

DOND 2017



DEAL OR NO DEAL
EPISODE VII: THE LAST CONTRACT

Session 1: 8:00-9:00

Presented by Osborne Clarke

Title:

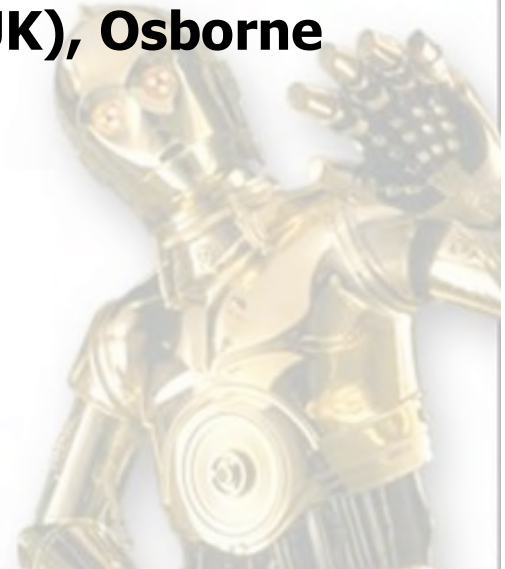
***Successful Contracting with Consumers
in Europe***

Speakers:

**Emily Jones - Partner and Head of West Coast
(US), Osborne Clarke**

**Konstantin Ewald - Partner (Germany),
Osborne Clarke**

**John Davison-Kelly - Partner (UK), Osborne
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PRACTICES

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Jeffrey Selman is a partner in the Corporate Group in Crowell & Moring's San Francisco office and serves on the firm's Corporate Group Steering Committee. Jeff represents emerging and middle-market public and private technology and life sciences companies and investors on formation, equity and debt financing, mergers and acquisitions, licensing, restructurings, board and management issues, and general corporate and commercial transactional matters.

Jeff has extensive experience facilitating transformative growth of small to mid-cap public and emerging private technology and life science companies through corporate finance and securities work, and middle-market M&A and other strategic transactions. Frequently serving as an outside general counsel for clients, Jeff has represented companies in a wide range of industries such as software (enterprise and consumer), the Internet, social networking, mobile device applications, interactive gaming and entertainment, media, semiconductor, network equipment, life sciences, biotech, medical devices, cleantech, geothermal, solar, agbio, battery and energy storage. He has also worked with many companies that have been spun out of research institutions.

Jeff has assisted public companies raise capital through public offerings and PIPE transactions. He also provides guidance for general SEC and national exchange compliance, and advises clients on corporate governance issues including board and management matters and investor relations.

Jeff manages strategic transactions for public and private company clients which include mergers, tender offers, and asset and stock sales on both the buy and sell side, cross-border transactions, joint ventures, and intellectual property licensing and collaborative agreements. Recent experience includes divestitures for a private equity-owned software-as-a-service company, acquisitions for a major car rental company, formation of a Brazilian joint venture for a public semiconductor company, in-licensing of cancer therapeutic compounds by an early-stage biotech company, formation and financing of a public-private joint venture to acquire and operate an off-shore oil drilling rig in Alaska,

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sales of private companies in the online consumer referral, solar and nanotechnology industries, and negotiation and drafting of interactive game development agreements.

Jeff has been recognized by clients and peers as a top lawyer in Northern California in *Chambers USA* in 2016 and 2017 in the area of Corporate/Mergers & Acquisitions. He served as vice chair of the State Bar of California's Business Law Section in 2004–2005. He is a member of the American Bar Association's Section of Business Law, including the Mergers & Acquisitions Committee, the Federal Regulations of Securities Committee, and the Corporate Governance Committee. He is also a former appointed member of the State Bar of California's Business Law Section's Committee of Cyberspace and Law (1997–2001).

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- Stanford University, A.B. Political Science (1987) with distinction and honors
- Columbia Law School, J.D. (1990)

Recent Highlights, News & Knowledge

<p>"The Impact of Today's Activist Stockholders: Why Activists are Key Deal Drivers," Deal or No Deal VII: The Last Contract, Santa Clara, CA (November 9, 2017). Presenter: Jeffrey C. Selman.</p>	<p><i>Speech/Presentation</i></p>
<p><u>DEAL NOTE: Crowell & Moring Represents Novume Solutions in Acquisition of Global Technical Services and Global Contract Professionals (Oct.26.2017)</u></p>	<p><i>Firm News/Announcement</i></p>
<p><u>Here's How A Tender Offer Like Uber's Would Unfold — Recode (October 5, 2017)</u></p>	<p><i>In the News</i></p>
<p>"The Impact of Today's Activist Stockholders," 8th Annual Western M&A/Private Equity Forum, San Francisco, CA (September 13, 2017). Presenter: Jeffrey C. Selman.</p>	<p><i>Speech/Presentation</i></p>
<p><u>Chambers USA 2017 Ranks 53 Crowell & Moring Lawyers and 23 Practice Areas Among Best in U.S. (May.26.2017)</u></p>	<p><i>Firm News/Announcement</i></p>
<p><u>DEAL NOTE: Crowell & Moring Advises GigPeak in its Acquisition By Integrated Device Technology, Inc. (Apr.04.2017)</u></p>	<p><i>Firm News/Announcement</i></p>
<p><u>DEAL NOTE: Crowell & Moring Advises UniPixel on Public Offering (Feb.21.2017)</u></p>	<p><i>Firm News/Announcement</i></p>
<p><u>Crowell & Moring Named a Top Firm for Serving Latin America by <i>Latinvex</i> (Oct.14.2016)</u></p>	<p><i>Firm News/Announcement</i></p>

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<p><u>"SEC Tired of Its Own Paperwork?: Proposed Amendment Will Scale Back Disclosures for More Companies," <i>Corporate Alert</i> (July 22, 2016). Contact: Jeffrey C. Selman</u></p>	<p><i>Client Alert/Newsletter</i></p>
<p><u>Deal Note: Crowell & Moring Advises GigPeak, Inc. on Underwritten Public Offering (Jun.15.2016)</u></p>	<p><i>Firm News/Announcement</i></p>

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Peter Michelsen is the President of CamberView Partners and also serves as the co-head of the firm's Contested Situations practice which encompasses long and short activism defense as well as contested and complex M&A.

Before joining CamberView, Mr. Michelsen was a Managing Director in the investment banking division of Goldman, Sachs & Co., where he was a member of the Mergers & Acquisitions group and a core member of the shareholder activism defense group. In that role, Mr. Michelsen advised companies on complex M&A transactions and strategic advisory assignments, including shareholder activism, proxy fights and consent solicitations, hostile takeovers and general corporate governance matters.

Mr. Michelsen began his career at Merrill Lynch & Co., where he executed M&A transactions across a broad range of industries.

He holds a J.D. from Harvard Law School and a bachelor's degree from Claremont McKenna College.

THE IMPACT OF TODAY'S ACTIVIST STOCKHOLDERS

**Association of Corporate Counsel
San Francisco Bay Area Chapter**

“Deal or No Deal”

Santa Clara, November 9, 2017

Ripped from the Headlines

Amazon's Acquisition of Whole Foods

- Jana Partners acquired 8.2% interest in Whole Foods.
- After three months, sold for \$300 million profit following the announcement of Amazon's acquisition of Whole Foods.
- Former CEO John Mackey [speaking about Jana Partners]:
“We need to get better, and we're doing that. But these guys [Jana] just want to sell us, because they think they can make forty or fifty percent in a short period of time. They're greedy bastards, and they're putting a bunch of propaganda out there, trying to destroy my reputation and the reputation of Whole Foods, because it's in their self-interest to do so.”



DEALS JULY 24, 2017 / 10:16 PM / A MONTH AGO

Activist hedge funds pull hard on the M&A lever

Michael Flaberry

5 MIN READ



FILE PHOTO: Customers leave the Whole Foods Market in Boulder, Colorado May 10, 2017.
REUTERS Rick Wilking/FILE PHOTO

Ripped from the Headlines, Pt. 2

Hudson Bay Capital Opposition to Merger of Sabra Health Care REIT, Inc. and Care Capital Properties, Inc.

- Deals thwarted by activists:

Year	Activist	Acquirer-Target	Size	Outcome
2010	Jana	Charles River Laboratories International - WuXi	\$1.7 Billion	Deal terminated
2015	Elliott Management	Dialog Semiconductor - Atmel	\$4.1 Billion	Shareholders approved*
2015	Starboard	Media General - Meredith	\$3.4 Billion	Deal terminated
2016	WW Investors	New York REIT - JBG Cos	\$3.2 Billion	Deal terminated
2017	Jana	EQT - Rice Energy	\$6.5 Billion	?
2017	Eminence Capital & Hudson Bay Capital	Sabra Health Care REIT - Care Capital Properties	\$4 Billion	?

Source: Bloomberg

*Deal was ultimately terminated because Microchip Technology interposed and acquired Atmel

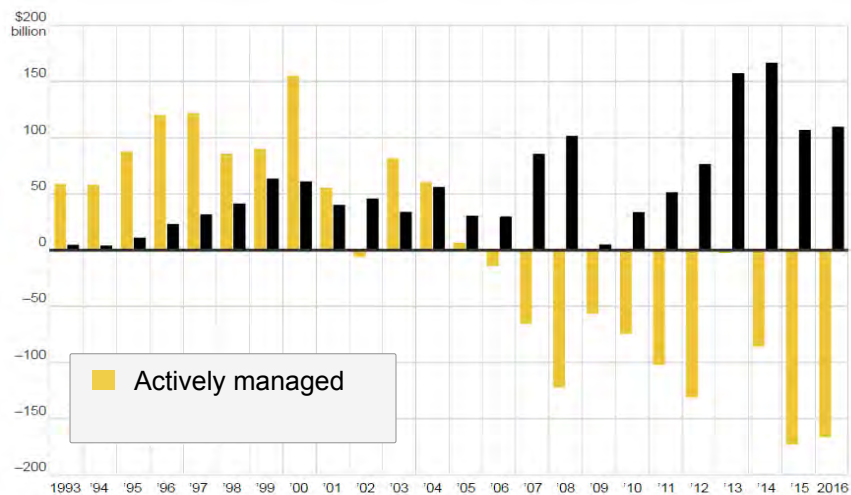
- Bumpitriage – 18 of 68 activist-opposed transactions between 2013 and Q1 2017 successful with 21% average increase – Activist Insight

The screenshot shows a Bloomberg article from July 31, 2017, by Mary Kate Nelson. The article title is "Activist Shareholder Doubles Down Against \$7.4 Billion Sabra Merger". The content discusses an activist shareholder's opposition to the proposed \$7.4 billion merger of Sabra Health Care REIT, Inc. (Nasdaq: SBRA) and Care Capital Properties, Inc. (NYSE: CCP), arguing that Sabra should consider putting itself up for sale to maximize shareholder value.

Investor Base Backdrop for Activism

Ownership of US Companies is Increasingly Concentrated in Passive and Index Funds

Active vs. Passive: Net Flows of U.S. Stock Mutual Funds and ETFs (1993-2016)¹



“At some point in the next nine months ... more than half of managed equity assets in the U.S. will be run on a passive basis ... At the current rate we forecast that this will happen sometime in Jan. 2018”

Inigo Fraser Jenkins, Bernstein Investment Research and Management (Apr. 2017)

Rise in S&P 500 Companies in which U.S. Passives Own More Stock than U.S. Actives

20 → **112**
2010 → 2016

Concentration in Large Index Funds

BLACKROCK



Vanguard

STATE STREET
GLOBAL ADVISORS

Combined Assets Under Mgmt:

~\$11T

Over 3X the global hedge fund industry

Largest Single Shareholder in:

88%

of S&P 500 companies

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Active and Passive Investor Dynamics in Activism

Actively Managed Funds Show Greater Support for Activists

Actively-managed funds are **more likely to support dissidents**, and have shown **greater private and public support for activist campaigns**. Recent examples include:

- Neuberger Berman ran a proxy fight (UltraTech) and was a participant in the Whole Foods situation
- Two major active funds privately supported ValueAct in removal of CEO
- T. Rowe Price opposed defenses at Allergan and deal at NetSuite

Mutual-fund manager Neuberger Berman...sent a letter to [Whole Food]'s board this week urging it to "immediately engage advisors" to review options including a sale or joint venture... Neuberger has been in talks with Whole Foods since last year but hasn't previously gone public with its suggestions for the chain...

Wall Street Journal, April 2017

Path to Victory is Increasingly Through Passive Funds

- **Passively-managed funds have shown a tendency to vote with management in fights**, but have indicated openness to listening to activists
- Many are **pushing back against quick settlement**, demanding engagement so their viewpoints may be heard prior to settling
- **Growth in the proportion of funds under passive management magnifies the influence of their votes**, increasing importance of proactive engagement

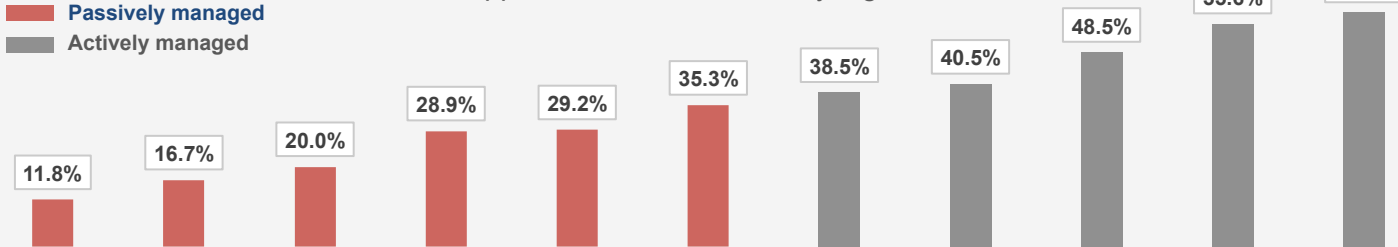
Activist investors are increasingly seeking to partner with index providers when they campaign for change at public companies...**"We take those calls all the time," said Ronald O'Hanley, CEO of SSGA. "We are listening to good ideas."**

Institutional Investor, May 2017

Investment style

- **Passively managed**
- **Actively managed**

Investor Support for Dissident in Proxy Fights, 2012-2016¹



H1 2017 Contested Campaigns

Companies Giving Board Seats to Activists; Roles of Institutional Investors

- In U.S., of 327 campaigns, there were 68 proxy contests initiated; 54 completed by June 30, 2017.
- 19 went to vote, 19 settled and 16 withdrawn.
- 46% of campaigns resulted in activists obtaining board seats.
 - Up from 41% in 2016 and 29% in 2012.
- Index investors urge feedback before settling with activists.
 - State Street Global Advisors: “[W]hile we recognize that negotiated settlements between companies and activists might benefit boards and management by reducing time, expense and reputation risk, we are concerned that in some cases these settlements are being reached too quickly and without any input from other shareholders.” (October 2016 Market Commentary)
- Institutional investors, such as mutual funds, investment advisers and pension funds, had 44 campaigns, representing approximately 13% of total U.S. campaign volume.

Illustrative Activist Investment Framework

Potential for Economic Gain	
Strategic Outcome	<ul style="list-style-type: none"> Is the company a logical target for a strategic acquirer? Are there opportunities for divestitures, restructuring, spin-offs, etc.?
Operational Improvement	<ul style="list-style-type: none"> How do revenue growth and margins compare against peers? Are there opportunities for significant cost savings or other operational initiatives?
Capital Structure Improvement	<ul style="list-style-type: none"> Is there excess cash with a poorly defined strategy for deployment? Can the company sustain additional leverage?
Passive Investment Thesis	<ul style="list-style-type: none"> Is the company trading below intrinsic value? Is there a reason to think the valuation disconnect with resolve over the investment horizon?
With Mitigants to Downside Risk	
Stable Business Model	<ul style="list-style-type: none"> What's the variability of the business? Is the business subject to macro or other cycles?
Valuation Support	<ul style="list-style-type: none"> Is the business trading at a discount to historical or peer multiples? Are there buyers if the stock cracks?
And a High Likelihood of Success in a Campaign	
Clear Path	<ul style="list-style-type: none"> Is the company vulnerable from a structural defense standpoint?
Corporate Governance Concerns	<ul style="list-style-type: none"> Does the company have corporate governance, board, compensation or similar deficiencies that can be leveraged to establish a need for change? Do shareholders have concerns about whether the board provides effective oversight?
Shareholder Support	<ul style="list-style-type: none"> Based on the factors above, will the company's shareholders support a dissident proxy fight?

M&A Focus of Activists

Activist Demands by Type

- Activist Insight, 2017 Half Year Review, Volume 6 Issue 6 - July 2017:

Demand type	June 2017	2017 YTD	2016 YTD
Board-related	52.2%	43.9%	47.5%
Balance Sheet	7.6%	8.1%	9.7%
Business Strategy	15.2%	6.4%	4.3%
M&A	12.0%	11.3%	12.2%
Remuneration	3.3%	5.9%	4.8%
Other Governance	8.7%	21.5%	20.2%
Other	1.1%	2.9%	1.7%

Proportion of public activist demands by demand type

- Thomson Reuters: 91 U.S. activist campaigns during H1 2017 called for companies to explore some type of sale process.
 - More than double than in 2016.

Governance Factors Impacting Probability of Success

Valuation, business fundamentals and strategic factors will drive the initial investment thesis of activists...



...but activists will focus on governance attributes of a company to determine whether they can prevail in a fight

Selected Company Fundamentals

Business Strategy

Portfolio Rationale / Break-up Potential

Operational Performance (Growth / Margins)

Capital Structure and Allocation

Shareholder Returns Track Record

Valuation (Absolute and Relative)

Selected External / Strategic Factors

Attractiveness to Acquirers

Competitive Landscape

Relationship with Shareholders

Government / Regulatory Interaction

Shareholder Returns Track Record

Valuation (Absolute and Relative)

Selected Corporate Governance Factors

Board Composition

Board Leadership

Director Experience

Director Tenure

Governance Provisions

Structural Defenses

Executive Compensation Structure

Alignment of Pay and Performance

Oversight of Potential Conflicts

Voting History (Withholds / Say-on-Pay)

History of Shareholder Proposals

History of Shareholder Responsive-ness

Future Trends

Continuing Impact of Activists on M&A

- Acquirors partnering with activists to pressure targets.
- Activists and private equity.
 - Elliot Management bid for LifeLock through private equity arm, Evergreen Coast Capital.
- Institutional investor engagement.
 - Rise of in-house governance capabilities and impact on proxy advisors' roles.
 - “BlackRock engages with companies from the perspective of a long-term shareholder. Since many of our clients' holdings result from index-linked investments – which we cannot sell as long as those securities remain in an index – our clients are the definitive long-term investors. As a fiduciary acting on behalf of these clients, BlackRock takes corporate governance particularly seriously and engages with our voice, and with our vote, on matters that can influence the long-term value of firms. With the continued growth of index investing, including the use of ETFs by active managers, advocacy and engagement have become even more important for protecting the long-term interests of investors.” Larry Fink, CEO of BlackRock 2017 letter to CEOs.

Future Trends (Cont'd)

Large Cap, International, CEO Removal, Follow-on Campaigns, and ESG

- Following a pronounced shift to small- and mid-market companies in 2016, **activist activity returned to large cap companies in 2017**, with targets such as General Motors, P&G, ADP, NRG Energy and CSX
- With US markets increasingly saturated, **activists have been willing to enter international markets**, with targets such as BHP, Nestle, and Akzo Nobel
- **Activists launched 9 campaigns specifically targeting CEOs** at high profile companies such as Arconic, Perrigo, CSX, Avon and Buffalo Wild Wings. According to the *Wall Street Journal*, one-third of companies in the S&P 500 and Fortune 500 that replaced a CEO this year through May 2017, did so following activist pressure
- Though prevalent, **settlements are often not the end of activist agitations and companies are increasingly facing multi-year campaigns**. Recent prominent examples include Arconic, where Elliott had settled for board representation with its former parent company the prior year and Air Methods, where Voce Capital nominated candidates for the 2017 meeting despite a settlement for board representation in 2016
- In order to secure both voting support and additional capital, **activists are increasingly using ESG (environmental, social and governance) factors** as part for their fight platforms and broader messaging (e.g. Trian and Blue Harbour)

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Crowell & Moring LLP is an international law firm with approximately 500 lawyers representing clients in litigation and arbitration, regulatory, and transactional matters. The firm is internationally recognized for its representation of Fortune 500 companies in high-stakes litigation, as well as its ongoing commitment to *pro bono* service and diversity. The firm has offices in Washington, D.C., New York, Los Angeles, San Francisco, Orange County, London, and Brussels.

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