

# *Concurrent Session: Activist Investors*

*Thursday, March 23<sup>rd</sup>*

*1:45pm – 3pm*

*La Quinta Resort & Club, La Quinta, California*

## **Moderator:**

Mark Parrell, EVP & CFO, Equity Residential

## **Panelists:**

Kevin Daniels, Mergers & Acquisitions Group-Head of  
Activism & Defense, Bank of America Merrill Lynch

Jonathan Litt, Founder & CIO, Land and Buildings

Gilbert Menna, Partner & Co-Chair-Real Estate & Real  
Estate Capital Markets Practice, Goodwin Procter LLP

Raymond Mertens Jr., VP, Dodge & Cox Investment  
Managers

© Copyright 2017

National Association of Real Estate Investment Trusts ®

*This material is provided by NAREIT and REITWise 2017 panelists for informational purposes only, and is not intended to provide, and should not be relied upon for, legal, tax or accounting advice.*

# Activist Environment Overview

March 2017

# Shareholder Activism Continues to be Prevalent

## Recent Market Trends

Companies with a solid history of value creation and no significant governance issues being targeted



Success is attracting new players



Activists are playing a much larger role in M&A

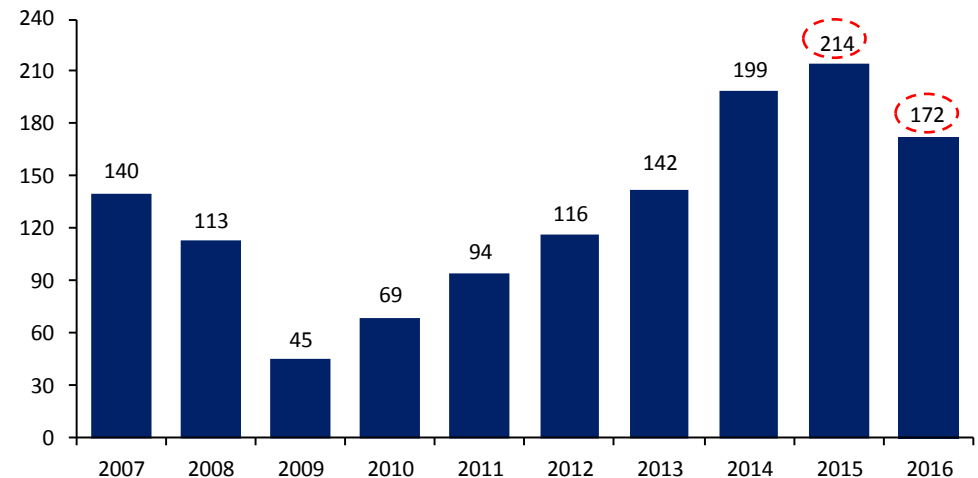


Institutional investors are increasingly supportive of activist agendas

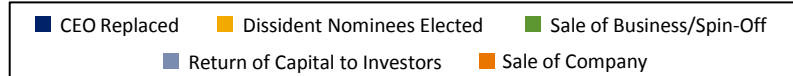
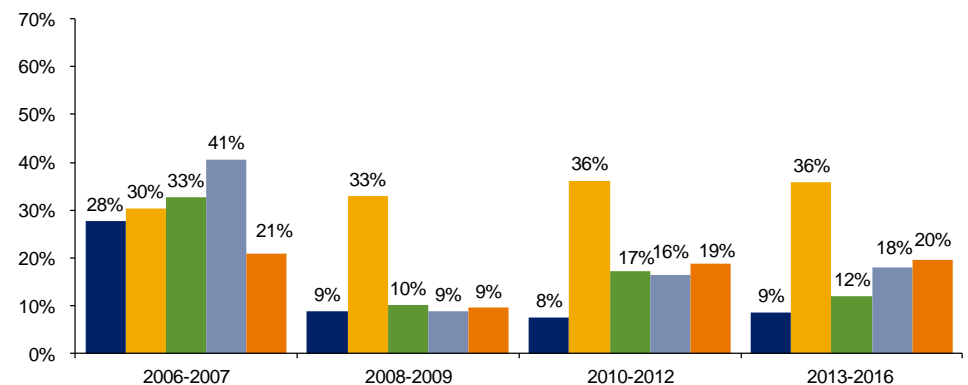


Many situations are resolved with private discussions or without agitation, often before an accumulation has even been made public

## New Activist Campaigns by Year (1)



## Activist Campaign Outcomes 2006–2016 (2)(3)


















Source: SharkRepellent, company public filings, and press releases.

(1) Excludes recurring campaigns, campaigns at investment funds, campaigns by governance activists, merger-related campaigns and campaigns involving US companies with a market cap of less than \$100 million. As of December 31, 2016.

















(2) Percentages represent the frequency of the corresponding outcome relative to the total year's campaigns. Reflects only campaigns that have been settled or resolved.

(3) Outcomes as of December 31, 2016.

# Selected Recent Activist Investor Activity in Real Estate Over the Past Two Years

	Announcement Date	Activist(s)	Campaign Goals	Outcome
 FORESTCITY	1-30-2017	Land and Buildings	<ul style="list-style-type: none"> <li>Evaluate strategic alternatives</li> <li>Board representation</li> </ul>	<ul style="list-style-type: none"> <li>On-going</li> </ul>
 BROOKDALE — SENIOR LIVING SOLUTIONS —	12-20-2016	Land and Buildings	<ul style="list-style-type: none"> <li>Sale of the company</li> <li>Pursue strategic alternatives</li> </ul>	<ul style="list-style-type: none"> <li>On-going</li> </ul>
 FELCOR LODGING TRUST	10-27-2016	Snow Park Capital	<ul style="list-style-type: none"> <li>Sale of the company</li> <li>Liquidation of assets</li> <li>Reduce management compensation</li> </ul>	<ul style="list-style-type: none"> <li>On-going</li> </ul>
 Taubman	10-19-2016	Land and Buildings	<ul style="list-style-type: none"> <li>Improve corporate governance</li> <li>Reduce corporate G&amp;A</li> </ul>	<ul style="list-style-type: none"> <li>On-going</li> </ul>
 CLUBCORP <sup>®</sup> THE WORLD LEADER IN PRIVATE CLUBS <sup>®</sup>	9-15-2016	FrontFour Capital	<ul style="list-style-type: none"> <li>REIT conversion</li> <li>Sale of the company</li> </ul>	<ul style="list-style-type: none"> <li>On-going</li> </ul>
 FORESTCITY	8-10-2016	Scopia	<ul style="list-style-type: none"> <li>Eliminate dual class structure</li> </ul>	<ul style="list-style-type: none"> <li>Agreed to eliminate dual class structure</li> <li>Two members of founding family retired from board</li> </ul>
 BOYD GAMING <sup>®</sup>	4-25-2016	Land and Buildings	<ul style="list-style-type: none"> <li>Formation of a gaming REIT</li> </ul>	<ul style="list-style-type: none"> <li>Ongoing</li> </ul>
 MONOGRAM RESIDENTIAL TRUST	3-3-2016	Snow Park Capital	<ul style="list-style-type: none"> <li>Strategic alternatives</li> <li>Board representation</li> </ul>	<ul style="list-style-type: none"> <li>Monogram and Snow Park appointed a non-voting observer to the Board</li> </ul>
 FELCOR LODGING TRUST	1-28-2016	Land and Buildings	<ul style="list-style-type: none"> <li>Sale of properties</li> <li>Share repurchase</li> <li>Board representation</li> </ul>	<ul style="list-style-type: none"> <li>Appointed two L&amp;B approved representatives to the board</li> </ul>
 NorthStar ASSET MANAGEMENT GROUP	1-11-2016	Land and Buildings	<ul style="list-style-type: none"> <li>Board representation</li> <li>Enhance shareholder value</li> <li>Recombine NSAM and NRF</li> </ul>	<ul style="list-style-type: none"> <li>Withdrew nomination of 6 candidates for director</li> <li>Voted in favor of merger agreement with NRF and Colony Capital, which it initially opposed</li> </ul>
 ASHFORD HOSPITALITY TRUST	1-11-2016	Rambleside Holdings	<ul style="list-style-type: none"> <li>Recombination of AHT, AHP, and AINC</li> <li>Board representation</li> </ul>	<ul style="list-style-type: none"> <li>Rambleside nominee appointed to AHT Board</li> </ul>
 ASHFORD HOSPITALITY PRIME	9-1-2015	Sessa Capital Snow Park Capital Weissman Group	<ul style="list-style-type: none"> <li>Sale of the company</li> <li>Board Representation</li> </ul>	<ul style="list-style-type: none"> <li>Courts rule that Sessa did not comply with bylaws and securities laws in soliciting proxies</li> <li>Company agrees to separate CEO and Chairman roles</li> <li>Ongoing process to review strategic alternatives</li> </ul>
 NYRT NEW YORK REIT	9-30-2015	Ashner/Witkoff Rambleside Land and Buildings	<ul style="list-style-type: none"> <li>Sale of the company</li> <li>Vote against JBG merger</li> <li>Enact plan for liquidation</li> </ul>	<ul style="list-style-type: none"> <li>JBG merger terminated</li> <li>NYRT announced shareholders approved liquidation plan</li> </ul>
 MACERICH <sup>®</sup>	4-3-2015	Land and Buildings Orange Capital	<ul style="list-style-type: none"> <li>Board representation</li> <li>De-classify Board</li> <li>Eliminate poison pill</li> </ul>	<ul style="list-style-type: none"> <li>Appointed two Macerich representatives (out of four) to the Board</li> <li>Declassified Board</li> <li>Terminated poison pill</li> </ul>
 MGM RESORTS INTERNATIONAL <sup>™</sup>	3-7-2015	Land and Buildings	<ul style="list-style-type: none"> <li>REIT conversion</li> <li>Sale of 50% of CityCenter</li> <li>Board representation (4 seats)</li> </ul>	<ul style="list-style-type: none"> <li>L&amp;B withdrew proxy due to lack of support</li> <li>MGM formed a majority controlled REIT</li> <li>L&amp;B has continued to push for more change including CEO removal</li> </ul>

# Several Prominent Activist Funds Have a History Investing in Real Estate

Activist	BlueMountain	Corvex	HG Vora	Highfields	Land & Buildings	Marcato Capital	Sandell	Snow Park Capital
Key Principals	 Andrew Feldstein	 Keith Meister	 Parag Vora	 Jonathon Jacobson	 Jonathan Litt	 Mick McGuire	 Thomas Sandell	 Jeffrey Pierce
Est. AUM <sup>(1)</sup>	\$3.4bn	\$5.3bn	\$2.8bn	\$13.2bn	~\$400mm	\$1.1bn	~\$300mm	N / A
History of Public Agitation / Seeking Board Seats								
Selected Recent Campaigns	<p><u>Chatham Lodging</u> Date: 2013 Goal: Unsolicited Bid</p> <p><u>RadNet</u> Date: 2013 Goal: Explore Strategic Alternatives</p>	<p><u>American Realty Capital Properties</u> Date: 2014 Goal: Board Representation</p> <p><u>CommonWealth REIT</u> <sup>(2)</sup> Date: 2014 Goal: Board Control</p> <p><u>Crown Castle</u> Date: 2014 Goal: Return of Capital</p> <p><u>CCA</u> <sup>(3)</sup> Date: 2012 Goal: REIT Conversion</p>	<p><u>General Motors</u> <sup>(4)</sup> Date: 2015 Goal: Return of Capital / Board Representation</p> <p><u>Town Sports</u> <sup>(5)</sup> Date: 2015 Goal: Return of Capital / Board Control</p> <p><u>Chatham Lodging</u> Date: 2014 Goal: Return of Capital / Board Representation</p> <p><u>Great Wolf Resorts</u> Date: 2012 Goal: Vote Against Merger</p> <p><u>Morgans Hotel Group</u> Date: 2010 Goal: Maximize Shareholder Value</p>	<p><u>Digital Realty Trust</u> Date: 2014 Goal: Short Position</p> <p><u>Tim Hortons</u> Date: 2013 Goal: Asset Separation / Return of Capital</p>	<p><u>Forest City</u> Date: 2017 Goal: Maximize Shareholder Value</p> <p><u>Brookdale</u> Date: 2016 Goal: Maximize Shareholder Value</p> <p><u>Taubmann Centers</u> Date: 2016 Goal: Maximize Shareholder Value</p> <p><u>Boyd Gaming Corp.</u> Date: 2016 Goal: Maximize Shareholder Value</p> <p><u>FelCor Lodging Trust</u> Date: 2016 Goal: Sale of company / Reduce Management Comp.</p>	<p><u>Sotheby's</u> Date: 2015 Goal: Return of Capital / Remove Officer</p> <p><u>American Realty Capital Properties</u> Date: 2014 Goal: Return of Capital</p> <p><u>Sotheby's</u> Date: 2014 Goal: Monetize Real Estate / Return of Capital</p> <p><u>CommonWealth REIT</u> Date: 2013 Goal: Board Control</p> <p><u>Life Time Fitness</u> Date: 2014 Goal: Conversion to a REIT Structure</p>	<p><u>Bob Evans Farm</u> Date: 2015 Goal: Maximize Shareholder Value</p> <p><u>Brookdale</u> Date: 2015 Goal: Board Representation / Spin-off of Company</p> <p><u>ARCT</u> Date: 2013 Goal: Vote Against Merger</p> <p><u>Bob Evans Farms</u> Date: 2013 Goal: Sale / Spin-off of Company</p>	<p><u>FelCor</u> Date: 2016 Goal: Maximize Shareholder Value / Enhance Corporate Governance</p> <p><u>Monogram</u> Date: 2016 Goal: Maximize Shareholder Value</p> <p><u>Ashford Hospitality Prime</u> Date: 2016 Goal: Maximize Shareholder Value</p>

Source: Company filings and SharkRepellent.

(1) AUM based on reported public equity assets under management as of the latest filings.

(2) Partnered with Related Fund Management in campaign.











(3) Partnered with Marcato Capital Management in campaign.

(4) Partnered with Appaloosa Management, Taconic Capital Advisors, and Hayman Capital Management in campaign.

(5) Partnered with PW Partners Capital Management in campaign.

# Institutional Investors and Activism

Institutional Investors are Willing to Support and Even Participate in Campaigns ...

Company	Institutional Investor	Activist
 ALLERGAN	 T. Rowe Price	Pershing Square
 CSX <small>How tomorrow moves</small>	NEUBERGER BERMAN	Mantle Ridge
 DARDEN	 Capital Group Companies	Starboard
 PEPSI	 CALSTRS	Trian
 DELL	 T. Rowe Price	Icahn
 Ingersoll Rand	 CALSTRS	Trian
 The McGraw-Hill Companies	 TEACHERS' PENSION PLAN	JANA
 TNT	 AIMCo	JANA
PERRY ELLIS	 CALSTRS	Legion Partners
 TIMKEN	 CALSTRS	Relational Investors
 URS	 Fidelity INVESTMENTS	JANA

... However, Index Funds are Taking a More Balanced View

*"Our main goal as a near-permanent source of capital for companies listed in the indices is to **maximize the probability of long-term value creation** on behalf of our clients...we recognize there are different ways for activists to engage with companies and that some activists can drive positive change. But **we are wary of activist situations that favor short-term gains at the expense of long-term investor interests.**"*

*– Ronald P. O’Hanley, President & CEO of State Street Global Advisors, October 10, 2016*

*"It is critical... to understand that corporate leaders’ duty of care and loyalty is not to every investor or trader who owns their companies’ shares at any moment in time, but to the company and its long-term owners. Successfully fulfilling that duty requires that corporate leaders engage with a company’s long-term providers of capital; that they **resist the pressure of short-term shareholders to extract value from the company if it would compromise value creation for long-term owners.**"*

*– Laurence D. Fink, Chairman & CEO of BlackRock, April 14, 2015*

# Non-activist Activism on the Rise

## Selected First Time Activist Campaigns (1)

### Angie's list

Activist: TCS  
Theme: Sale of Company / Board Seats  
Outcome: Settlement / 2 board seats  
1 Fund, 1 Independent



Activist: Villere  
Theme: Board Seats  
Outcome: 2 board seats  
2 Independents  
Company sold



Activist: Harvest  
Theme: Board and Management Change  
Outcome: Won 2 seats in vote  
2 Independents



Activist: Artisan  
Theme: Asset Separation  
Outcome: Ongoing

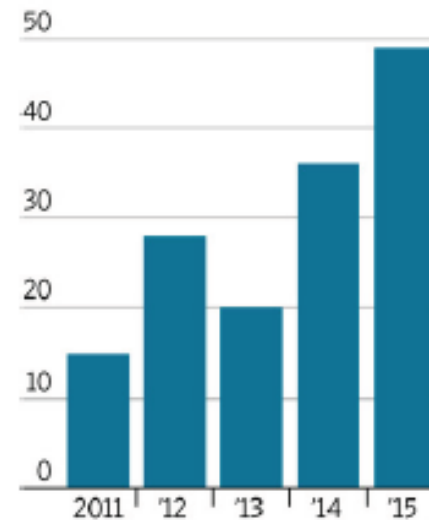


Activist: Neuberger Berman  
Theme: Board Seats  
Outcome: 2 board seats  
2 Independents

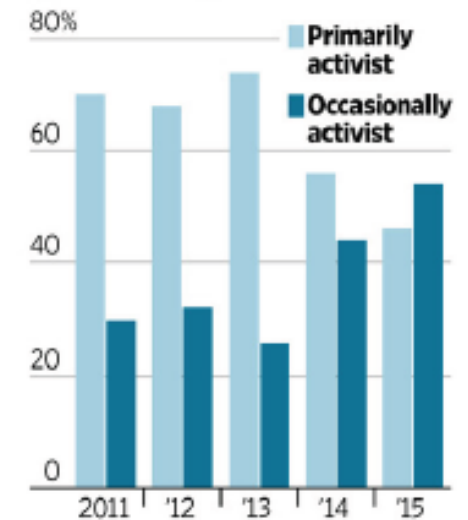


Activist: Altimeter & PAR Capital  
Theme: Board Seats  
Outcome: Settled / 2 board seats  
1 Fund, 1 Independent

## Campaigns Launched by First-Time Activists (2)



## Activist Campaigns by Investor Type (2)



## Recent Trends

- In addition to established funds, increased activity from new entrants and first time activist funds
  - These investors are generally not “professional activists” but are rather being vocal in a specific situation
- Other new entrants include funds trying to establish an activist reputation to drive fundraising
- Settlements remain the most frequent resolution, both for campaigns launched by new and established activist funds

“The rise of these ‘reluctavists’ or ‘suggestivists’ as they are sometimes called, reflects the success of vocal shareholders in forcing corporate change, as well as broader shifts in the investing world.”

“First-time activists ran 49 campaigns against U.S. companies last year, up from 36 in 2014 and 15 in 2011, according to Activist Insight. Some 54% of all campaigns were launched by what the researcher deems ‘occasional’ activists, up from 30% in 2011.”

– *Don't Make Me Do This: Rise of the Reluctant Activist*, *The Wall Street Journal*, 18 February 2016

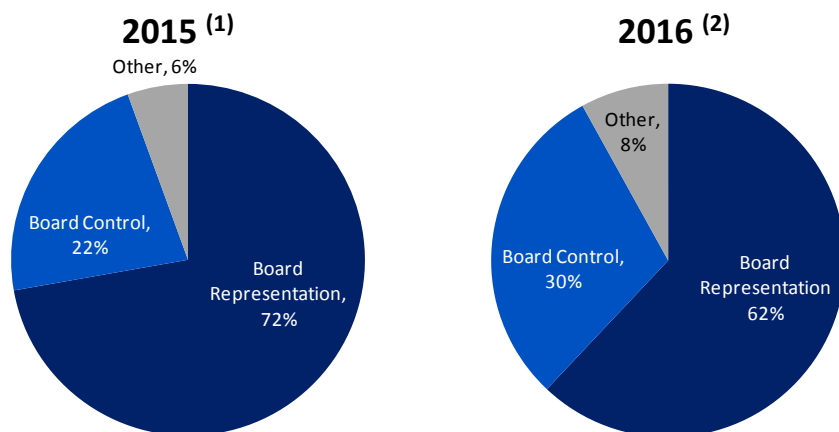
Source: SharkRepellent, public company filings, and press releases.

(1) Selected activist campaigns from Q4 2015 to current.

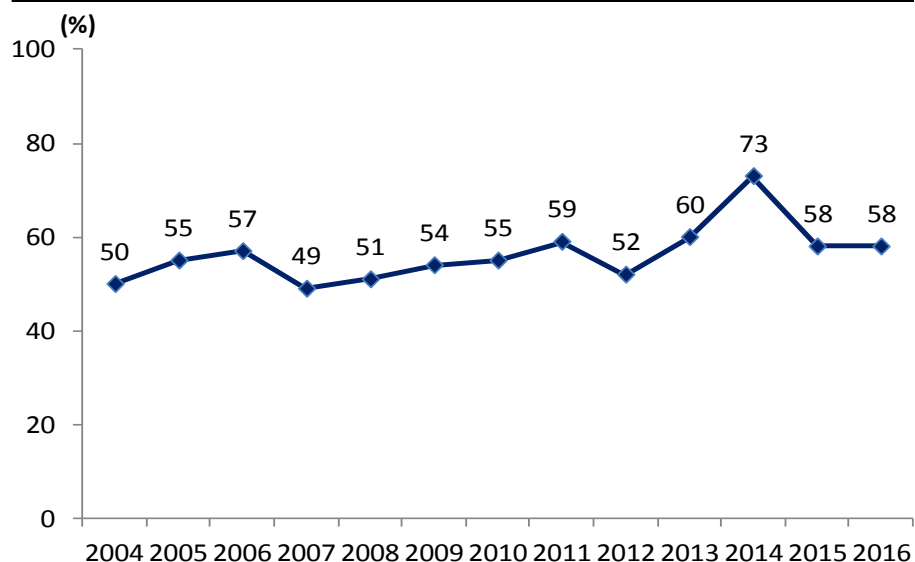
(2) Source: “Don't Make Me Do This, Rise of the Reluctant Activist”, *The Wall Street Journal*, 2/18/2016.

# Recent Lessons Out of the 2016 Proxy Season

## Primary Campaign Type 2015 & 2016 Proxy Fights



## Dissident Success Rate in Proxy Fights (3)



Source: SharkRepellent.

(1) In 2015, a total of 87 proxy fights launched with U.S. companies (20 determined by a vote). As related to the data in the pie chart, in 2015, a total of 59 proxy fights launched (15 determined by a vote) at companies with market capitalizations greater than \$100mm.

(2) In 2016, a total of 73 proxy fights launched with U.S. companies (18 determined by a vote). As related to the data in the pie chart, in 2016, a total of 47 proxy fights launched (11 determined by a vote) at companies with market capitalizations greater than \$100mm.

(3) Success rate calculated as number of outright victories, partial victories or settlements by the dissident as a percentage of all proxy fights where an outcome has been reached.

## Key Observations and Recent Trends

- The trend of most situations being resolved through settlements has continued with few activist challenges going all the way to a proxy fight
  - For 2016, only three \$1bn+ market cap companies went all the way to a proxy vote
    - Green Dot/Harvest: Activist won 2 seats
    - Benchmark Electronics/Engaged Capital: Activist won 2 seats
    - iRobot/Red Mountain Capital: Management's 2 nominees re-elected
  - In 2015 12 \$1bn+ market cap companies had an activist challenge that went all the way to a proxy vote or an ISS recommendation
  
- Activists continue to achieve success in public challenges with approximately 71% resolved challenges in 2016, resulting in an activist "win" either through a settlement or shareholder vote
  - First time activists playing a role - these investors are generally not "professional activists" but are rather being vocal in a specific situation
  - Examples include:
    - United Airlines / Altimeter
    - Johnson & Johnson / Artisan
    - EPIQ Systems / Villere
    - Ultratech / Neuberger Berman



# Derivatives as an Activist Accumulation Tactic

The increasing use of derivatives as an accumulation tactic by activist hedge funds presents specific challenges for public companies

## Selected Activist Derivative Accumulations <sup>(1)</sup>

Company	Mentor Graphics	Xerox	Pentair	Zoetis	Conn's	Allergan	Navistar	Forest Laboratories, Inc.	JCPenney
Activist	ELLIOTT	ICAHN	TRIAN PARTNERS	PERSHING SQUARE	LUXOR	PERSHING SQUARE	MHR Fund Mgmt / ICAHN	ICAHN	PERSHING SQUARE
Stake Acquired <sup>(2)</sup>	8.1% <sup>(3)</sup>	7.1% <sup>(4)</sup>	7.2%	9.2% <sup>(5)</sup>	31.0%	9.7%	14.9% / 14.9%	7.0%	16.5% <sup>(6)</sup> / 26.4% <sup>(7)</sup>

## Total Return Swaps

- An equity swap is a contract between two counterparties where they agree to pay cash flows to each other based upon the notional amount of a single security, stock basket or index
  - One pays the total return on the underlying asset (price change plus dividends)
  - The other receives the total return of the underlying asset while usually paying a financing rate
- Provides the economics of ownership without holding the physical position
- Swap counterparties do not receive voting rights
- Traditional "trip-wires" may not provide notice of accumulations

## Put / Call Options

- Activists have used call options to rapidly acquire large stakes in a company
- Typically over-the-counter arrangements, as opposed to listed options
- Enables activists to acquire shares quickly and with stealth

## Potential Reporting Requirements

- An activist will generally file a 13D within 10 days after crossing a 5% ownership threshold, inclusive of derivatives
- Swaps and some other accumulation tactics may delay reporting
- Derivatives often used to delay an HSR notification to the target company

(1) Defined as situations where an activist employed derivative accumulation techniques for some significant portion of their stake in a company.

(2) Includes both derivative and physical ownership.

(3) Includes derivatives employed for approximately 3.7%.

(4) As of Xerox 13D filing on November 11, 2015. Approximately 89% of the initial accumulation was through forward contracts.

(5) Includes both the 8.3% beneficial ownership held by Pershing Square and the 0.9% beneficial ownership of Sachem Head Capital Management, as disclosed in the respective funds' 13Ds, each dated November 12, 2014.

(6) Includes derivatives employed for approximately 2.0%.

7 (7) Vornado has also reported a 9.9% stake, also employing derivatives for approximately 8.6%.

# Where Companies Can Go Wrong

- 1 The Board and Management need to speak with one voice – important for an activist to know that there is “no daylight” between Management and Board**
  - Directors should avoid “one-off” discussions and inform the Management team promptly of any approach
- 2 Dismissive posture or bunker mentality can create perception of defensiveness and unwillingness to consider what could be legitimate proposals**
- 3 “Scorched earth” defense can backfire with other shareholders**
  - Resorting to litigation or governance tactics for the sole purpose of blunting an activist’s approach can be counterproductive
- 4 Making it personal / taking it personally – must avoid emotion and focus on substance of activist arguments**
- 5 Failing to realize that private communications will inevitably become public**
- 6 Disparaging hedge fund holders and portraying activists as “fast money” and therefore unimportant**
- 7 Failing to engage shareholders and communicate investment thesis prior to activist campaign**
  - Best overall defense is an informed and satisfied shareholder base

# Activist Communications Considerations

## CEO / CFO / Executive Management

- Maintain openness to shareholder concerns and discussions
- Small list (ideally one) of company representatives authorized to respond in any fashion – typically CEO
- General response that Company is comfortable with current strategy and plans, but always open to shareholder input
- Assemble full team to confer regarding proper response

## Directors

- Directors should avoid “one-off” discussions and be mindful of obligations
- No response or commentary other than “will call you back” – no immediate response is required
- Inform management team promptly about any approach
- Important for activist or raider to know that there is “no daylight” between management board
  - Part of early passes is to understand (i) if any exploitable gaps exist between management and board (ii) what is the appetite for a fight

## Guiding Principles

- Activism tends to be as much a political campaign as debate on merits of current team and strategy
  - Expect that “anything you say can and will be used against you” in a contest
  - Avoid saying “open” to any specific transaction / proposed action; comments on expected / hoped-for stock price movements
  - Avoid “our company is not for sale” / “timing isn’t right”
  - If you do respond, statements must be true and cannot omit a material fact necessary to make the statement not misleading

***Management and the Board of Directors should speak with one voice as any separation between Management and the Board can be exploited by activists***

# Notice to Recipient

## Disclaimer

---

“Bank of America Merrill Lynch” is the marketing name for the global banking and global markets businesses of Bank of America Corporation. Lending, derivatives, and other commercial banking activities are performed globally by banking affiliates of Bank of America Corporation, including Bank of America, N.A., member FDIC. Securities, strategic advisory, and other investment banking activities are performed globally by investment banking affiliates of Bank of America Corporation (“Investment Banking Affiliates”), including, in the United States, Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Clearing Corp., which are both registered broker-dealers and members of FINRA and SIPC, and, in other jurisdictions, locally registered entities.

Investment products offered by Investment Banking Affiliates: Are Not FDIC Insured \* May Lose Value \* Are Not Bank Guaranteed.

These materials have been prepared by one or more subsidiaries of Bank of America Corporation for the attendees of the conference to which these materials relate and may not be used or relied upon for any purpose other than as specifically contemplated by a written agreement with us. These materials are based on information from public sources or otherwise reviewed by us. We assume no responsibility for independent investigation or verification of such information (including, without limitation, data from third party suppliers) and have relied on such information being complete and accurate in all material respects. To the extent such information includes estimates and forecasts of future financial performance, we have assumed that such estimates and forecasts represent reasonable estimates. No representation or warranty, express or implied, is made as to the accuracy or completeness of such information and nothing contained herein is, or shall be relied upon as, a representation, whether as to the past, the present or the future. These materials were designed for use by the attendees of the conference and are being furnished and should be considered only in connection with other information, oral or written, being provided by us in connection herewith. These materials are not intended to provide any basis for evaluating, and should not be considered a recommendation with respect to, any transaction or other matter. These materials do not constitute an offer or solicitation to sell or purchase any securities and are not a commitment by Bank of America Corporation or any of its affiliates to provide or arrange any financing for any transaction or to purchase any security in connection therewith. These materials are for discussion purposes only and are subject to our review and assessment from a legal, compliance, accounting policy and risk perspective, as appropriate, following the conference. We assume no obligation to update or otherwise revise these materials. These materials have not been prepared with a view toward public disclosure under applicable securities laws or otherwise, are intended for the benefit and use of the attendees of the conference, and may not be reproduced, disseminated, quoted or referred to, in whole or in part, without our prior written consent. These materials may not reflect information known to other professionals in other business areas of Bank of America Corporation and its affiliates.

Bank of America Corporation and its affiliates (collectively, the “BAC Group”) comprise a full service securities firm and commercial bank engaged in securities, commodities and derivatives trading, foreign exchange and other brokerage activities, and principal investing as well as providing investment, corporate and private banking, asset and investment management, financing and strategic advisory services and other commercial services and products to a wide range of corporations, governments and individuals, domestically and offshore, from which conflicting interests or duties, or a perception thereof, may arise. In the ordinary course of these activities, parts of the BAC Group at any time may invest on a principal basis or manage funds that invest, make or hold long or short positions, finance positions or trade or otherwise effect transactions, for their own accounts or the accounts of customers, in debt, equity or other securities or financial instruments (including derivatives, bank loans or other obligations) of certain companies referred to herein or any other company that may be involved in any transaction. Products and services that may be referenced in the accompanying materials may be provided through one or more affiliates of Bank of America Corporation. We have adopted policies and guidelines designed to preserve the independence of our research analysts. The BAC Group prohibits employees from, directly or indirectly, offering a favorable research rating or specific price target, or offering to change a rating or price target to a subject company as consideration or inducement for the receipt of business or for compensation and the BAC Group prohibits research analysts from being directly compensated for involvement in investment banking transactions. We are required to obtain, verify and record certain information that identifies potential clients, which information includes the name and address of potential clients and other information that will allow us to identify potential clients in accordance, as applicable, with the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) and such other laws, rules and regulations as applicable within and outside the United States.

We do not provide legal, compliance, tax or accounting advice. Accordingly, any statements contained herein as to tax matters were neither written nor intended by us to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on such taxpayer. If any person uses or refers to any such tax statement in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then the statement expressed herein is being delivered to support the promotion or marketing of the transaction or matter addressed and the recipient should seek advice based on its particular circumstances from an independent tax advisor. Notwithstanding anything that may appear herein or in other materials to the contrary, the attendees shall be permitted to disclose the tax treatment and tax structure of a transaction (including any materials, opinions or analyses relating to such tax treatment or tax structure, but without disclosure of identifying information or, except to the extent relating to such tax structure or tax treatment, any nonpublic commercial or financial information) on and after the earliest to occur of the date of (i) public announcement of discussions relating to such transaction, (ii) public announcement of such transaction or (iii) execution of a definitive agreement (with or without conditions) to enter into such transaction; provided, however, that if such transaction is not consummated for any reason, the provisions of this sentence shall cease to apply. **Copyright 2017 Bank of America Corporation.**

**REIT**

# Wise<sup>®</sup> 2017

NAREIT's Law, Accounting & Finance Conference

March 22 – 24, 2017

## Shareholder Activism

Andrew Goodman  
Joseph L. Johnson III  
Gilbert G. Menna



GOODWIN

# Activism Overview and Trends

- ◆ **The number of companies subject to activism demands remains at a near all-time high.**
  - The total number of activist campaigns fell slightly in 2016 (277 as compared to 300 in 2015). This still far exceeds 272 campaigns in 2014 and 221 campaigns in 2013.<sup>1</sup>
- ◆ **In 2016, activist activity was driven by newly-formed and less experienced activists. The campaigns by these activists accounted for 66% of all campaigns in 2016, as compared to 53% in 2015.**
- ◆ **In contrast, historically active funds accounted for only 29% of campaigns in 2016 (as opposed to 46% in 2013).**
- ◆ **Activism remains focused on mid-cap companies with 60% of the campaigns involving issuers with market capitalization between \$100 million and \$1 billion in both 2015 and 2016.**



<sup>1</sup> Data used herein sourced from FactSet SharkRepellent, unless otherwise noted.

# Activism Overview and Trends

- ◆ **Activists' success in obtaining Board representation remains very high.**
  - In 2015 and 2016, activists succeeded in obtaining Board seats in 58% and 57%, respectively, of the campaigns they launched.
  - The primary reason for this trend is an increasing percentage of settlement agreements between activists and issuers. In 2016, 40% of all campaigns resulted in a settlement agreement and Board representation, as opposed to 24% in 2013.
  - Faced with the potential expense and distraction of a proxy fight by activists with a successful track record (e.g., Elliott, Starboard, etc.), companies frequently agreed to a settlement.
  - These settlements also occurred much quicker than in previous years, with 30% of all settlements concluding within 30 days of the initiation of a campaign in 2016 (as compared to 15% in 2015) and 57% in the first 60 days in 2016 (as opposed to 36% in 2015).



# Activism Overview and Trends

## ◆ Activists' campaigns have become more sophisticated and effective.

- Activist funds are willing to hire outside advisors and incur substantial expenses to succeed. In connection with its initial 13D filing for Citrix, Elliott Management disclosed that it had spent several million dollars to analyze the company. Elliott hired a team of veteran software executives, a consulting firm and two investment banks to advise it in connection with its investment.
- Widespread use of derivatives to build substantial stakes quickly and with stealth.
- Candidates nominated by an activist for Board seats have frequently been prominent figures in the relevant space with decades of executive experience. A list of activists director candidates includes Jeffrey Zucker (former CEO of NBC Universal), John Myers (former President and CEO of GE Asset Management), Eddy Hartenstein (former CEO of Tribune Company and Direct TV) and Gordon Bethune (former CEO of Continental Airlines).
- Because activist investors have delivered significant returns that are independent of broader market conditions, institutional investors have been generally supportive of their actions. Institutional investors also have developed relationships with certain of these funds significantly increasing their chances of success in a fight.





# Activism Overview and Trends

## ◆ Management Victorious at the Polls.

- A positive trend for management has been their success in proxy contests which have gone to a shareholder vote. In 2015 and 2016, management was victorious in 65% and 55% of these contests, respectively. This compares to 37% in 2014 and 39% in 2013.
- These strong numbers for management demonstrate that thoughtful engagement with institutional shareholders combined with a campaign highlighting the accomplishments of management and an engaged, independent Board is often successful. In 2016, iRobot (a Goodwin client) followed this blueprint to decisively win a proxy fight against a new activist (Red Mountain Capital) despite ISS and Glass Lewis supporting Red Mountain. Management is much more likely to engage in a fight with new activists who do not have a track record of success. Historically active funds accounted for only 5% of the proxy fights in 2016.
- The composition of a company's shareholder base also plays a major role in its likelihood of success in a fight which goes to a shareholder vote. Companies with a significant percentage of its shares held by retail investors are much more likely to be successful in a fight. While these types of fights are more expensive, retail investors are generally more supportive of management.



# Activism Overview and Trends

## ◆ Activist Hedge Funds Continue to Thrive.

- According to Hedge Fund Research, after growing at a compound annual rate of 23% from 2009 to 2015, total assets under management (AUM) for activists decreased by 9.2% during the first half of 2016 from \$129 billion to \$112.5 billion. This decrease is a result of both underperformance and outflows from the strategy. Several large public pension funds – CalPERS, the New York City Employees’ Retirement System (NYCERS), and the Illinois State Board of Investment – divested their holdings due to lagging returns and high fees. Nevertheless, this asset class still held \$112.5 billion in assets at the end of the second quarter of 2016, up significantly from \$36 billion in 2009.
- While activist funds struggled with an average return of 1.15% in 2015, the HFRI Event-Driven Index showed a 10.4% return for these funds in 2016, with numerous prominent funds like Elliott and Trian Partners exceeding this level and smaller funds like Engaged Capital and Raging Capital up 20% and 27%, respectively.
- Thus, despite the decline in AUM and the poor performance of certain prominent funds such as Pershing Square, activism is here to stay as activist funds have become an established asset class.



# Continuing Concentration of Ownership by Institutional Investors

- ◆ According to ProxyPulse, the percentage of shares held by retail investments has continued to decrease from 35% in 2012 to 30% in 2016.
- ◆ This shift has been accompanied by a shift away from institutions with active investment philosophies and towards index funds. According to *The Wall Street Journal*, in June 2016, these funds owned 11.6% of the S&P 500 up from 4.6% in 2006.
- ◆ At the same time, the percentage ownership of the largest institutional investors also has increased. Today, the average ownership stake held in S&P 500 companies by Vanguard, Fidelity, State Street and Blackrock, collectively, is 21.2% (up from 17.4% in 2012).
- ◆ In analyzing the impact of this change, it is important to note that voting participation by institutional and retail shareholders in 2016 was 91% and 28% respectively.



# Institutional Investors Want Public Company Boards to Hear Their Voices And To Be Cautious In Reaching Settlements With Activist

- ◆ Over the last several years, Vanguard has directly and successfully engaged issuers to adopt majority voting and remove takeover defenses like staggered boards.
- ◆ In 2015, Larry Fink, the CEO of Blackrock, wrote letters to public companies urging them not to take short-term actions, such as buybacks and increased dividends, which may satisfy activists' demands but impair long term value. In 2016, he wrote another letter urging companies to articulate a strategic framework for long-term value creation to serve as a counterpoint to activist demands for actions with short-term benefits.
- ◆ In 2017, Mr. Fink again revisited the themes of his previous years' letters stating:
  - “For the 12 months ending in the third quarter of 2016, the value of dividends and buybacks by S&P 500 companies exceeded those companies' operating profit. While we certainly support returning excess capital to shareholders, we believe companies must balance those practices with investment in future growth. Companies should engage in buybacks only when they are confident that the return on those buybacks will ultimately exceed the cost of capital and the long-term returns of investing in future growth.”
  - “As we seek to build long-term value for our clients through engagement, our aim is not to micromanage a company's operations. Instead, our primary focus is to ensure board accountability for creating long-term value. However, a long-term approach should not be confused with an infinitely patient one. When BlackRock does not see progress despite ongoing engagement, or companies are insufficiently responsive to our efforts to protect our clients' long-term economic interests, we do not hesitate to exercise our right to vote against incumbent directors or misaligned executive compensation.”



# Institutional Investors Want Public Company Boards to Hear Their Voices And To Be Cautious In Reaching Settlements With Activist

- ◆ In October 2016, State Street Global Advisors issued a market commentary raising concerns that, in connection with reaching quick settlements with activists, companies may be hurting the long-term interests of shareholders. In particular, SSGA noted:
  - Settlement agreements that are entered into quickly and without appropriate consultation with other shareholders deprive long-term shareholders of the opportunity to express their views.
  - SSGA's review of the actions of the largest activists identified several red flags that raise questions about the long-term effects of activism, including increases in CEO pay and tying CEO pay to earnings per share, as well as undue focus on share buybacks, spin-offs and other financial engineering.
  - Settlement agreements should include terms that protect the interests of long-term investors, which could include requirements that activists meet share ownership thresholds and hold shares for a defined period, as well as restrictions on share pledges by the activists.
- ◆ SSGA also announced a policy of engaging with companies that pursue previously unplanned financial engineering transactions within a year of a settlement to better understand the reason behind the strategic change.



# Perceived Undervaluation is the Trigger for Activism

- ◆ Activist demands generally fall under the following categories and address the following matters:
  - **Capital Structure Matters** – Claimed deficiencies in target capital structure which are used as a means of arguing for returning cash to shareholders, such as stock buybacks, increasing regular dividends or special dividends and increasing leverage.
  - **Operational/Strategic Matters** – Such as proposing specific programs for operational improvements (e.g., reducing costs, improving margins, etc.), recommending a sale or spin-off of non-core assets, pushing for an outright sale of the company (“exploration of strategic alternatives”) and opposing an announced transaction or acquisitions generally.
  - **Governance Matters** – Such as eliminating or reducing takeover protections, changing the board composition or management, splitting Chairman/CEO roles and effecting changes regarding executive compensation.
- ◆ In their initial letters to a public company board, activists generally will touch on each of these three “buckets” in recommending changes which need to be made to avoid a fight.



# Impact of Proxy Advisory Firms

- ◆ Proxy advisory firms, such as ISS and Glass Lewis, have a significant impact on public companies, especially in activist situations.
- ◆ In contests for board representation, ISS generally asks two key questions:
  - Has the activist demonstrated that change is warranted?
  - If change is warranted, are the activist's nominees more likely to effect that change than management's nominees?
- ◆ In contests where an activist is seeking board control, ISS will also review the activist's business plan and identification of new management.
- ◆ Since 2013, ISS has supported one or more of the activist nominees in 57% of proxy fights.
- ◆ In 2016, ISS' recommendations matched the outcome of a fight 63% of the time. This represents a significant decline from 77% in 2013 and 73% in 2014. This trend is mostly due to the development of internal proxy functions in larger institutional investors in recent years.
- ◆ Each company should analyze its own list of shareholders to determine how important the proxy advisory firm's views are to them.



# Activists Typically Follow Well-Established Escalation Strategy

- ◆ Activists generally travel together. The wolfpack follows the lead activist into the stock.
- ◆ Significant turnover of shareholder base following activist announcement of stake. With stock price increase following activist announcement, historic investors exit the stock and are replaced by “event driven” investors.
- ◆ Activists use the media (and social media) to communicate their case/intentions and put pressure on the company.



## Accumulation of Stake

- ◆ Slowly accumulate initial stake to establish “toehold” without moving price
- ◆ Often accomplished through derivatives to avoid public disclosure required by HSR and SEC rules
- ◆ Once public disclosure of stake is made, the activist converts derivatives into actual shares

## Public Announcement of Stake

- ◆ Announce position through filing a 13D
- ◆ Depending on investment strategy, the 13D includes a presentation/letter to the Board explaining investment rationale
- ◆ Request meeting with Lead Outside Director/Board

## Public Campaign

- ◆ Solicit support of other shareholders
- ◆ Public disclosure of letters or “white paper” further explaining investment thesis and/or attack “entrenchment”/nonaction by the Board

## Proxy Fight

- ◆ Submission of nominees to replace existing directors
- ◆ Proxy contest to elect activist nominees





# Steps after an Initial 13D Filing Designed to Increase Pressure on Management and the Board

- 1. Continue to accumulate shares.**
- 2. Increase intensity of engagement with the Company.**
- 3. Encourage current shareholders to support activist agenda.**
  - Cultivate sell-side commentary in favor of expanded capital return.
  - Develop and cultivate relationships with top institutional shareholders.
- 4. Encourage other like-minded shareholders, including activist funds, to enter the stock.**
  - 13D filing will trigger significant churn in the shareholder base.
  - Activist may have numerous “followers” in the activist fund community.
- 5. Continue to publicly attack the Company’s performance or failure to take action in response to activist’s demands.**
  - Directly or indirectly through media briefings, social media and sellside analyst notes.
- 6. Publicly issue white paper or presentation highlighting their thesis.**
  1. Letter implies detailed presentation is already complete.
- 7. Seek Board change by nominating directors at next annual meeting.**



# Dealing with a Situation Involving Activists: What's different about communications?

- ◆ **Remember the importance of “due diligence.” Research the activist and its track record with other companies.**
  - Review tactics employed by activist in the past.
  - Identify activist’s potential weaknesses and soft spots.
  - Explore structural defense measures that can be deployed.
- ◆ **Everything you say can and will be used against you.**
- ◆ **Activist may seek to solicit information or establish lines of communication with directors.**
  - Even the most innocuous communications can be damaging to a Company and its strategy.
  - It is critical that the Company adopt a communications strategy and determine who is allowed to speak for the Company (CEO, Lead Outside Director, etc.) and the message that should be sent.
  - The Company must deliver consistent messages and speak with one voice.
- ◆ **Monitor trading volumes and changes to shareholder base.**
- ◆ **Know your shareholders and meet with them (in good times and bad).**



# Activism Defense Preparedness

- ◆ **Adopt a communications strategy and determine who will speak for the company (CEO, Lead Outside Director, etc.)**
- ◆ **Continued shareholder base monitoring**
- ◆ **Continued shareholder base engagement with specific communications with key investors on important issues such as capital allocation, margin analysis and longer-term targets**
- ◆ **Review capital structure and return of capital strategies**
- ◆ **Review existing takeover protections and deadlines for shareholder nominations and proposals**
- ◆ **Review Board composition, independence and corporate governance**
  - Consistently review composition of your Board and corporate governance policies.
  - Do you have correct skill set?
  - Shareholders expect regular turnover on Board.
  - If your directors have 10+ years on the Board, you are open to an attack by activists.



# How to Win an Activist Fight

- 1. Review existing communications strategy and determine who will speak for the company in the fight (CEO, Lead Outside Director, Nominees for Election at Annual Meeting)**
  - A company must deliver consistent messages and speak with one voice.
  - Everything you say can and will be used against you.
  - Activist may seek to solicit information or establish lines of communication with directors.
  - Even the most innocuous communications can be damaging to a company and its strategy.
- 2. Identify and address potential vulnerabilities.**
  - Consider counterstrategies for strategic, operational, financial and governance weaknesses.
  - It's OK to co-opt good ideas from your shareholders and make positive changes.
- 3. Take the high road – focus on your company's strengths.**
  - Remember the goal – to win shareholder votes and their confidence.
  - Be measured in your response; not every argument requires a rebuttal.
  - Critical to stay on messages and control the forum for delivering the message.
- 4. Define your core messages and repeat them.**
  - Shareholders are most focused on company performance – so establish clear proof on strategy, operational and financial success.
  - Get messages out/take actions that will disarm the activist before a public campaign begins.



# How to Win an Activist Fight (cont'd)

## 5. Create record of engagement with activist.

- The contest begins with first phone call/letter.
- Engage the activist early on – don't go into the bunker preparing for battle without first understanding whom you're dealing with.
- Show the company is willing to negotiate with activist and make "compromises" to avoid a fight.

## 6. Monitor trading volumes and changes to shareholder base and keep your shareholders close.

- When it comes to your shareholders – communicate, communicate, communicate – but not always about the activist or its issues.
- Face to face dialogue with your company's management team trumps phone or email exchanges.
- Understand the factors that influence voting decisions of your key shareholders.

## 7. Maintain a measured stance of business as usual.

- Settle in – contests can last a long time.
- Be tactical in use of management's time; try to quarantine the issue.

## 8. Keep your Board informed and constructively engaged.

- Lead Outside Director and heads of governance and finance committees may have special roles.
- Prepare them for potential attacks on their track records.
- Help foster perception that Board and management are working hand-in-glove.

## 9. Be Nimble - Be prepared for rapid response.

- Adopt a process which allows for quick response to activist releases and other developments.
- Form committee of "decision-makers" (Board and management) who have time and can make quick decisions.



# APPENDIX



# Names to Watch for: “Activist” Investors with Greatest Track Record of Pursuing Fights

## Top Ten Activists (ranked by total assets managed)

	<b>Elliott Management</b>	<b>Icahn Enterprises</b>	<b>ThirdPoint</b>	<b>ValueAct</b>	<b>Pershing Square</b>
<b>Principal:</b>	Paul Singer	Carl Icahn	Daniel Loeb	Jeffrey Ubben	Bill Ackman
<b>AUM (\$bn):</b>	\$45.0	\$33.0	\$22.6	\$17.5	\$14.8
<b>Founded:</b>	1977	1987	1995	2000	2004
	<b>Corvex Management</b>	<b>JANA Partners</b>	<b>Trian Partners</b>	<b>Sachem Head Capital</b>	<b>Starboard</b>
<b>Principal:</b>	Keith Meister	Barry Rosenstein	Nelson Peltz	Scott Ferguson	Jeffrey Smith
<b>AUM (\$bn):</b>	\$12.6	\$11.6	\$13.8	\$4.7	\$4.7
<b>Founded:</b>	2010	2001	2005	2012	2011



# Names to Watch for: The “WOLFPACK”

- Ader Investment Mgmt
- Biglari Capital
- Blue Harbour
- Breeden Capital Mgmt
- Bulldog Investors
- Cannell Capital
- Carlson Capital
- Cevian Capital
- Clinton Group
- Crescendo Group
- Discovery Group
- Eminence Capital
- Engine Capital
- Engaged Capital
- Franklin Mutual Advisers
- GAMCO Investors
- Glenview Capital Mgmt
- Greenlight Fund
- Knight Vinke
- Land & Building Investment Mgmt
- Laxey Partners
- Lone Star Value Mgmt
- Luxor Capital
- Marathon Partners
- Marcato Capital
- Matrix Capital
- Millennium Mgmt
- MHR
- Neuberger Berman
- Northern Right Capital
- Osmium Partners
- Owl Creek Asset Mgmt
- Paulson & Co.
- Praesidium Investment Mgmt.
- Raging Capital Mgmt
- Ramius Capital
- Red Mountain Capital Partners
- Saba Capital Management
- Sandell Asset Mgmt
- Sarissa Capital
- Scopia Capital Mgmt
- Snow Park Capital
- Soroban Capital
- Southeastern Asset Mgmt
- Spring Owl Asset Mgmt
- Stadium Capital
- Steel Partners
- Taconic Capital Advisors
- TCI Fund Mgmt
- Tenzing Global Investors
- TPG-Axon Capital
- Vertex
- Voce Capital
- Vintage Capital Mgmt
- Yucaipa





---

[Table of Contents](#)

[Index to Financial Statements](#)

**THE MERGER**

*The following is a description of the material aspects of the merger. While Essex and BRE believe that the following description covers the material terms of the merger, the description may not contain all of the information that is important to Essex stockholders and BRE stockholders. Essex and BRE encourage Essex stockholders and BRE stockholders to carefully read this entire joint proxy statement/prospectus, including the merger agreement and the other documents attached to this joint proxy statement/prospectus and incorporated herein by reference, for a more complete understanding of the merger.*

**General**

Each of the Essex Board and the BRE Board has unanimously declared advisable, and the Essex Board has unanimously approved, the merger agreement, the merger and the other transactions contemplated by the merger agreement, and the BRE Board has unanimously approved the merger agreement and authorized the performance by BRE thereunder. In the merger, BRE will merge with and into Merger Sub, with Merger Sub continuing as the surviving entity, and BRE stockholders will receive the merger consideration described below under “The Merger Agreement—Merger Consideration; Effects of the Merger.”

**Background of the Merger**

The BRE Board and management periodically and in the ordinary course evaluated and considered a variety of financial and strategic opportunities as part of their long-term strategy to maximize stockholder value. Members of the management teams of BRE and Essex have in the past from time to time engaged in preliminary discussions regarding a potential strategic business combination of the two companies, although these discussions had occurred more than five years earlier and did not result in any agreement between the parties.

Beginning in the middle of 2012, Essex expressed a renewed interest in a potential strategic business combination transaction between BRE and Essex. In July 2012, Michael J. Schall, President and Chief Executive Officer of Essex, set up a meeting with Constance B. Moore, President and Chief Executive Officer of BRE, which was held on July 16, 2012. At the meeting, Mr. Schall indicated that Essex was interested in engaging in discussions with BRE regarding a potential strategic business combination. Ms. Moore noted that BRE had underperformed the multi-family sector in 2012 in same store revenue growth, adversely impacting BRE’s common stock price in recent periods. She stated that, in her opinion, BRE’s current market valuation did not yet fully take into account the value of BRE’s development pipeline. Ms. Moore also noted that in prior discussions over the years between Essex and BRE, Essex had not indicated that it would pay a premium to BRE stockholders. Mr. Schall asked that she give the matter further consideration, and he would contact her again to continue to discuss the matter. Ms. Moore thereafter reported the meeting to Mr. Irving F. Lyons, the Chairman of the BRE Board, and they discussed the appropriate response to Essex.

On August 2, 2012, Ms. Moore called Mr. Schall, and Mr. Schall returned the call on August 13, 2012. Mr. Schall reiterated Essex’s interest in a potential strategic business combination with BRE. Although Ms. Moore agreed that there could be advantages to both companies from a strategic business combination, she stated that it was not an appropriate time for BRE to consider a potential strategic business combination, primarily for the reasons discussed at the meeting held on July 16, 2012, including Ms. Moore’s belief that the market had not fully valued BRE’s development pipeline.

Subsequently, Mr. Schall notified Ms. Moore by email that Essex would provide further information to BRE about its willingness to continue discussions regarding a potential strategic business combination, including its willingness to pay a premium to BRE stockholders.

On September 3, 2012, Ms. Moore received a letter, dated August 27, 2012 (the “August 2012 Letter”), from Mr. Schall on behalf of Essex, addressed to her. In the August 2012 Letter, Essex proposed a potential

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

strategic business combination of Essex and BRE, which Essex characterized as a merger of equals. The August 2012 Letter stated that Essex believed that a premium to BRE's stock price was appropriate and necessary, based upon Essex's further preliminary assessment of BRE's portfolio and development pipeline. The August 2012 Letter stated that, based on Essex's preliminary analysis and the recent trading ranges of both BRE's and Essex's common stock, Essex believed that an appropriate premium would be in the range of 5% to 15%. The August 2012 Letter noted that the discussion of price was conceptual, and pricing would be a function of deal structure, transaction costs, and financial impacts, all of which would require further discussion and more detailed due diligence. In the August 2012 Letter, Essex proposed that Essex and BRE enter into mutual confidentiality and standstill agreements to facilitate the exchange of non-public information and further discussions.

On September 5, 2012, the BRE Board held a telephonic meeting to discuss Essex's preliminary proposal set forth in the August 2012 Letter. Representatives of Latham & Watkins LLP, which we refer to as Latham & Watkins, counsel to BRE, were also present. Ms. Moore summarized for the BRE Board her prior discussions with Mr. Schall. The BRE Board reviewed the terms and conditions of the preliminary proposal set forth in the August 2012 Letter. The BRE Board discussed, among other things, the development pipeline and the fact that those projects would only begin to be reflected in BRE's operating results starting in late 2013 and continuing into 2014 and 2015. The BRE Board reviewed the potential benefits of a strategic business combination with Essex, including potential operating synergies and the anticipated improved ability of a larger combined company to compete for growth capital. The BRE Board noted that it was possible that Essex would ultimately not be willing to pay a premium to BRE's then current trading price of its common stock at the levels indicated in the August 2012 Letter, as the range was stated as conceptual and subject to further discussion and more detailed due diligence. After discussion, the BRE Board determined that it would not be in the best interests of BRE or its stockholders to engage in discussions with Essex at that time. In addition, the BRE Board agreed that at the Board's annual strategic retreat at the end of October 2012, the BRE Board would review in detail the current status of the development pipeline, as well as the other facets of BRE's long-range strategic plan. In addition, the BRE Board requested that Wells Fargo Securities, financial advisor to BRE, attend the annual strategic retreat to assist the BRE Board in a further review of the August 2012 Letter and BRE's long-range strategic plan.

On September 6, 2012, in accordance with direction from the BRE Board, Ms. Moore sent a letter to Mr. Schall stating that she had shared the August 2012 Letter with the BRE Board and, while they appreciated receiving Mr. Schall's views on the potential benefits of a strategic business combination, the BRE Board did not feel it was in the best interest of BRE's stockholders to enter into discussions with Essex at this time.

On September 24, 2012, Mr. Schall contacted Ms. Moore via email, and they spoke by telephone on October 1, 2012. Ms. Moore confirmed to Mr. Schall that the BRE Board supported the position stated in her letter dated September 6, 2012. Mr. Schall said that the Essex Board supported his efforts to open discussions with BRE.

On October 23, 2012, the BRE Board held its annual strategic retreat. Members of BRE's senior management and representatives of Wells Fargo Securities were also present. During this meeting, the BRE Board reviewed BRE's multi-year business plan. Management discussed the current macro-economic environment, the year-to-date performance of the REIT sector and apartment REITs in particular, and observations regarding the perception of BRE by the investment community. Management noted that on a 2012 year-to-date basis, BRE's trading price had meaningfully lagged its peers in the multi-family sector, including Essex. Management believed that this was due to several factors including: (i) BRE's lagging revenue growth relative to its peers (which management believed primarily reflected the mix of markets and submarkets in which BRE's properties are located); (ii) concerns of BRE's investors regarding the size and return profile of BRE's development pipeline; and (iii) the fact that BRE's overall earnings growth was lower than its peers. The BRE Board and management reviewed a number of alternatives, and concluded that BRE should take several actions in order to address investor concerns and position BRE for greater long-term growth. These actions included the following: (i) reducing the size of BRE's existing development pipeline, through the sale of select land parcels or contribution of the parcels to a joint venture with an outside investor; (ii) allowing the development pipeline to

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

reduce further over time by virtue of the eventual completion of the six existing communities then under development through mid-2015, and a reduction in the number of new projects in the development pipeline; and (iii) selling a number of existing slower growth properties through mid-2015, for net proceeds estimated at that time to be between approximately \$350 million and \$575 million, which would help fund the development pipeline, limit the amount of debt or equity that would need to be issued to fund the development pipeline, and improve BRE's growth profile. The BRE Board and management noted that until these actions were fully implemented, BRE's financial results would continue to be affected by the slower growth properties in the existing portfolio, and that the sale of a large number of units would be significantly dilutive to BRE's earnings. At the same time, the benefits of the cash flow produced by the delivery of the existing development pipeline would not be reflected in BRE's financial results for a 24 to 36 month period, and in the interim, investors would likely discount the projected performance of the new developments due to the risk that the developments may not be completed on time or on budget, or may not perform as well as BRE expected. Accordingly, the BRE Board expected that the market value of BRE common stock would likely be under continued pressure during that period, but that the long-term goal was to position BRE for outperformance by 2015 after the asset sales and new developments had been completed and stronger and more predictable earnings growth realized. At the meeting, the BRE Board also reviewed with management and Wells Fargo Securities other potential strategic alternatives, including a strategic merger with another party such as Essex or another company operating in the multi-family sector, or a sale of BRE to a private buyer.

On December 7, 2012, Mr. Schall sent a second letter, addressed to Ms. Moore and Mr. Lyons (the "December 2012 Letter"). In the December 2012 Letter, Essex expressed continuing interest in engaging in formal discussions with BRE regarding a potential business combination. The December 2012 Letter stated that, based on Essex's review of publicly available information, Essex was prepared to offer BRE's stockholders \$53.00 per share of BRE common stock. The December 2012 Letter also stated that Essex had analyzed a potential business combination that would provide consideration to BRE stockholders of approximately 80% in Essex common stock and 20% in cash, but that Essex would be willing to consider a transaction with a greater cash component. The December 2012 Letter indicated that the preliminary, non-binding offer was not subject to a financing condition and Essex intended that the proposed business combination would be structured as a tax-free reorganization. The December 2012 Letter proposed that as a next step Essex and BRE exchange non-public information with each other.

On December 10, 2012, Ms. Moore responded to the December 2012 Letter, stating that BRE would respond once the BRE Board had the opportunity to consider it.

On December 11, 2012, Janice Sears, a member of the Essex Board, met with Jeanne Myerson, a member of the BRE Board, at the request of Ms. Sears. During the meeting, Ms. Sears explained what the Essex Board and management team viewed as potential advantages to both Essex and BRE and their respective stockholders of a combination of the two companies. Following the discussion of those potential advantages, Ms. Myerson asked Ms. Sears about rumors and analyst speculation that Essex had acquired shares of BRE common stock as a strategic investment. Ms. Sears explained that Essex did hold shares of BRE common stock, as well as securities of other companies. Ms. Myerson told Ms. Sears that the BRE Board had a regularly scheduled meeting soon, at which the topic of the December 2012 Letter would be discussed. Ms. Myerson then reported the substance of this meeting to Mr. Lyons and Ms. Moore.

On December 19, 2012, the BRE Board held a regularly scheduled meeting in San Francisco. Members of BRE's senior management were also present. Ms. Moore summarized for the BRE Board the December 2012 Letter and her most recent discussions with Mr. Schall. She noted that in early November, 2012, Essex had disclosed that it had made an investment in the common stock of a company that Essex considered strategic in nature, and, thereafter, there had been market rumors and analyst speculation that Essex had acquired approximately \$70 million of BRE common stock. Ms. Myerson summarized her discussion with Ms. Sears. The BRE Board then reviewed the terms and conditions of the December 2012 Letter. The BRE Board noted that at the strategic retreat held two months earlier, the BRE Board had reviewed the terms of the August 2012 Letter,

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

which had preliminarily proposed a transaction with a premium to BRE stockholders of between 5% and 15% to current BRE market valuations. The BRE Board expected at that time that the current BRE market valuation would likely be under continued pressure in the near term, but that the long-term goal of BRE's strategic business plan was to position BRE for outperformance by 2015 after the asset sales and new developments had been completed and stronger and more predictable earnings growth realized. After discussion, the BRE Board determined that it would not be in the best interests of BRE's stockholders to engage in discussions with Essex at that time. The BRE Board directed Mr. Lyons to contact George M. Marcus, the Chairman of the Essex Board, and directed Ms. Moore to send a letter to Mr. Schall, setting forth in detail some of the reasons why the BRE Board had made that determination. Later that day, following the BRE Board meeting, Mr. Lyons contacted Mr. Marcus and informed him of the BRE Board's decision. Ms. Moore then sent a letter to Mr. Schall dated December 20, 2012, stating that the BRE Board believed that the market had undervalued the potential value creation embedded in BRE's existing development pipeline. The letter stated that the BRE Board continued to believe that it would not be in the best interest of BRE's stockholders to enter into discussions with Essex at that time, that BRE's existing strategy presented significant opportunities for BRE which were expected to translate into enhanced value for BRE's stockholders, and that a business combination with Essex along the lines proposed in the August 2012 Letter and the December 2012 Letter would not offer the same potential to create value for BRE's stockholders.

On April 15, 2013, in conjunction with BRE's effort to obtain joint venture capital for the development of its two Pleasanton, California projects, BRE requested to meet with representatives of a large pension fund with significant real estate investments. Ms. Moore and Mr. John A. Schissel, Executive Vice President and Chief Financial Officer of BRE, met with senior executives of the pension fund in San Francisco to discuss the pension fund's interest in working with BRE on a range of potential capital raising alternatives. The discussions were general and preliminary in nature, but the pension fund representatives indicated that the pension fund's preferred alternative was to deploy capital in a more efficient manner through a platform transaction, and that an acquisition of BRE by the pension fund could be of interest to them. Ms. Moore told them that if the pension fund had a specific proposal to share, she would relay it to the BRE Board. Ms. Moore reported the substance of the meeting to Mr. Lyons. After this meeting, there was no further contact from representatives of the pension fund.

In early June 2013, Jonathan Litt, the Chief Executive Officer of Land and Buildings, or L&B, a long/short investment fund, contacted Ms. Moore and requested a meeting with her at the upcoming NAREIT Investor Forum in Chicago. L&B had been a long-term stockholder in BRE, and Mr. Litt had spoken to Ms. Moore several times in recent years regarding L&B's investment in BRE.

On June 5, 2013, Mr. Litt proposed that they meet at a coffee shop located in the conference hotel. At this meeting, Mr. Litt stated that L&B was interested in discussing an acquisition of BRE. Mr. Litt indicated that he had contacted unnamed capital sources that were interested in the BRE portfolio of properties, and unnamed operators about running BRE. Mr. Litt asked that BRE enter into exclusive negotiations with L&B, in which case it would be possible for L&B to propose a per share purchase price for the BRE common stock with a "6 handle."

Following Ms. Moore's meeting with Mr. Litt, Ms. Moore relayed the conversation to Mr. Lyons. Ms. Moore and Mr. Lyons agreed that it would not be advisable for BRE to agree to exclusive negotiations with L&B at this time, but that she should request additional information from Mr. Litt about L&B's preliminary proposal.

On June 17, 2013, Ms. Moore called Mr. Litt and told him that BRE was committed to its independent business plan, and would not enter into exclusive negotiations with L&B. She also stated that, before the BRE Board would entertain discussions with any party, BRE would first need to verify that any proposal was credible. She asked Mr. Litt to provide information about the transactional and operational experience of his proposed acquisition partners, and the proposed sources of capital. Mr. Litt said that he could not reveal this information.

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

In July 2013, a senior executive of Company A, a privately-held real estate development company, contacted Ms. Moore and requested a meeting to discuss several matters, including proposed legislative changes to California Prop 13. They agreed to meet on August 1, 2013 in San Francisco.

On the morning of July 31, 2013, immediately prior to BRE's regularly scheduled quarterly earnings call, L&B issued a press release that included a letter from L&B to the BRE Board. In the letter, L&B represented that in June 2013, it had made an offer, on behalf of a consortium, to purchase BRE at \$60 per share. L&B requested in the press release that the BRE Board form an independent committee to pursue a sale of BRE and to give serious consideration to the L&B offer. The letter and press release omitted the identity of the consortium members. L&B did not give prior notification to BRE that it intended to send a letter to the BRE Board or issue a press release.

Shortly after the issuance of L&B's press release, BRE held its regularly scheduled earnings conference call, reporting the results for the quarter ended June 30, 2013. On the call, Ms. Moore stated that she could not comment on the L&B letter, but she did state the BRE Board and management team would consider any legitimate proposal that was in the best interest of stockholders.

Later in the day, the BRE Board held a special telephonic meeting. Members of BRE's senior management and a representative of Latham & Watkins were also present. Ms. Moore summarized for the BRE Board her discussions with Mr. Litt, and said that Mr. Litt had not responded to her specific request for information about L&B's proposed sources of financing for an acquisition of BRE. The BRE Board specifically noted that: (i) Mr. Litt managed an investment fund with less than \$200 million in total assets under management, and L&B did not have the capital capacity to acquire BRE; (ii) in mid-June 2013, Ms. Moore had specifically requested that Mr. Litt provide information regarding his sources of capital, and to date, he had not responded; and (iii) Mr. Litt had no experience in engaging in acquisitions of any type. Accordingly, the BRE Board directed BRE's management to issue a press release stating that L&B's proposal did not evidence a viable opportunity for the BRE Board to consider. Later that day, BRE issued a press release to that effect.

On August 1, 2013, Ms. Moore met with the senior executive of Company A, as had been previously scheduled. Among other things, the representative of Company A wanted to discuss ways in which BRE and Company A might work together. The senior executive of Company A noted that it had access to a significant amount of capital for investment.

On August 12, 2013, and on several occasions thereafter, Mr. Litt contacted Mr. Lyons. Mr. Lyons talked with Mr. Litt by telephone on August 13 and 15, 2013, and in person on September 26, 2013. In each case, Mr. Lyons asked Mr. Litt to provide additional information about the undisclosed consortium, its capital sources, operational capabilities, and transaction experience. Mr. Litt refused to provide any additional information about the L&B offer unless BRE signed a nondisclosure agreement. Mr. Lyons told Mr. Litt that if significant capital sources were available to invest in BRE, then those capital sources should contact BRE directly rather than through Mr. Litt.

On August 14, 2013, Mr. Schall met Ms. Moore for lunch at the invitation of Mr. Schall. Mr. Schall said that he previously had been contacted by Mr. Litt and had told him that Essex was not interested in participating with Mr. Litt in any proposal to acquire BRE. However, Mr. Schall told Ms. Moore that Essex remained interested in a potential strategic business combination with BRE. Mr. Schall stated that he was meeting the following week with Mr. Marcus and Keith R. Guericke, the Vice Chairman of the Essex Board, and that he would discuss with them the possibility of Essex making a preliminary proposal to acquire BRE at a per share price that "starts with a 6", if such a valuation could be supported by further due diligence.

In mid-August 2013, the senior executive of Company A called Ms. Moore and requested another meeting. On August 22, 2013, Ms. Moore and other members of BRE's senior management met with the senior executive of Company A, and a consultant to Company A. The senior executive of Company A stated that they had

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

identified thirteen BRE properties (representing approximately 4,440 units) that Company A would like to acquire, which properties were BRE's highest growth properties. No purchase price was proposed. Ms. Moore stated that she thought it would not be in the best interests of BRE's stockholders to dispose of its highest growth properties and retain its slower growth properties. The senior executive of Company A said Company A might consider an acquisition of BRE in its entirety but would require a partner to purchase the slower-growth BRE properties.

Mr. Guericke had contacted Mr. Lyons on August 1, 2013, requesting a meeting, and they met on August 21, 2013. Mr. Guericke said that Essex was interested in a potential strategic business combination with BRE. Mr. Guericke stated that Essex would be able to place appropriate value on BRE's development pipeline. Mr. Lyons said that the BRE Board was planning to hold its annual strategic planning meeting at the end of October 2013, and, therefore, discussions with Essex would be premature prior to that meeting.

On August 30, 2013, Mr. Schall called Ms. Moore. He said that Essex had developed a very detailed financial model for a potential strategic business combination with BRE. Mr. Schall noted that the market price of Essex common stock had declined in recent periods, but he thought that Essex would still be willing to consider an offer price of \$60 per share if further due diligence supported such a valuation. Mr. Schall requested that Essex and BRE enter into a mutual nondisclosure agreement, and exchange non-public information so that each company could value the other. Ms. Moore told Mr. Schall that the BRE Board was planning its annual strategic planning meeting at the end of October 2013, and therefore discussions with Essex would be premature prior to that meeting.

On September 10, 2013, Ms. Moore called the senior executive of Company A and told him that BRE would not be interested in selling its higher growth properties to Company A. He responded that if the BRE Board were to decide to solicit proposals to acquire BRE, Company A would like to have the opportunity to consider making a proposal, even though Company A would have to dispose of a portion of the properties in the BRE portfolio.

On September 10, 2013, the Essex Board held its regularly scheduled quarterly meeting. Members of senior management were also present. Mr. Schall updated the Essex Board on his conversation with Ms. Moore on August 30, 2013 and expressed his view that, at this time, he was not optimistic that a potential business combination with BRE was possible upon terms that would be satisfactory to Essex.

On October 29, 2013, the BRE Board held its annual strategic retreat. All members of the BRE Board were present, as well as members of BRE's senior management, and representatives of Wells Fargo Securities and Latham & Watkins. Several long-term stockholders of BRE, including Mr. Litt, and a securities analyst who covered BRE, were invited to join a portion of the meeting, and they addressed the BRE Board regarding their views about the REIT industry generally, the multi-family sector, and BRE and its peers in particular. The BRE Board also discussed in detail BRE's progress in implementing the independent business plan, as outlined at the October 2012 strategic retreat, including the completion of developments in 2013, the progress made in disposing of properties in non-core, slower growth markets, and the fact that BRE had not yet attracted a joint venture partner, on acceptable terms, for its two Pleasanton, California development projects. The BRE Board reviewed various valuation methodologies for BRE in order to evaluate the long-term value creation opportunity embedded in the independent business plan, and the risks associated with realizing that value, including the challenges of completing the development pipeline in a rising interest rate environment. The BRE Board also discussed a number of potential strategic alternatives, including a strategic merger and a sale of BRE. The BRE Board noted that an acquisition of BRE would likely trigger a California property tax reassessment, which would generate a tax liability for any acquirer, but that potential overhead synergies could help offset the increased tax expense. The BRE Board analyzed a possible strategic business combination of BRE and Essex, as well as a strategic business combination with other publicly-traded REITs that operate in the multi-family sector. The BRE Board also discussed the possibility of a sale of BRE to a private buyer.

On October 30, 2013, the BRE Board held a meeting and voted unanimously to open discussions with Essex to understand in greater detail what Essex would propose in terms of a potential strategic business combination,

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

and to continue to review other potential strategic alternatives for BRE. The BRE Board also voted to form a planning committee of the BRE Board, which would be responsible for reviewing and evaluating any potential transaction with Essex and any other interested parties, managing the day-to-day process with respect to an assessment and negotiation of any potential transaction, and making recommendations to the BRE Board with respect to any potential transaction. The BRE Board appointed Mr. Lyons, and Jeffrey T. Pero, Thomas E. Robinson and Dennis E. Singleton, independent members of the BRE Board, to serve as members of the planning committee, which we refer to as the BRE Committee, and appointed Mr. Lyons as Chairman of the BRE Committee.

Later that day, following the BRE Board meeting, the BRE Committee held a meeting. Ms. Moore and representatives of Wells Fargo Securities and Latham & Watkins were present. At the meeting, the BRE Committee authorized and directed Mr. Lyons to contact Mr. Marcus to inform him that the BRE Board would like to understand better what Essex was willing to propose in terms of a potential strategic business combination. In addition, the BRE Committee began the process, with the assistance of Wells Fargo Securities, of identifying other qualified parties that might be interested in a potential transaction with BRE.

On October 31, 2013, Mr. Lyons contacted Mr. Marcus, stating that he was calling on behalf of the BRE Board. He said that the BRE Board would like to understand better what Essex was willing to propose in terms of a potential strategic business combination. Mr. Lyons also said that BRE was prepared to share non-public information on a confidential basis in order to allow Essex to make a detailed proposal to the BRE Board on a fully informed basis. Mr. Lyons told Mr. Marcus that BRE's financial advisor would contact Essex's financial advisor to discuss next steps.

On November 1, 2013, the BRE Committee held a telephonic meeting. Also present at the meeting were Ms. Moore and representatives of Wells Fargo Securities and Latham & Watkins. At the meeting, Mr. Lyons reported on his discussion with Mr. Marcus. The BRE Committee requested that Wells Fargo Securities assist the BRE Committee in identifying additional qualified parties that might be interested in considering a transaction with BRE.

On November 2, 2013, representatives of BRE's and Essex's financial advisors held a call. Following the call, BRE's form of nondisclosure agreement was sent to Essex to facilitate confidential discussions regarding a potential strategic business combination.

Beginning on November 2, 2013, representatives of Latham & Watkins and Goodwin Procter LLP, which we refer to as Goodwin Procter, legal counsel to Essex, began negotiating the terms of the nondisclosure agreement. The form of agreement prepared by BRE provided for, among other things, a standstill covenant with customary terms, which prohibited Essex for a two-year period from, among other matters, making unsolicited offers to acquire BRE or its securities, by merger or otherwise, or to commence a proxy solicitation to vote BRE's securities.

On November 4, 2013, the BRE Committee held a telephonic meeting. Also, present at the meeting was Ms. Moore and representatives of Wells Fargo Securities and Latham & Watkins. At this meeting, the BRE Committee reviewed a number of qualified parties that might be interested in an acquisition of BRE. The BRE Committee instructed representatives of Wells Fargo Securities to contact these qualified parties on a confidential basis to gauge their levels of interest in a potential transaction. The BRE Committee also reviewed the standstill provision included in the form of nondisclosure agreement that had been given to Essex, and discussed the relative merits of including such a provision in nondisclosure agreements with interested parties.

On November 5, 2013, the BRE Committee held a telephonic meeting. Representatives of Wells Fargo Securities and Latham & Watkins were present. At the meeting, the BRE Committee reviewed the preliminary feedback received from potentially interested parties that, at the BRE Committee's direction, had been contacted by Wells Fargo Securities on behalf of BRE. Of the six parties contacted (including Essex), four indicated that



---

## [Table of Contents](#)

### [Index to Financial Statements](#)

they were interested in entering into a nondisclosure agreement and receiving additional non-public information. The BRE Committee authorized Wells Fargo Securities to contact one additional potentially interested party.

On November 8, 2013, the BRE Board held a telephonic meeting at which the BRE Board reviewed the preliminary feedback received from potentially interested qualified parties that, at the BRE Committee's direction, had been contacted by Wells Fargo Securities on behalf of BRE. Members of senior management of BRE, and representatives of Wells Fargo Securities and Latham & Watkins, were present. Of the seven parties (including Essex) contacted prior to the meeting, four (including Essex) were interested in entering into a nondisclosure agreement and receiving confidential information. The BRE Board then directed the BRE Committee to continue with the process of soliciting interest in an acquisition of BRE.

Later that day, Company B, a publicly traded REIT that operated multi-family properties, signed a nondisclosure agreement with BRE with a two-year standstill and was granted access to confidential information regarding BRE.

On November 11, 2013, the BRE Committee held a telephonic meeting. Ms. Moore and representatives of Wells Fargo Securities and Latham & Watkins were also present. At that meeting, Wells Fargo Securities reviewed with the BRE Committee the status of discussions with the four potentially interested parties.

Later that day, Essex executed a nondisclosure agreement with BRE. Thereafter, Essex commenced a review of the business, financial and legal documents that were made available in BRE's electronic data room. Representatives of Essex, its legal and financial advisors made numerous requests for additional information, and BRE and its advisors made available responsive information.

On November 14, 2013, Company A signed a nondisclosure agreement with a two-year standstill with BRE and, on that same day, Company C, a privately-owned developer and manager of multi-family properties which had a preexisting investment relationship with the pension fund referenced above, signed a nondisclosure agreement with a two-year standstill with BRE and each were then granted access to non-public information regarding BRE.

On the morning of November 15, 2013, at the direction of the BRE Committee, a representative of Wells Fargo Securities spoke with Mr. Litt and inquired about the status of L&B's interest in a potential acquisition of BRE. L&B had previously submitted notice to BRE that it intended to nominate six people for election as BRE directors at BRE's next annual meeting of stockholders. Mr. Litt said that it would be very complicated for L&B to solicit proxies in favor of its nominees while at the same time seeking to acquire BRE. Mr. Litt then stated that he had terminated all discussions with the consortium members, and had told the consortium members that if they were interested in acquiring BRE, they should approach BRE directly.

Later that day, and again on November 19, 2013, the BRE Committee held telephonic meetings. At those meetings, Wells Fargo Securities reviewed with the BRE Committee the status of discussions with potentially interested parties.

On November 21, 2013, at the direction of the BRE Committee, Wells Fargo Securities sent a letter, on behalf of BRE, to each of Essex, Company A, Company B and Company C, inviting each of them to submit an initial proposal for a transaction with BRE. The letter requested that each party submit to BRE a written, non-binding indication of interest by December 3, 2013. The letter noted that, following the receipt of indicative proposals, BRE intended to quickly select one or more prospective bidders to further discuss the terms of their proposals, and to provide such parties with access to additional due diligence materials and a draft definitive agreement for review and comment. The letter further stated that BRE intended to seek to enter into a definitive agreement by the end of December 2013.

On November 24, 2013, a representative of Company B notified Wells Fargo Securities that Company B would not be submitting a proposal for a transaction with BRE. The principal reasons given were that



---

## [Table of Contents](#)

### [Index to Financial Statements](#)

Company B's common stock was trading at a level that would not allow it to make an attractive offer to BRE, and that an acquisition of BRE would not be significantly strategic for Company B in light of Company B's current property portfolio.

On November 26, 2013, the Essex Board held a telephonic meeting. In addition to the directors, present were representatives of senior management and present by telephone was UBS, Essex's financial advisor. The Essex Board reviewed the valuations of BRE prepared by Essex's management and discussed the parameters of the terms of a preliminary non-binding offer letter to be submitted to BRE in response to BRE's process letter requesting proposals for a transaction with BRE. In addition, the Essex Board voted to delegate to the current members of the Essex executive committee (Messrs. Marcus, Guericke, Thomas E. Randlett and Schall), the responsibility of reviewing and evaluating a potential transaction with BRE and managing the day-to-day process with respect to assessment and negotiation of any potential transaction with BRE.

On the morning of December 2, 2013, the BRE Committee held a telephonic meeting. Representatives of Wells Fargo Securities and Latham & Watkins were present. At this meeting, the BRE Committee reviewed the status of discussions with Essex and Companies A and C. Wells Fargo Securities informed the BRE Committee that Company B had indicated it would not be submitting a proposal.

Also on December 2, 2013, the Executive Committee of Essex held a telephonic meeting. In addition to the committee members, present were representatives of senior management. The Executive Committee reviewed with management the parameters of the terms of a preliminary, non-binding offer letter to BRE as recommended by management based on its valuations of BRE and due diligence to date. After discussion, the Executive Committee of Essex authorized management to submit an initial non-binding preliminary offer letter to BRE on the terms presented and discussed at the meeting.

Also on December 2, 2013, representatives of BRE, Essex and BRE's financial advisor met in San Francisco. In attendance were Ms. Moore and Mr. Lyons from BRE, and Messrs. Schall and Guericke from Essex, as well as other members of senior management of each of BRE and Essex. BRE's management answered questions from the Essex representatives regarding, among other matters, BRE's development pipeline. The Essex representatives presented their views as to the long-term value of Essex and its equity securities. The parties also discussed the potential benefits to both companies and their respective stockholders of a potential strategic business combination involving BRE and Essex.

On December 3, 2013, as directed by the Essex Executive Committee, Essex submitted an initial non-binding preliminary proposal for a transaction with BRE. Essex's initial proposal was for a business combination transaction in which BRE's stockholders would receive 0.2971 shares of Essex common stock and \$11.50 in cash per share of BRE common stock. The preliminary offer was not subject to any financing condition. Essex indicated that it expected to have committed financing in place at the time of signing of a definitive agreement. Essex's initial proposal indicated that Essex was prepared to move quickly to negotiate a definitive transaction agreement and publicly announce a transaction by the end of December 2013.

Company A did not submit a proposal for a transaction with BRE. The principal reason given by Company A was that many properties in BRE's portfolio did not meet Company A's investment criteria and such properties would need to be sold by Company A after any potential transaction. Company A did not believe that it could present an attractive offer to BRE given the discount it would need to place on the properties that it intended to sell. However, Company A indicated that it was interested in some of the higher growth properties in BRE's portfolio and Company A might be willing to partner with another party that was interested in BRE's other properties. Although Company A was encouraged to specify which properties Company A wanted and the corresponding values for each such property, Company A ultimately did not provide any further information.

Company C also did not submit a proposal to BRE. The principal reason given by Company C was that Company C did not believe it could present an attractive offer for BRE, in part because it was primarily

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

interested in the higher yielding assets and not the balance of BRE's portfolio. Although Company C was encouraged to provide BRE with more information to understand better Company C's interest, Company C did not provide any further detail.

Beginning on December 3, 2013, each of BRE and Essex became aware of market rumors and speculation that Essex had made an offer to acquire BRE at a price per BRE share that would represent a significant premium to BRE's recent trading prices prior to that date.

On the morning of December 4, 2013, the BRE Committee held a telephonic meeting. Also present at the meeting were Matthew T. Medeiros and Christopher J. McGurk, independent directors of BRE, as well as Ms. Moore, Mr. Schissel and representatives of Wells Fargo Securities and Latham & Watkins. At the meeting, the BRE Committee reviewed the terms and conditions of Essex's initial proposal. The BRE Committee also reviewed the comments received from Companies A and C as to why neither had submitted proposals. The BRE Committee asked Mr. Lyons to contact representatives of Essex to set up a meeting to discuss in greater detail the terms and conditions of the Essex initial non-binding proposal submitted on December 3, 2013.

On December 4, 2013, at the invitation of Mr. Lyons, representatives of Essex met with representatives of BRE in San Francisco, to discuss Essex's initial non-binding proposal. Present from BRE were Ms. Moore, and Messrs. Lyons, Robinson and Schissel, as well as representatives of Wells Fargo Securities and Latham & Watkins. Present from Essex were Messrs. Schall, Guericke and Burkart, and present by telephone were representatives of UBS and Goodwin Procter. At this meeting, Mr. Lyons indicated that based on prior conversations with Ms. Moore and Mr. Schall the BRE Board was expecting that the Essex proposal would be at least \$60.00 per share. Based on the one-month volume weighted average price as of December 3, 2013, the value of Essex's proposed merger consideration of 0.2971 shares of Essex common stock was \$46.74, which, when added to the proposed \$11.50 in cash, totaled \$58.24 per share of BRE common stock. Mr. Lyons noted that if Essex were to raise the cash component of its proposal by \$1.76 per share of BRE common stock, it would raise the indicated value of Essex's proposal to \$60.00 per share of BRE common stock (based on the average price referred to above). At that price level, Mr. Lyons stated that he would be willing to recommend Essex's revised proposal to the BRE Board, as a basis for BRE to enter into further discussions with Essex. In response to an inquiry by Essex's financial advisor, Mr. Lyons said that he thought that the BRE Board would agree to an exclusive negotiating period with Essex if the Essex offer were increased to this level. Mr. Lyons also stated that he expected that it would be important to the BRE Board that some of its members be added to the Essex Board at the closing of a potential transaction, in light of the fact that, after the proposed business combination, BRE's stockholders would own approximately 37% of the common stock of the combined company. Mr. Lyons proposed that three current members of the BRE Board be added to the Essex Board. Mr. Lyons said that the BRE Board had a regularly scheduled board meeting on December 18, 2013, and he thought it was reasonable to expect that a transaction could be negotiated, executed and announced no later than that date.

On December 5, 2013, Messrs. Guericke and Schall called Mr. Lyons and informed him that Essex's valuation could support increasing the cash portion of the merger consideration by \$0.83, to a total of \$12.33 per share of BRE common stock, which, when added to the 0.2971 share of Essex common stock with an indicated value of \$46.74 as calculated above, totaled \$59.07 per share of BRE common stock. Messrs. Guericke and Schall noted that Essex would not be willing to increase its offer further and would expect BRE to agree to a period of exclusive negotiations with Essex.

On December 6, 2013, the BRE Board held a telephonic meeting. Members of BRE's senior management, and representatives of Wells Fargo Securities and Latham & Watkins, were present. The BRE Board reviewed the status of discussions with the seven potentially interested parties (including Essex) that had been contacted. Of those seven, four (Essex and Companies A, B, and C) executed nondisclosure agreements with BRE and conducted due diligence. Of these four, only Essex submitted a proposal to acquire BRE. The BRE Board also discussed the principal reasons given by Companies A, B, and C as to why they did not submit proposals. At the meeting, Mr. Lyons updated the BRE Board on the recent activities of the BRE Committee, including his

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

contacts with representatives of Essex following the submission of Essex's initial proposal, which had resulted in Essex agreeing to increase the cash portion of the proposed merger consideration from \$11.50 per share of BRE common stock, to \$12.33 per share. Mr. Lyons noted that Essex would require a period of exclusive negotiations as a condition to further discussions. In light of existing market rumors and speculation, the BRE Board also discussed the advisability of publicly announcing that BRE was in a continuing process to review strategic alternatives, and had entered into exclusive negotiations with Essex. The BRE Board directed Mr. Lyons and the BRE Committee to continue negotiations with Essex, and approved the execution by BRE of an exclusivity agreement with Essex.

On December 6, 2013, the Essex Board held a telephone meeting. In addition to directors, also present were representatives of senior management. Senior management reviewed with the Essex Board the previous conversations with representatives of BRE, including the call with Mr. Lyons on December 5, 2013. After discussion, the Essex Board authorized management to submit a revised offer letter and exclusivity agreement on the terms discussed with Mr. Lyons.

Later that day, as directed by the Essex Board, Essex provided a draft offer letter and exclusivity agreement. Following negotiation by the parties, the letter was finalized. The letter proposed a revised transaction in which BRE stockholders would receive 0.2971 shares of Essex common stock, and \$12.33 in cash, for each share of BRE common stock. The letter stated that three current BRE directors would be invited to join the board of the combined company. The letter provided that BRE would negotiate exclusively with Essex until December 31, 2013.

On December 7, 2013, Ms. Moore countersigned Essex's revised offer letter and exclusivity agreement, agreeing on behalf of BRE as to the exclusivity covenant. Later that day, Latham & Watkins sent Goodwin Procter a draft of the merger agreement between the parties for review and comment by Essex.

Commencing on December 8, 2013, BRE made available to Essex in its electronic data room additional non-public business, financial and legal materials. Shortly thereafter, Essex made available to BRE in its electronic data room non-public information regarding Essex's assets, operations, and financial conditions and prospects.

On December 9, 2013, BRE issued a press release announcing that the BRE Board, working with BRE's management team and advisors, had been in an ongoing process of exploring strategic alternatives to enhance stockholder value. The press release stated that the BRE Board had undertaken a comprehensive and thorough review of alternatives that included, among other things, a possible sale or merger of BRE. In connection with a solicitation of indications of interest by BRE, the press release disclosed that BRE had received a non-binding proposal from Essex to acquire BRE in a negotiated merger in which each outstanding share of BRE common stock would be exchanged for 0.2971 shares of Essex common stock and \$12.33 in cash. The press release stated that the companies were currently engaged in discussions regarding this proposal and had agreed to an exclusivity period.

On December 10, 2013, Goodwin Procter and Latham & Watkins had a conference call and discussed the structure of the proposed business combination. Among other matters, the parties discussed the possibility of pursuing a third-party joint venture as a way for Essex to effect the proposed business combination in order for Essex to maintain its flexibility with regard to financing the proposed business combination. The proposed Asset Sale and Special Dividend was discussed as a means to provide that flexibility. The parties discussed the potential tax consequences to BRE stockholders if the proposed Asset Sale and Special Distribution were utilized.

Later that day, Goodwin Procter called Latham & Watkins and conveyed their principal comments on the draft merger agreement. After that call, Goodwin Procter delivered written comments. These comments included the following: (i) a termination fee of \$170 million payable by BRE to Essex in the event that the transaction

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

were terminated under specified circumstances; (ii) a provision that would require that BRE submit the merger transaction to a vote of BRE's stockholders even if a third party had made a superior proposal to acquire BRE (referred to as a "force the vote" provision); (iii) a provision that the transaction would terminate if not consummated by August 31, 2014; (iv) a covenant that BRE would reimburse Essex's out-of-pocket expenses in the event that BRE's stockholders did not vote to approve the merger with Essex even in the absence of a superior proposal; and (v) a covenant that BRE would not waive any standstill agreements that it had previously received from other potential bidders. In addition, Essex asked for BRE's assistance in structuring the transaction to facilitate the assumption by Essex of BRE's outstanding debt securities, as well as implementing the proposed asset sale and special dividend structure.

On December 11, 2013, the BRE Board held a telephonic meeting. Members of BRE's senior management and representatives of Wells Fargo Securities and Latham & Watkins were present. Mr. Lyons updated the BRE Board on the status of negotiations with Essex, and BRE's review of Essex's business, financial statements, and management. Representatives from Latham & Watkins also reviewed Essex's financing plan, including a bridge commitment letter to be entered into concurrently with the execution of the merger agreement and the possibility of a third-party joint venture as a possible financing alternative.

Later that day, at the request of Mr. Lyons, Ms. Moore and Messrs. Lyons, Pero, Singleton, and Sullivan, met in person with Mr. Schall and other members of Essex's senior management in Palo Alto, California, to discuss Essex's plans and strategy for the combined company following the merger.

On December 12, 2013, Ms. Moore and other members of senior management of BRE, together with representatives of Wells Fargo Securities, had a teleconference with members of senior management from Essex to discuss Essex's business plan and review the key assumptions used in Essex's corporate financial forecast.

On December 12, 2013, Latham & Watkins transmitted a revised draft of the merger agreement to Goodwin Procter. In response to the principal points previously raised by Goodwin Procter, BRE responded as follows: (i) a termination fee of \$135 million payable by BRE to Essex in the event that the transaction terminated under specified circumstances; (ii) no force the vote provision, (iii) Essex's proposal that the transaction would terminate if not consummated by August 31, 2014, was not acceptable; (iv) reimbursement by BRE of up to \$10 million of Essex's out-of-pocket expenses related to the transaction in the event that BRE's stockholders did not vote to approve the merger with Essex in absence of a superior proposal; and (v) no restriction on BRE's ability to waive any standstill agreements previously received from other potential bidders. In addition, BRE would agree to assist Essex in facilitating the assumption by Essex of BRE's outstanding debt securities, and agreed to a possible delay in the closing of the transaction to allow for time to obtain certain specified consents, provided that the receipt of such consents would not be a condition to the closing of the proposed merger. BRE also agreed to provide Essex with the option to implement the proposed asset sale and special dividend structure, provided that the implementation of that structure would not delay, or be a condition to, the closing of the proposed merger.

On December 14, 2013, Goodwin Procter sent Latham & Watkins a revised draft of the merger agreement.

On December 15, 2013, a representative of UBS informed a representative from Wells Fargo Securities that two of the outstanding issues on the draft merger agreement were particularly important to Essex: (i) the force the vote provision; and (ii) the requirement that BRE not waive any standstill agreements previously received from other potential bidders.

On December 16, 2013, the BRE Board held a telephonic board meeting. Members of BRE's senior management, as well as representatives of Wells Fargo Securities and Latham & Watkins, were present. Mr. Lyons provided the BRE Board with an update on the status of discussions with Essex. The BRE Board discussed, with the assistance of Wells Fargo Securities, recent trading ranges of Essex common stock, and the implied value of the stock portion of the merger consideration.

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

On December 16, 2013, the Essex Board held a board meeting in Palo Alto, California. In addition to directors, present from Essex were members of senior management, as well as representatives of UBS and Goodwin Procter. During this meeting, a representative of Goodwin Procter reviewed with the Essex Board the legal aspects of the proposed transaction, including, among other matters, the structure of the proposed transaction, the potential payments and benefits that senior executives and employees of BRE may be eligible to receive in connection with the proposed transaction, the proposed financing commitment letter and the principal terms and conditions of the draft merger agreement, including the principal open issues in the draft merger agreement. Also, UBS reviewed with the Essex Board the financial terms of the proposed transaction.

Later that day, Latham & Watkins delivered a revised draft of the merger agreement to Goodwin Procter. Also that day, Ms. Moore met with Messrs. Schall and Dance in San Francisco to discuss, among other things, details regarding employee retention during the periods prior to and after the closing of the proposed merger.

On December 17, 2013, Messrs. Lyons and Schall had a telephone call to attempt to resolve the principal outstanding issues in the draft merger agreement. Mr. Schall emphasized the importance to Essex that the merger agreement include the force the vote covenant, but that in exchange for BRE's agreement to accept that covenant, Essex would be willing to: (i) reduce the termination fee payable by BRE from \$170 million to \$152.5 million; (ii) change the final termination date, from August 31, 2014 to mid-June 2014; and (iii) eliminate the covenant prohibiting BRE from waiving any outstanding standstill agreements with other bidders. Mr. Lyons informed Mr. Schall that it was his belief that the BRE Board would not support a transaction that included a force the vote covenant. Mr. Schall responded that Essex could agree to remove the force the vote covenant, but only if BRE were willing to pay a termination fee of \$170 million. Mr. Lyons indicated he would be willing to recommend that the BRE Board accept the \$170 million termination fee, in exchange for the removal of the force the vote covenant and the other terms proposed by Mr. Schall.

Later that day, Goodwin Procter and Latham & Watkins exchanged drafts of the merger agreement to provide for a \$170 million termination fee payable by BRE in certain circumstances, no force the vote provision, a final termination date of the merger agreement of June 17, 2014, and that the BRE Board would be permitted to waive any outstanding standstill agreements with other bidders if the BRE Board determined in good faith that the failure to do so would be inconsistent with the BRE Board's duties.

On December 18, 2013, the BRE Board held a meeting in San Francisco, California. All members of the BRE Board were present, as well as members of BRE's senior management, representatives of Wells Fargo Securities and Latham & Watkins, and representatives of Ballard Spahr LLP, which we refer to as Ballard Spahr, BRE's Maryland counsel. At the meeting, Mr. Lyons updated the BRE Board on the status of discussions with Essex. Wells Fargo Securities reviewed with the BRE Board its financial analysis of the merger consideration and rendered to the BRE Board an oral opinion, confirmed by delivery of a written opinion dated December 18, 2013, to the effect that, as of such date and based on and subject to various qualifications, limitations and assumptions stated in its opinion, the merger consideration to be received pursuant to the merger agreement by holders of BRE common stock (other than Essex, Merger Sub and their respective affiliates) was fair, from a financial point of view, to such holders. Representatives of Ballard Spahr and Latham & Watkins discussed with the BRE Board the duties applicable to its decisions with respect to its review and consideration of the proposed transaction, and reviewed the material terms of the proposed merger agreement. After discussion, the BRE Board unanimously declared that the merger agreement, the merger and the other transactions contemplated by the merger agreement were advisable and in the best interests of BRE and its stockholders, approved the terms and conditions of the merger agreement, authorized BRE to enter into and perform its obligations under the merger agreement, and recommended to BRE's stockholders that they vote in favor of the approval of the other transactions contemplated by the merger agreement.

On December 18, 2013, the Essex Board held a meeting in Palo Alto, California. All members of the Essex Board were present, as well as members of senior management, representatives of UBS and Goodwin Procter were present by telephone. At the meeting, Essex's legal and financial advisors updated the Essex Board on the

---

## [Table of Contents](#)

### [Index to Financial Statements](#)

status of discussions with BRE. UBS reviewed with the Essex Board its financial analysis of the merger consideration and rendered to the Essex Board an oral opinion, confirmed by delivery of a written opinion dated December 18, 2013, to the effect that, as of such date and based on and subject to various assumptions made, matters considered and limitations described in its opinion, the merger consideration to be paid by Essex in the merger, was fair, from a financial point of view, to Essex. A representative of Goodwin Procter reviewed the material terms of the proposed merger agreement and the material terms of the financing commitment letter and discussed the duties of the Essex directors. After discussion, the Essex Board unanimously determined and declared that the merger agreement, the merger and the other transactions contemplated by the merger agreement, including the issuance of shares of Essex common stock to BRE stockholders in the merger, were fair to, advisable and in the best interests of Essex and its stockholders, approved the terms and conditions of the merger agreement, authorized Essex to enter into and perform its obligations under the merger agreement, and recommended to Essex's stockholders that they vote in favor of the issuance of shares of Essex common stock to BRE stockholders in the merger.

Following the approvals of the BRE Board and the Essex Board, BRE and Essex finalized and executed the merger agreement and other transaction documentation. On December 19, 2013, BRE and Essex issued a joint press release announcing the transaction.

#### **Recommendation of the Essex Board and Its Reasons for the Merger**

In evaluating the merger, the Essex Board consulted with its legal and financial advisors and Essex's management and, after consideration, the Essex Board has unanimously determined and declared that the merger agreement, the merger and the other transactions contemplated by the merger agreement, including the issuance of shares of Essex common stock to BRE stockholders in the merger, are fair to, advisable and in the best interests of Essex and its stockholders. The Essex Board has unanimously approved and adopted the merger agreement, the merger and the other transactions contemplated by the merger agreement, including the issuance of Essex common stock to BRE stockholders in the merger.

#### **THE ESSEX BOARD UNANIMOUSLY RECOMMENDS THAT ESSEX STOCKHOLDERS VOTE FOR THE ISSUANCE OF SHARES OF ESSEX COMMON STOCK TO BRE STOCKHOLDERS IN THE MERGER.**

In deciding to declare advisable and approve and adopt the merger agreement, the merger and the other transactions contemplated by the merger agreement, including the issuance of Essex common stock to BRE stockholders in the merger, and to recommend that Essex stockholders vote to approve the issuance of shares of Essex common stock to BRE stockholders in the merger, the Essex Board considered various factors that it viewed as supporting its decision, including the following material factors described below:

- *Strategic Benefits.* The Essex Board expects that the merger will provide a number of significant potential strategic opportunities and benefits, including the following:
  - the combination of two highly complementary multifamily portfolios to create the largest multifamily REIT on the West Coast will allow Essex stockholders to participate in a stronger Combined Company with the opportunity to leverage both companies' strong presence in attractive West Coast markets and will result in a platform with superior value creation opportunities;
  - the combined portfolio of approximately 56,000 multifamily units in 239 properties will provide an enhanced competitive advantage across the West Coast and drive opportunistic growth and capital deployment;
  - by combining two companies with businesses with significant geographic overlap, the Combined Company is expected to have a stronger platform across West Coast markets, which will improve the performance of the portfolio;