drake's public consent solicitation won the support of more than 40% of outstanding shares for a special shareholder meeting to elect a new Board (only 25% were needed).
- Leading independent proxy advisory firms, Institutional Shareholder Services (ISS) and Glass Lewis, endorsed the Drake slate.
- On June 30, 2022, the entire Drake Slate was elected with 75% of votes cast by shareholders.



Key Takeaways

- ***Board Size.*** The AJRD contest presents a cautionary tale about the perils that can befall a board with an even number of directors.
 - Corporate boards typically act in a collegial and collaborative fashion, and decisions are consensus driven. However, it is prudent to keep an odd number of directors to eliminate the possibility of a deadlock that could paralyze board decision-making.
- ***Settlements with Activists.*** Boards need to consider the long-term implications of settling proxy contests via the addition of activist representatives to the board.
 - If a settlement with an activist investor is appropriate, a corporate board should strongly consider insisting that any activist designee be independent, as opposed to an insider employed by - or affiliated with - the activist fund.
 - Consider that Mr. Lichtenstein and two of his supporters on the AJRD Board were originally added to the AJRD Board in 2008 as part of a settlement that resolved a proxy contest launched by Mr. Lichtenstein's activist fund.
- ***Be Mindful of Potential Litigation.*** Well-funded activist funds are prepared to bring costly litigation to pressure corporate board members and executives into a settlement. Mr. Lichtenstein brought claims against Ms. Drake and her colleagues in both state and federal court. The effort was aimed at leveraging Mr. Lichtenstein's financial resources, pressuring the individual defendants and seeking "sound bites" and press headlines to advance the proxy contest.
 - Board members and management need to be mindful that activist situations can escalate to litigation, and written materials (including e-mails and other electronic communications) may have to be produced and could be misconstrued and taken out of context.
- ***Take the High Ground.*** The AJRD contest presented two contrasting narratives of AJRD's performance and future. But maybe more importantly, the campaigns displayed a remarkably different style in communications with shareholders and other stakeholders. Mr. Lichtenstein's hyperbolic and sensationalist style ultimately backfired, as reflected in the reports issued by the independent proxy advisory firms.
- ***Antitrust Risks in M&A.*** The AJRD contest was ultimately precipitated by the termination of AJRD's announced acquisition by Lockheed Martin, which was blocked by the FTC. Dealmakers need to continue to act with prudence and experienced insight in navigating the current regulatory environment and potential risks of regulatory opposition to business combination transactions.



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Eduardo Gallardo is Global Co-Chair of the Mergers and Acquisitions practice at Paul Hastings and is based in the firm's New York office.

Eduardo focuses his practice on mergers and acquisitions, shareholder activism defense and corporate governance matters. He has extensive experience representing public and private buyers and sellers in connection with mergers, acquisitions, and takeovers, both negotiated and contested. He has also represented public and private companies in connection with proxy contests, leveraged buyouts, spinoffs, divestitures, restructurings, recapitalizations, joint ventures, and other complex corporate transactions. Eduardo has substantial experience in the technology, financial services, telecommunications, energy, real estate, healthcare, and life sciences industries.

Clients describe Eduardo as "an exceptionally thoughtful, pragmatic and knowledgeable adviser" in *Chambers USA, 2022*.

Representative Experience

Activism and Takeover Defense Representations:

- Represented **Barnes & Noble Education** on its renewed cooperation agreement with activist fund Outerbridge Capital Management LLC.
- Represented **Barnes & Noble Education** in its successful defense against an unsolicited takeover bid launched by Bay Capital Finance.
- Represented **California Water Service Group** in its \$2 billion unsolicited interloper bid for SJW Group.
- Represented **DepoMed, Inc.** in connection with its successful defense against a \$3.3 billion unsolicited takeover offer from Horizon Pharma, including related proxy contest and litigation.
- Represented real estate firm, **The Related Companies**, in its investment in CommonWealth REIT, including successful consent solicitation to remove and replace the entire Board of Trustees of CommonWealth, and related litigation.
- Represented **Transatlantic Holdings**, a reinsurance company, in its \$3.4 billion merger with Alleghany Corporation, and successful defense against a hostile exchange offer commenced by Validus Holdings.

Recent M&A Representations:

- Represented **AT&T Services, Inc.** in the \$1.4 billion sale of Warner Bros. Games' Playdemic, Ltd., the mobile games studio responsible for Golf Clash, to Electronic Arts.
- Represented **Fifth Wall Acquisition Corp. I** in its \$2.2 billion acquisition of SmartRent, Inc.
- Represented **PAR Technology**, a leading global provider of restaurant software, in its \$500 million acquisition of Punchh Inc.
- Represented **Amherst Residential** in its proposed \$2.3 billion acquisition of Front Yard Residential Corporation, a publicly-traded REIT.

Awards & Accolades

- *Chambers USA*, Corporate/M&A and Corporate/M&A: Takeover Defense
- *The American Lawyer*, "Dealmaker of the Year"
- *The National Law Journal*, Mergers & Acquisitions and Antitrust Trailblazer
- *Lawdragon 500*, Leading Dealmaker in America
- *The International Financial Law Review*, Leading M&A Attorney
- The Columbia Law School Latin American Law Student Association, Distinguished Alumnus Award, 2018

Involvement

- Member, Board of Visitors of Columbia Law School
- Member, Board of Advisors of the Institute for Law & Economics of the University of Pennsylvania
- Member, Advisory Board of Columbia Law School's Blog on Corporations and the Capital Markets
- Member, the Society of Corporate Secretaries and Governance Professionals
- Fellow, the American College of Governance Counsel



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Steve Camahort is Global Co-Chair of the Mergers and Acquisitions practice at Paul Hastings and is based in the firm's San Francisco office.

He has extensive experience in M&A and related corporate governance issues. He has worked for corporate clients, private equity funds, and financial advisors in negotiated and hostile transactions, with a particular emphasis on the technology and life science sectors.

In *Chambers Global* and *USA 2022*, clients are quoted as saying:

"Steve Camahort is an elite lawyer. He is very commercial with a strong understanding for the business points that matter. I trust him implicitly."

"He is not only an excellent adviser but also able to bring in the best of Paul Hastings. He can pull in other partners and resources efficiently where it makes sense to help us make decisions and evaluate the legal implications of topics."

"He provides an amazing level of partnership."

Representative Experience

Public M&A and Corporate Representations:

- Representing **Lexington Realty Trust** in successful defense against a proxy fight by Land & Buildings Investment Management and its publicly announced exploration of strategic alternatives.
- Representing **FiscalNote Holdings** in its pending business combination with Duddell Street Acquisition Corporation, a SPAC sponsored by an affiliate of Maso Capital.
- Represented the **Special Committee to the Board of Directors of U.S. Well Services, Inc.** in its proposed sale to ProFrac Holding Corp.
- Represented **Masimo Corporation**, in its acquisition of Sound United, LLC.
- Represented **AdTheorent**, a portfolio company of HIG Capital, in its business combination with MCAP Acquisition Corporation, a publicly traded special purpose acquisition company.
- Represented **Keysight Technologies, Inc.** in its acquisitions of Eggplant Software, a portfolio company of Carlyle, and Sanjole and its investments in Rigetti Computing and Nozomi Networks.
- Represented **Telefonaktiebolaget L M Ericsson** in connection with its acquisition of CradlePoint, Inc.
- Represented **Vontier Corporation** in connection with its investment in Tritium Holdings Pty Ltd and the business combination involving Tritium and Decarbonization Plus Acquisition Corporation II
- Represented **Pamela Lopker**, controlling stockholder of QAD in its sale to Thoma Bravo and Ms. Lopker's significant rollover investment

- Represented **Mitek Systems** in connection with a public unsolicited proposal from ASG Technologies Group, a portfolio company of Elliott Management, and associated stockholder activism by Elliott.
- Represented **Salesforce** in its acquisition of DemandWare and its proposed acquisition of LinkedIn.
- Represented leading investment banks such as **Goldman Sachs, Morgan Stanley** and **Qatalyst Partners** in numerous transactions, including MaxLinear/Silicon Motion, Intel/Tower Semi, Blackstone Realty/QTS, Amazon/MGM, Salesforce/Slack, HP's successful defense against Xerox and Qualcomm's successful defense against Broadcom

Awards & Accolades

- *Chambers Global USA Corporate/M&A, International & Cross-Border (2022)*
- Mr. Camahort has been cited in numerous guides to leading M&A practitioners, such as *Chambers Global Guide to The World's Leading Lawyers, the Best Lawyers in America (including as 2018 and 2014 Lawyer of the Year (M&A - San Francisco))*, *the Chambers USA Guide to America's Leading Business Lawyers*, *Northern California Super Lawyers magazine*, *The International Who's Who of Mergers & Acquisition Lawyers*, *The Legal Media Group Guide to the World's Leading M&A Lawyers*, *the PLC Cross-Border Mergers and Acquisitions Handbook*, and *Who's Who Legal – California*.



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Gary Zanfagna is the Chair of the firm's Antitrust and Competition Practice Group, and is based in Washington, D.C. His practice encompasses antitrust law issues globally, with a focus on guiding corporations through antitrust reviews of transactions, regulatory and other investigations, and enforcement matters. He has extensive experience advising executives on mergers, acquisitions, divestitures, and joint ventures, helping them devise innovative strategies to enable business combinations.

Prior to joining Paul Hastings, Mr. Zanfagna was Chief Antitrust Counsel for a Fortune 50 Company. Over his 20-year tenure there, he was responsible for all competition matters globally, including leading the merger review process before the U.S. Federal Trade Commission (FTC) and Department of Justice, the European Commission, and other foreign competition agencies. He also has valuable government experience, having served at the FTC in two separate roles, including as Assistant Director for the Office of Policy Planning.

Mr. Zanfagna is the Immediate Past Chair of the American Bar Association's influential Antitrust Law Section, which is the world's leading community of competition, consumer protection, and data privacy professionals, with over 7,500 members.

Representative Experience

Among his representations, Mr. Zanfagna has:

- Cleared more than 50 acquisitions, divestitures and joint ventures in multiple sophisticated, complex industries, leading the regulatory approval process before the FTC, DOJ, EC and other foreign competition agencies.
- Extensive in-house experience providing sophisticated, practical strategic antitrust advice to the C suite on global business initiatives and complex corporate challenges.
- Background in and considerable knowledge of Technology, Aerospace and Defense, Fine Chemicals, and Energy sectors.
- Successfully defended Fortune 50 Company in a civil and criminal price-fixing suit involving a fraudulent whistleblower, ultimately clearing the way for approval of a 3-2 merger.
- Prevailed in 3-year EC investigation of Fortune 50 Company without requirement to modify any business practices.
- Successfully defended Fortune 50 Company in multi-year FTC and EC investigation of alleged monopolization and coordinated conduct in concentrated industry, facilitating more than \$1 billion in new product sales.
- Developed corporate-wide training program for business and legal executives on regulatory requirements and enforcement developments to minimize corporate risk.

Speaking Engagements & Publications

- Interview, "Regulatory Risks to Play Larger Role in New M&A Calculus," by *PYMNTS*
- Author, "Antitrust isn't headed to an inflection point; it's already there," for *The Hill*
- Author for *The Antitrust Source*
- A principal author, *Antitrust Guidelines for Collaborations among Competitors*, issued by the Commission and the Antitrust Division of the U.S. Department of Justice
- Frequent speaker on a range of antitrust topics, including merger enforcement trends, the current Biden administration antitrust enforcement priorities, and current M&A transaction challenges

Involvement

- Chair, ABA Antitrust Law Section, 2020-21
- Board Member, Presbyterian Church in Westfield, 2019-2022, Finance Officer
- Fundraising for schools and national charity organizations