MISSING IN ACTIVISM: RETAIL INVESTOR ABSENCE IN CORPORATE ELECTIONS

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Shareholder-led campaigns to install new leadership at U.S. firms—so-called proxy contests—occur too rarely and, when they do occur, are led by the same, boring cast of characters too often. This Article presents empirical evidence from a hand-collected database of public filings of proxy statements from 2006 to 2008—the years public filings are available from the SEC electronic filing system. In short, the data suggest that the system of contested corporate elections is broken and, from there, the Article points the way toward legal reform. When it comes to the interests of retail investors—i.e., individuals with small stakes in a particular firm—the evidence suggests that contested corporate elections are virtually off-limits as a conduit for activism. Retail investors almost never launch a campaign and their interests are not represented well by those who do.

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I. INTRODUCTION

The campaign ran full tilt. Sam Ringer, a Seattle businessman, used $75,000 of his own money to take on the current office holder, David Stedman.[1] He planned to build

[1] Lion Shareholder Committee, Definitive Proxy Statement (Form DEFC 14A), at 9 (June 11, 2007), *available at* http://www.sec.gov/Archives/edgar/data/941179/000110465907046800/a07-15653_1defc14a.htm (filed under registrant Lion, Inc.) (stating that the shareholder committee was comprised of Kevin Kuck, Ron Matney, and Art Manegre and led by Sam Ringer); Lion, Inc., Definitive Proxy Statement (Form DEF 14A), at 6 (May 11, 2007), *available at* http://www.sec.gov/Archives/edgar/data/941179/000

an elaborate marketing campaign and win over an apathetic electorate. He sent the voters mailers with headlines that exhorted them to "ACT NOW."[2] He repeatedly emphasized a familiar refrain, "WE NEED YOUR SUPPORT."[3] He ended with a reminder that the voters have the power to create the change they want, intoning "DON'T MISS THIS OPPORTUNITY TO LET YOUR VOICES BE HEARD."[4] If Ringer and his team could strike the right message, he could carry the election and oust the incumbent. But Ringer, the challenger, lost.[5]

Surprisingly perhaps, Ringer was not running for political office. The challenger in this case was a major shareholder in Lion, Inc., a software company in the Pacific Midwest.[6] The incumbents were the current directors of the Lion Board and David Stedman was their CEO. The campaign was a corporate election to determine who would lead the firm.

Shareholder-led campaigns to install new leadership at public firms occur rarely.[7] When they do occur, incumbents have the advantage.[8] Most importantly, incumbents can use the corporate treasury, to fund their campaign expenses, while challengers cannot.[9] Furthermore, when shareholder-

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093041307004352/c48336_defl4a.txt (describing Dave Stedman as a director, President, and CEO of Lion, Inc.).

[2] Lion, Inc., Definitive Additional Materials (Form DFAN 14A) at 2 (June 11, 2007), *available at* http://www.sec.gov/Archives/edgar/data/941179/000110465907046803/a07-15653_4dfan14a.htm.

[3] *Id.* at 1.

[4] *Id.* at 3.

[5] For dataset of outcomes of contested corporate elections in 2007, see GEORGESON, 2007 ANNUAL CORPORATE GOVERNANCE REVIEW 48–49 (2007), http://www.georgeson.com/usa/download/acgr/acgr2007.pdf.

[6] *See generally* Lion Shareholder Committee, *supra* note 1; *see also* Lion, Inc., *supra* note 1.

[7] *See infra* Parts II–IV.

[8] *See* GEORGESON *supra* note 5, at 47–49 (listing all dissident proxies taking place in 2007, totaling approximately 68, with the dissident succeeding in roughly 8).

[9] *See, e.g.*, Rosenfeld v. Fairchild Engine & Airplane Corp. 128 N.E. 2d 291 (N.Y. 1955) (holding that a corporation can compensate the incumbent board when the proxy contest is in good faith, while winning outsiders

led campaigns do occur, they are led by the same, boring cast of characters all too often. This Article presents empirical evidence showing that the system of contested corporate elections is broken, that retail investors are excluded, and, consequently, that there is a need for legal reform.[10]

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may vote themselves compensation after their victory, but compensation is not permitted if the argument is based solely on personalities).

[10] Although commentators disagree on the means of reform (or even the merits of reform generally), there is near unanimity among prominent corporate law scholars that the system of shareholder campaigns is a poor method for promoting shareholder involvement in corporate affairs. Adolf Berle and Gardiner Means have suggested that the voting system makes shareholders "subservient" to the directors. ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 277 (1932). Columbia's Jeff Gordon has referred to corporate elections as a "ramshackle voting system." Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power; Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 477 (2008) (noting that management's ability to set the terms of corporate elections, nominate candidates to the board, and solicit proxy votes plays into shareholder apathy). Yale's Jon Macey has recently called the system "anemic." Jonathan R. Macey, *Too Many Notes and Not Enough Votes: Lucian Bebchuk and Emperor Joseph II Kvetch About Contested Director Elections and Mozart's Seraglio*, 93 VA. L. REV. 759, 759 (2007) (characterizing the state of shareholder democracy at U.S. firms). Lynn Stout and Margaret Blair have previously scoffed at the campaign system at firms, noting that "boards elect themselves" without any realistic input from shareholders. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 311 (1999); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 789 (2007) (noting that shareholder control through contested corporate elections has been "recognized to be largely a myth for at least three-quarters of century"). And Lucian Bebchuk, perhaps the most widely known current commentator (and critic) on shareholder campaigns, has called the shareholder vote a "myth." Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 679–82 (2007). *See also* LEE HARRIS, MASTERING CORPORATIONS & OTHER BUSINESS ENTITIES 223–32 (2008) (arguing that because of costs of an independent campaign and board hostility to shareholder proposals, shareholders have few real opportunities to use corporate elections as a way to effect beneficial changes at the firm); ROBERT CLARK, CORPORATE LAW 95 (1986) (opining that many believe the system of shareholder voting is flawed); Frank Easterbrook & Daniel Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983) (noting that manager's domination of the proxy machinery is the "coup de grace").

That is, when it comes to the interests of retail investors—i.e., individual investors and households, usually with small stakes in a particular firm[11]—the evidence suggests that contesting a corporate election is virtually off-limits. Average retail investors almost never launch a campaign, and their interests are not represented well by those who do. In fact, out of the thousands of public companies that had corporate elections in 2008, retail investors launched less than a handful.[12] They lost all of them.[13]

In a contested corporate election, two groups launch independent campaigns for shareholder votes over who will sit on the corporate board, which effectively determines control over the direction of the firm.[14] As in a political election, the challenger in these corporate contests—usually a large institutional shareholder—campaigns to create the impression that she has better ideas than the current board about how the firm should conduct business.[15] Meanwhile, the incumbents—always management—ask shareholders to

[11] According to recent reports, about fifty percent of U.S. households own stock. The value of those holdings was nearly $5.5 trillion dollars and represents one of the largest liquid financial assets for households. SEC. INDUS. & FIN. MARKETS ASS'N, FACT BOOK 2007 67, 69 (2007) [hereinafter "SIFMA 2007 FACT BOOK"] (finding that approximately fifty-seven million U.S. households owned equities in 2005).

[12] At only Alaska Air Group, Croghan Bancshares, Inc. and Rackable Systems did individual investors with relatively small stakes (e.g., those who own less than one percent of outstanding shares) launch campaigns. *See* GEORGESON, 2008 ANNUAL CORPORATE GOVERNANCE REVIEW 47–49 (2008), http://www.georgeson.com/usa/downlo ad/acgr/acgr2008.pdf (listing of all the dissident proxies taking place in 2008).

[13] *Id.*

[14] Throughout this Article, the author intends to refer to contests between management and shareholders for votes as "contested corporate elections" or "challenges" or "contests." These contests are also variously known in the literature as "proxy contests," "proxy challenges," "contested solicitations," "independent proxy solicitations," or some variation of the same.

[15] *See infra* Part III.A.

stay the course and vote to keep them in office.[16] Thus, a contested corporate election contemplates the potential ouster of the members of the board of directors and their replacement by the challenger or her nominees.[17] As a consequence, the right to launch a campaign is a powerful one. However, the data show that shareholders, particularly small, retail investors, rarely take such action.

As other commentators have noted, the lop-sided nature of the rules reduces the potential number of contested corporate elections overall and the number of control challenges, and skews the outcome of these elections—though this last finding remains disputed.[18]

This Article establishes, for the first time, that the current funding rules for contested corporate elections are the primary factor responsible for limiting the parties able to launch a control challenge to a narrow class of almost identical shareholders, including private investment entities (e.g., hedge funds), insiders, disgruntled former insiders, and a handful of large shareholders.[19]

This homogeneity of challenging party in contested corporate elections is particularly disheartening for several reasons. First, individual-investor money is a significant part of public-company capital structure. Individuals own a full twenty-six percent of public equities with an aggregate value of $5.5 trillion.[20] Thus, individual shareholders should

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[16] "Management" refers to directors and officers of the firm.

[17] Although the principal concern of this Article is contested corporate elections for "control" of the firm—i.e., board seats—one should keep in mind that technically a contested corporate election might also revolve around issues other than the ouster of the current board of directors. Importantly, for instance, shareholders might launch a challenge and solicit votes on an issue concerning firm governance, a so-called "shareholder proposal." As with any other contested corporate election (including those that are struggles over board seats), the shareholding community will be asked to vote on the shareholder proposal at the annual meeting or a special meeting called for purpose of taking a vote.

[18] *See infra* Parts II–IV.A.

[19] *See infra* Part III.

[20] SIFMA 2007 FACTBOOK, *supra* note 11, at 65.

have a meaningful conduit for participating in contested corporation elections. Yet, outside of the groups previously mentioned, individual investors rarely launch a campaign, and according to recent data, almost never launch a successful one.[21]

Second, an alternative set of rules that make it easier for retail investors to launch contests and campaign for a rival slate of director, may improve firm performance.[22] If shareholder-led campaigns became more frequent, corporate managers would refocus their attention on shareholder interests.[23] It would signal that shareholders have the

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[21] *See infra* Part III.B & IV.B.

[22] *Compare, e.g.*, Bebchuk, *supra* note 10, at 712 n.68, 712–14 (arguing that the empirical evidence suggests that proxy contests increase shareholder wealth ex post and likely increase shareholder wealth ex ante); Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1731 (2008) (finding that hedge fund activism enhanced firm value); Eric L. Talley, *Public Ownership, Firm Governance, and Litigation Risk*, 76 U. CHI. L. REV. 335, 340 (2009) (citing empirical studies that show that "democratic" firms performed better for investors than "nondemocratic" ones); David Ikenberry & Josef Lakonishok, *Corporate Governance Through the Proxy Contests: Evidence and Implications*, 66 J. BUS. 405, 406–07 (1993) (finding that firms where contests were launched were performing poorly prior to the contest); Roberta Romano, *Less is More: Making Institutional Investor Activism as a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174, 182 n.20 (2001) (citing empirical studies showing that proxy contests have consistently created "positive wealth effects"), *with* Stout, *supra* note 10, at 791 ("[C]alls for greater 'shareholder democracy' appeal to laymen, the business media, and even many business experts not because they are based on evidence, but because they have a strong emotional allure."). Interestingly, however, this literature is missing a recent breakdown of whether contests launched by different types of shareholders—for instance, campaigns mounted by hedge funds or other entities versus campaigns put on by individual shareholders—produce different results for firm performance.

[23] Bebchuk, *supra* note 10, at 682 (discussing various significances of the shareholder franchise) ("[A] viable shareholder power to replace directors . . . is necessary to provide directors with strong affirmative incentives to focus on shareholder interests."); *see also* Easterbrook & Fischel, *supra* note 10, at 403 (arguing that managers will act in

ability to oust (or credibly threaten to oust)[24] under-performing managers.[25] Management is more likely to take shareholder proposals seriously if shareholders have a credible option to mount a campaign for the replacement of directors.[26] Without regular elections (or comparable corporate governance structure), managers are more likely to ignore shareholder preferences and use their position to pursue their own personal agendas.[27] If directors know that the threat of ouster is illusory, they might have few

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shareholder interests "in order to advance their own careers and to avoid being ousted").

[24] Importantly, the threat of corrective action can be just as important as the actual use of the action. If directors realize that shareholders have a credible option to remove them for bad conduct, such action might not need to be taken often in order to encourage managers to perform well. *See generally* Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 878 (2005) ("[I]t should be emphasized that the benefits of shareholder intervention power should not be measured solely, or even primarily, by the rate of actual shareholder intervention."); *see also id.* at 876 (arguing that "granting shareholders the power to interview would likely produce most of its benefits by inducing management to initiate desirable changes, and these benefits thus should not be measured by the frequency with which shareholder-initiated proposals would actually be adopted").

[25] For empirical evidence on this point, see Bebchuk, *supra* note 10, at 677, 712–14 (summarizing empirical studies on relationship between challenges and firm value); Brian J. Bushee, *Do Institutional Investors Prefer Near-Term Earnings over Long-Run Value?*, 18 CONTEMP. ACCT. RES. 20 (2001)); Stephen J. Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L. J. 271, 299 n.135 (2003) (noting empirical studies) (citing Claire E. Crutchley et al., *Shareholder Wealth Effects of CalPERS' Activism*, 7 FIN. SERVS. REV. 1 (1998)); Michael P. Smith, *Shareholder Activism by Institutional Investors: Evidence from CalPERS*, 51 J. FIN. 227 (1996).

[26] *See generally* Paul H. Edelman & Randall S. Thomas, *Corporate Voting and the Takeover Debate*, 58 VAND. L. REV. 453, 460 (2005) (noting that managers may respond to shareholder use of the ballot box). Ikenbery & Lakonishok, *supra* note 22, at 407 (noting that standard economic analysis holds that contested elections are one method of disciplining corporate-manager behavior).

[27] Bebchuk, *supra* note 24, at 850 (describing self-dealing behavior by managers when effective corporate governance structures are not in place).

incentives to avoid increasing their compensation beyond market rates, adopting rules that operate to entrench themselves, or engaging in other self-interested acts.[28]

Third, reforming the current rule structure for contested corporate elections has some promise for making managers better corporate actors. Regardless of the outcome of a contested corporate election, the very fact that there is a contest creates a forum for contestants to explain their strategy, direction, and (in the case of managers) previous actions to the shareholder community. In the political literature, experts have generally agreed that contested elections force incumbents to respond to the preferences of the electorate, address constituency concerns, and forgo personal and/or partisan indulgences.[29]

Unfortunately, the corporate law literature has, thus far, failed to discuss a similar benefit that arises from a contested corporate election. Namely, that a contested corporate election likely sharpens the debate. Indeed, a contested election makes mangers think hard about their

[28] *See, e.g.*, *id.* at 854–55 (presenting empirical evidence that incumbent directors routinely ignore shareholder preferences with respect to staggered boards); Brav et al., *supra* note 22, at 1730–31 (noting that hedge fund activism disciplines managers).

[29] *See generally* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 620–30 (2002) (describing the effects of noncompetition in political elections); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) ("Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens. But politics shares with all markets a vulnerability to anticompetitive behavior. In political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge. This market analogy may be pushed one step further if we view elected officials and dominant parties as a managerial class, imperfectly accountable through periodic review to a diffuse body of equity holders known as the electorate."); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Finance Elections*, 94 COLUM. L. REV. 1160, 1182–83 (1994) (discussing the promotion of debate as a measure of whether the system of political elections requires reform).

actions. It likely enhances their communication skills and increases the time spent on deliberation, ultimately improving the quality of their actions. Thus, contests, *ipso facto*, likely make for better decision-making and improve firm strategy.

Fourth, an alternative set of rules increases the prospect of shareholder participation in corporate elections, giving shareholders a conduit to make their preferences known and reinforcing the idea that the preferences of the shareholders, who are the ultimate owners of the firm, matter.[30] Thus, increased shareholder participation matches the generally-shared Western ideals that the ultimate owners should have some discretion and authority over firm assets, regardless of whether their choices are value-enhancing.[31]

Parts II through IV present empirical research on the shortage of corporate elections contested by individual investors, particularly retail investors, at U.S. firms. These Parts outline and then expand upon the current literature by

[30] *See, e.g.*, Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 684–85 (2006) (noting that the debate is between those "who believe that shareholders actually own corporations and should have a greater say in how they are run" and their skeptics). *But see* Stout, *supra* note 10, at 791 (noting that the metaphor of shareholders-as-owners is "misleading").

[31] *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992) (chronicling history of property rights); C.B. Mapherson, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (1977) (describing the early philosophical view that private property owner rights were sacrosanct); Lee Harris, *'Reparations' as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 417–19 (2003) (describing respect for the owners of private property as a cornerstone of Western ideals); *see also* Harris, *supra* note 10, at 182. In fact, as some courts have suggested, there is something democratic about shareholders having the right to participate in governance. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985) (noting that if stockholders are unhappy with board action, "the powers of corporate democracy are at their disposal to turn the board out"); Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) (finding that the right to vote is "critical to the theory that legitimates the exercise or power by some . . . over vast aggregations of property they do not own"); *see also* Bebchuk, *supra* note 10, at 676.

offering fresh insights and new data. The evidence is jarring. Shareholder challenges are rare, homogeneous, and frequently prone to failure. As Lucian Bebchuk's recent work (along with the analysis herein) shows, there are few challenges overall, and even fewer so-called "control challenges."

Additionally, the data suggest that challenges appear to originate from the same set of shareholders, usually hedge funds and other institutional investors. Along with some contest-outcome information from Georgeson, a consultancy, the vast majority of the new data is hand-collected from publicly-available filings with the SEC's EDGAR system from 2006, 2007, and 2008, the latest years for which complete data is available.[32] The data suggest that individual investors, other than former (possibly disgruntled) insiders and large shareholders, rarely launch campaigns. Furthermore, true retail investors—individual investors without a relatively large stake in the firm—almost never do. In the rare cases in which they do launch campaigns, they have relatively thin campaign budgets and, as a consequence, seldom win these contests.

Part V introduces possible explanations for the lack of interest in shareholder campaigns and the lack of diversity of challenger identity. It argues that the intersection of at least three factors—legal rules, economic factors, and business norms—likely explains the widespread hesitancy of retail investors to launch corporate campaigns.

Finally, the absence of retail investors in contested corporate elections raises the question of whether there should be reform and, if so, what that reform should be.[33]

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[32] *SEC, How Do I Use Edgar? A Quick Tutorial*, www.sec.gov/edgar/quickedgar.htm (last visited Jan. 1, 2010) (providing that full-text search of public filings is available only for the "last four years").

[33] Perhaps the most hotly-debated question concerning contested corporate elections is whether to make the corporate ballot available in shareholder-led campaigns. If shareholders are able to use the corporate ballot to transmit their proposal for changes on the board of directors to other shareholders, they will not have out-of-pocket expenditures, such as

Thoughtful solutions to the system of contested corporate elections have already generated a robust debate among prominent corporate law scholars,[34] Delaware judges,[35] investors,[36] and the SEC, the main public regulatory authority for corporate entities.[37] Part VI discusses the general contours of policy reform, given the evidence.[38]

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printing and distribution costs. *See, e.g.*, Gordon, *supra* note 10, at 475–76, 478–81.

[34] *See, e.g.*, Bebchuk, *supra* note 10, at 699 (arguing that leaders of contested corporate elections should be reimbursed if they garner one-third of shareholder votes). However, not all commentators want shareholders to have a voice in management of the firm. *See, e.g.*, Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 742–43 (2007) (arguing that Bebchuk's proposed reform is "something that no one wants and no one needs, something contrary to long history and successful practice, and something that is not supported by empirical data or by successful comparative experience."); Stout, *supra* note 10, at 790–91 (2007) (responding that the notion that shareholder control over public campaigns will create benefits is the "myth" he argues that "[a]n extensive literature on the theory of the corporation . . . suggests that shareholders enjoy net benefits from board governance. This is because board governance, while increasing agency costs, also promotes efficient and informed decision-making, discourages inter-shareholder opportunism, and encourages valuable specific investment in corporate team production."); *see also* Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315, 351 (2008); Julian Velasco, *Taking Shareholder Rights Seriously,* 41 U.C. DAVIS L. REV. 605 (2007) (arguing for greater access to company proxy materials).

[35] *See, e.g.*, Leo E. Strine, Jr., *Response to Increasing Shareholder Power: Toward a True Corporate Republic: A Traditionalist's Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759 (2005); E. Norman Veasey, *The Shareholder Franchise is Not a Myth: A Response to Professor Bebchuk*, 93 VA. L. REV. 811, 816–18 (2007) (arguing that there is no need to reform corporate law rules to increase shareholder power to replace directors in elections).

[36] The SEC has received thousands of comment letters from investors and other interested parties about proposed changes to the proxy voting system in public companies. *See* Cynthia Campbell et al., *Current Perspectives on Shareholder Proposals: Lessons from the 1997 Proxy Season*, 28 FIN. MGMT. 90 (1998).

[37] *See, e.g.*, Security Holder Director Nominations, Exchange Act Release No. 48,626, Investment Company Act Release No. 26,206, 68 Fed.

The significance of this Article is threefold. First, this Article expands upon previous empirical work on the nature of contested corporate elections, which fails to directly take into account challenger identity in shareholder-led campaigns. This article remedies that gap, showing that retail investors are essentially missing in action. Second, this Article identifies particularly nettlesome problems that arise when shareholder-led campaigns are launched almost exclusively by a narrow group of challengers. Third, this project helps point the way to legal reform.

II. ABSENCE OF CHALLENGES

This Part briefly presents the most recent empirical research on the scarcity of shareholder-led campaigns at U.S. firms. A discussion on whether there is a shortage of campaigns by retail investors raises two more specific questions: (1) whether there is a shortage of overall challenges; and (2) whether there is a shortage of a specific type of challenges (e.g., control challenges). As will be shown, shareholder campaigns are rare and control challenges are even rarer.

Reg. 60,784 (proposed Oct. 23, 2003) (providing for open access to the firm proxy statement).

[38] In a companion article, the author presents the debate about policy reform among academics in more detail and suggests one workable policy solution. Lee Harris, *Shareholder Campaign Funds* (on file with author). In short, the author discusses a funding scheme for shareholder campaigns based on principles similar to the funding mechanism in the political sphere, the Presidential Campaign Fund. Uniquely, the presidential funding system revolves around check-off funding for eligible presidential aspirants. Candidates can rely on public funding to the extent that taxpayers agree to direct a small sum, three dollars, from their tax return to the presidential campaign fund. That is, as in presidential campaigns, the "governed"—here, shareholders—could be asked annually (via the firm's required proxy statement communication) to devote a nominal sum to create a "Shareholder Campaign Fund." The fund would reimburse eligible shareholder campaigns and, with any luck, expand both the number and type of shareholder campaigns and diversify the source of those who are able to launch such campaigns in the first place.

A. Overall Challenges

The first data to consider are the overall number of contested corporate elections. A contested corporate election may take place when a challenger launches a campaign to elect a rival slate to the board of directors of the firm. Both the challenger and the incumbents solicit votes from shareholders through the so-called proxy system. That is, contestants seek as many shareholder votes, or proxies, as possible in advance of the annual meeting (or special meeting) where they may cast the proxies.[39] However, challenges do not always revolve around elections to the board of directors, though that is the most frequent issue.[40] Independent challenges may also involve any other issue of firm governance—for example, approval of a shareholder proposal or rejection of a management proposal—whereby a challenger launches a stand-alone campaign to solicit the support of other shareholders for (or against) a proposal.[41]

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[39] DEL. CODE ANN. tit. 8, § 212(c) (2005); 17 C.F.R. § 240.14a-16(a)(1) (2008); MODEL BUS. CORP. ACT. § 7.22(b) (2005). *See also* HARRIS, *supra* note 10, at 221–33. Notably, a challenger may also make a nomination at the firm's annual meeting. *See* DEL. CODE ANN. tit. 8, § 211(b) (2005) (providing that *any* proper business may be transacted at the annual meeting) (emphasis supplied); *see also* Levitt Corp. v. Office Depot, Inc., No. 3622, 2008 Del. Ch. LEXIS 47 (Del. Ch. Apr. 14, 2008) (providing that a shareholder may make a nomination at the firm's annual meeting without advance notice, so long as such nomination is not inconsistent with the firm's by-laws); *see, e.g.*, GEORGESON, *supra* note 5, at 49 (noting that dissident nominations were made at Take-Two's annual meeting).

[40] In 2007, there were fourty-six contested solicitations. *See* GEORGESON, *supra* note 5, at 48–49. Of those, at least thirty-eight, or eighty-three percent, were challenges related to elections to the board of directors. *Id.*

[41] *See supra* note 12. Additionally, it is worth noting that SEC rules provide that shareholders may make proposals that must be included as part of the proxy materials the firm distributes to all shareholders. Shareholders making such proposals can avoid some disclosure obligations as well as the costs of dissemination. Interestingly the procedural barriers for access to the issuer proxy statement are relatively low. Shareholders need only hold a relatively modest stake in the firm for a year or longer, make a brief proposal limited to 500 words, and transmit the proposal to

For instance, in one 2007 contested corporate election, the challenger campaigned to prevent CVS Caremark from backdating stock options.[42]

Another example involves one of the most iconic CEO's of recent times, Michael Eisner, and one of the most iconic companies, Topps, the maker of the eponymous baseball cards and of Bazooka bubble gum. During the 2007 proxy season, shareholders of Topps launched a campaign in opposition to a management proposal for merger.[43] The management of Topps recommended that the company merge with Torante, a private-equity fund managed by Eisner, the irascible former leader of Disney.[44] Although Torante's merger offer would have provided a 9.4% premium for Topps shareholders, the opposition believed the merger significantly undervalued Topps.[45] In a certain sense, they turned out to be right, since their opposition led to a higher offer for Topps from rival Upper Deck, another baseball card company.[46] Still, shareholders ultimately sided with management, and the challengers lost their contest.[47]

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the firm a reasonable time in advance of the annual meeting. *See generally* Rule 14a-8, 17 C.F.R. § 240.14a-8; Rule 14a-7 and 14a-2, 17 C.F.R. § 240.14a-2(b)(1).

[42] *See, e.g.*, Amalgamated Bank LongView Collective Investment Fund, Definitive Proxy Statement, Contested Solicitation (Form DEFC 14A), at 1 (Apr. 23, 2007), *available at* http://www.sec.gov/Archives/edgar/data/64803/000113760407000013/defcfinal.txt (filed under registrant CVS/Caremark Corp.) (disclosing campaign in support of shareholder proposal to avoid backdating).

[43] *See* Crescendo Partners II, Definitive Proxy Statement, Contested Solicitation (Form DEFC 14A) (May 21, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1219602/000119380507001371/e602144_defc14a-topps.htm (filed under registrant The Topps Co.).

[44] Kaja Whitehouse, *Topps Agrees to Eisner-Led Offer But Opposed as 'Undervalued'*, WALL ST. J., Mar. 7, 2007, at B4.

[45] *Id.*

[46] Mike Barris, *Topps Calls 'Time' on Deal Vote—Bid Backed by Eisner is Facing Likely Failure; Chance to Woo Investors*, WALL ST. J., Aug. 28, 2007, at C5.

[47] *See* GEORGESON, *supra* note 5, at 49.

The number of overall challenges is important to retail investors. A greater number of independent campaigns can theoretically provide value-enhancing benefits to the firm and its shareholders, regardless of the contest type (i.e., control challengers or non-control challengers) and regardless of contestant identity (e.g., hedge fund versus retail investor).[48] For instance, the number of overall independent challenges might have some generally positive disciplinary effect on the conduct of managers.[49] If challenges are frequent, managers will take the prospect of a challenge seriously and try to avoid conduct that creates an atmosphere conducive to a challenge. Managers might pursue shareholder interests and avoid the appearance of using their position to further their own interests. Further, any contested election forces incumbent managers to explain their actions and rationale to shareholders as they campaign for shareholder support.[50] This in and of itself is valuable

[48] It should be noted that this data only includes instances of public campaigns. One possibly significant shortcoming, however, is that the data does not provide a glimpse into how many non-public campaigns take place. Briggs, *supra* note 30, at 709 (correctly noting that "empirical and other academic studies that review only 'proxy fights' while excluding pressure campaigns and most contest settlements miss this considerably large universe of shareholder activism entirely, and consequently unintentionally understate its significance"). The point is that challengers have several alternative mechanisms for putting pressure on managers, besides public, contested elections. *Id.* at 689–95 (discussing various strategies). Still, the public, contested election is one of the only ways (besides a tender offer) to oust under-performing managers, which makes this method of activism an important sword. Thus, while the results of this conduit of shareholder activism should not be overstated, its *importance* cannot be.

[49] Bebchuk, *supra* note 10, at 679–70 (noting that directors have divergent interests that are checked by the prospect of contested elections); Lucian A. Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests,* 78 CAL. L. REV. 1073, 1077–78 (1990) (arguing that contested corporate elections facilitate beneficial changes in control despite incumbent opposition).

[50] This is comparable to the beneficial effects of a contested political election. In a contested election, the incumbent has to make a case to her constituency.

and counterbalances other rules—like the business judgment rule—that insulate managers from having to explain their business decisions to anyone.[51]

Overall, however, there were very few challenges to incumbents at public companies. A previous report found that shareholders launched little more than two dozen election contests per year.[52] Most of these challenges were at smaller companies.[53] Consistent with this data, another study by Thomas Briggs found that there were only fifty-two public campaigns across the twenty-month period from January 2005 to August 2006, or approximately thirty-one per year.[54] Finally, in a highly influential article, Lucian Bebchuk recently found that there appear to be very few shareholder-led challenges.[55] Overall, Bebchuk finds that, over a ten-year period (1996–2005), there were 303 challenges, or about thirty challenges per year.[56]

The chart below presents an updated look at the data on contested elections. The author's updated findings are similar to Bebchuk's and Brigg's initial findings. In 2006, 2007, and 2008, the last years for which there is available data, the author found 133 total contested challenges for an average of forty-four for each of those years.[57] As shown below, over the updated ten-year period (from 1999–2008),

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[51] *See, e.g.*, Kamin v. American Express Co., 383 N.Y.S.2d 807 (N.Y. Sup. Ct. 1976), *aff'd*, 387 N.Y.S.2d 993 (N.Y. App. Div. 1976) (describing the business judgment rule).

[52] *See* Choi & Fisch, *supra* note 25, at 300 (citing Edward Robinson, *Sam Wyly, Cowboy Investor*, BLOOMBERG MARKETS, (Sept. 2001)).

[53] *Id.*

[54] Briggs, *supra* note 30, at 696.

[55] *See* Bebchuk, *supra* note 10. The Bebchuk piece spawned a spate of responses in the same volume. *See* Edward M. Iacbobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515 (2007); Martin Lipton & William Savitt, *supra* note 34, at 733; Macey, *supra* note 10, at 759; John L. Olson, *Professor Bebchuk's Brave New World: A Reply to "The Myth of the Shareholder Franchise,"* 93 VA. L. REV. 773 (2007); Stout, *supra* note 8; Veasey, *supra* note 35, at 811.

[56] Bebchuk, *supra* note 10, at 683.

[57] Author's calculations. For dataset, see GEORGESON, *supra note* 12, at 47, http://www.georgeson.com/usa/download/acgr/acgr2008.pdf.

there were a total of 359 challenges, or an average of nearly thirty-six per year.

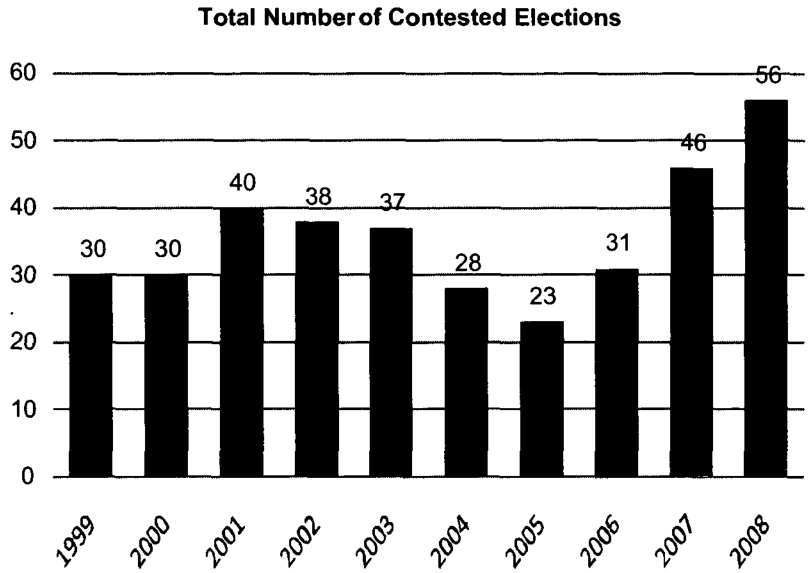

Chart A

It is worth mentioning early that one possible critique of these numbers is the absence of context. As others have suggested, it is difficult to know without a control group whether thirty-two per year is a sufficient number of contested corporate elections.[58] Absent a poll of shareholders, it is not possible to discern how many campaigns would satisfy shareholder preference. For now, what can be said is that the overall number illustrates that challenges are exceedingly rare. Thus, it is unlikely that the incidence of campaigns overall creates much disciplinary

[58] *See, e.g.*, Macey, *supra* note 10, at 760–65. Previous authors have given good, but not completely satisfactory, responses on this point. *See, e.g.*, Bebchuk, *supra* note 10, at 688 (suggesting that the number of campaigns is low given "the large number of public companies" and shareholder dissatisfaction). In a companion article, the author demonstrates how the right policy reform can respond to this criticism. For a short summary of the argument made therein, see *supra* note 38.

pressure on managers to pursue shareholder preferences (although they may feel pressure to perform well for other reasons), or makes managers more deliberative and deliberate, or reinforces notions of shareholder democracy.

B. Control Challenges

Second, control challenges—challenges for board seats as in the AirTran example discussed earlier—also seem to mitigate the prospect of mismanagement by incumbents at firms. More than other types of contested elections, a control election puts into play the possible ouster of current board members and their replacement by the challenger's nominees. Even with respect to director elections, there are important differences. Some contested elections over board seats are true control elections, in which a challenger seeks election of nominees for a majority of the board seats. Other elections are contests over so-called short slates—elections for only a less-than-majority of board seats.

Imagine that a board of directors is comprised of nine members. In a true control election, a challenger would launch a campaign for five or more seats. If successful in at least five contests, the challenger would effectively control the board and the firm, since boards generally make decisions based on majority rules. If a challenger only mounts a campaign for fewer than five seats—say, three out of nine—the challenger has not launched a true control challenge, since they will not be able to ensure success on board votes.[59] Even with only three seats, however, a

[59] In these cases, only a portion of the board of directors will come up for election in a given year. Because of norms and state corporate codes on this point, when firms decide to go to staggered elections, this usually means that one-third of the board will be up for election. Thus, although boards have annual elections, many firms stagger their elections. *See, e.g.*, DEL. CODE ANN. tit. 8 § 141(d) (2009) (providing that firms may stagger director elections); *see also* HARRIS, *supra* note 10, at 127 (noting that boards often elect one-third of positions at elections). To win true control in cases of a staggered board, a challenger must launch multiple successful campaigns. For instance, in the Midwest/AirTran case, the challenger, AirTran, won its contest for three seats, but not true control of the nine-

challenger is able to wield enormous influence on firm operations.

Since the control challenge means that the incumbents might lose their position on the board and perhaps their career and livelihood, these types of challenges are thought to exact real discipline on manager conduct. In other words, managers will behave well in order to avoid control challenges from disgruntled shareholders and take seriously the threat of such challenges. Thus, the frequency (or scarcity) of such challenges is telling. If too low, managers can safely presume that no control challenge will take place and the market disciplining feature of the power is lost. Insufficiently frequent control challenges might also indicate the need for legal reform to encourage more control contests. At the very least, a low number would suggest an area of inquiry for reform-minded thinkers and policy-makers. On the other hand, if there are a significant number of control challenges, then the need for legal reform is not apparent.

On this point, other authors, including Bebchuk, have found that control challenges are extremely rare. Bebchuk finds that control challenges—specifically, challenges to gain control of the firm as a stand-alone entity—occurred 118 times over the ten-year period in his sample, for an average of about twelve times per year.[60] Other researchers have concurred, finding very low incidence of control challenges. Ikenberry and Lakonishok, studying a twenty-year period (1968 through 1988), found a total of 150 contested elections for an average of around eight control challenges per year.[61] Of these, they found that approximately about a third of the challenges were minority slates, which, if successful, would

member board of directors. AirTran would have only been in true control of the company if it could gain at least five seats or win two of three seats up for election at the next annual meeting. *See Suitor for Midwest Air Wins Board Seats*, N.Y. TIMES, June 15, 2007, at C10.

[60] Bebchuk, *supra* note 10, at 685–86. As for challenges related to a plan of merger or acquisition, Bebchuk reports an additional eighty-eight such challenges, or about nine per year. *Id.*

[61] Ikenberry & Lakonishok, *supra* note 22, at 408.

give the challenger a seat on the board, but not control of the board.[62]

At this point, it is important to elaborate even more on the nature of control challenges, since this is somewhat of a bone of contention between researchers (including Bebchuk and this author). Change of control can be associated with a contested corporate election in at least two ways. In the first type of contest for control, a shareholder would mount a campaign for seats on the board of directors. The shareholder-led campaign would typically seek to install an entirely new slate of directors, replacing the incumbent directors with the challenger's nominees. The entity will continue to operate as a stand-alone entity, as before the incumbents' ouster.

A second way to change control in a firm in connection with a contested election utilizes the same procedures, except that the contest is mounted by an acquirer also intending to acquire a controlling stake in the firm by buying out other shareholders. The contested election is simply an early step in the acquisition of the firm and its integration into the acquirer's portfolio. Before the acquirer can integrate the firm, the acquirer must launch a contest for control of the board because it will need a friendly board to amend the articles of incorporation and redeem any takeover defensive measures.[63] Usually, this type of acquirer has a distinct advantage compared to a shareholder-led campaign not related to an acquisition. Since the acquirer intends to acquire all the shares of the firm, the campaign on the rival slate is analogous to a referendum on the acquirer's offer price.[64]

The Bebchuk analysis reveals that one of the core problems with contested elections currently is that there is a shortage of the first type of control challenges—i.e., challenges to replace the board and manage as a stand-alone

[62] *Id.*

[63] Bebchuk, *supra* note 10, at 684–85.

[64] *Id.*

entity.[65] Thus, Bebchuk defines change-in-control transactions narrowly.[66] In his analysis, he does not count as a control challenge those related to a takeover or sale of the company. Bebchuk only includes challenges by reform-minded shareholders or entities who intend to continue to run the firm as a stand-alone entity. Again, as for challenges to gain control of the firm as a stand-alone entity, Bebchuk reports that there were 118 challenges over a ten-year period for an average of about twelve per year.[67]

However, a control challenge involving a takeover attempt may exact a similar sort of discipline on managers.[68] Thus, this study includes these challenges in order to get a clearer picture of how often a contest for control takes place. Using the same data set as Bebchuk, but including challenges to the company as a stand-alone entity *and* those connected with a takeover, the number of challenges jumps to 206 over the ten-year period, for an average of about twenty-one challenges per year.[69] In many years, there were nearly as many contests for control in connection with a sale

[65] *Id.* at 688 ("We have seen that the incidence of electoral challenges by a rival team seeking to run the company better is quite small—and successful such challenges are quite rare.").

[66] *Id.* at 685 (noting that "the question we are examining here concerns the incidence of election contests over the management of a company as a stand-alone entity").

[67] *Id.* at 685–86. As for challenges related to a plan of merger or acquisition, Bebchuk reports an additional eighty-eight such challenges, for an average of about nine per year. *Id.*

[68] Even Bebchuk would admit as much. *See id.* at 684–85 ("Of course, the number of contests in this category is relevant for assessing the disciplinary force of the market for corporate control."). At the same time, however, in some ways, Bebchuk's thought to separate the two makes sense. That is, these other mechanisms are in many ways less desirable than launching a contest to continue as a stand-alone entity. For instance, although through a hostile acquisition an acquirer can oust or discipline poor-performing managers, such a move would be extremely costly. They would have to buy up a controlling stake, which would require ample free cash flow or access to financing. Thus, the absence of contests is worrisome insofar as shareholders' only other formal method of disciplining managers may be the ill-fitting hostile takeover.

[69] *Id.* at 686.

of the company as there were contests simply to sack · current directors and install a new board. In fact, as · chart below shows, in 2000 and 1997, the author found m contests involving sale than control contests to install a n governing board.

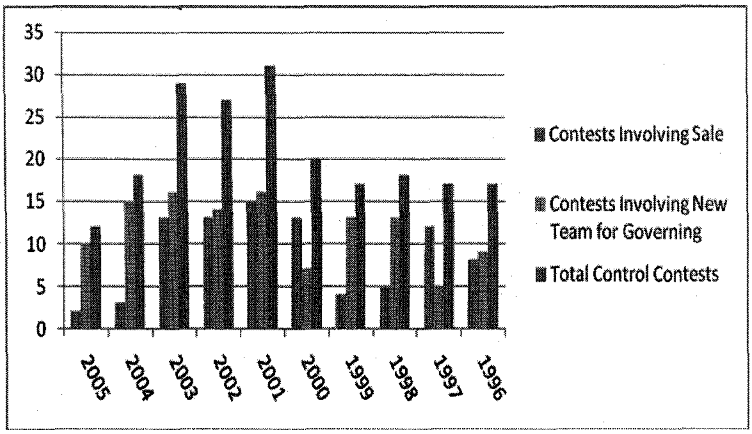

Chart B

However, even at twenty-one challenges per year, sı challenges are still rare. Importantly, contests for contı either related to sales or to a stand-alone entity, repres the largest share of overall contests, approximately sixty-percent on average.[70] Nonetheless, given their scarcity, i highly unlikely that managers would reasonably expec challenge to control. Thus, absent legal reforms, the pov of shareholders to launch a control challenge is unlikely exact significant discipline upon managers.

III. ABSENCE OF CHALLENGER DIVERSITY

The research presented thus far generates a useful a nearly complete picture of corporate elections in terms of incidence of challenge overall and type of challenge (i control versus non-control). Recent studies, however, ha not offered hard evidence regarding the identity

[70] Bebchuk, *supra* note 10, at 686.

challengers in corporate elections.[71] This project breaks new ground by hand-collecting a database of the identities of participants in contested corporate elections since 2006, the first year complete information is available from the SEC's database, EDGAR.[72] The assembled database includes full information—such as contestant identity, share ownership, win/loss, and campaign expense estimates—on all contested corporate elections in 2006, 2007, and 2008.

Challenger-identity information is important for a variety of reasons.[73] Most obviously, if the challengers are unrepresentative, then so, too, will be their challenges. Challenges that originate predominately from the same special interest groups will similarly revolve around a limited set of objectives, which may not be representative of what other shareholders desire and perhaps less likely to enhance value.[74]

In addition, challenger-identity might give a clue as to how reform, if needed, should be structured. For instance, if the evidence suggests that retail investors rarely launch a challenge, regulatory reform might specifically encourage challenges from this subgroup. The next part remedies this gap in the literature using the most recent data on contested corporate elections. The data are worrisome. Shareholder-led campaigns appear to emerge from the same kind of challengers. Shortly, the evidence suggests that primarily private-investment entities (usually hedge funds and other private-equity vehicles) launch challenges. Small stakeholders, like retail investors, almost never launch them.

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[71] *But see* Briggs, *supra* note 30 (discussing hedge fund activism).

[72] *See supra* note 32.

[73] Indeed, on some level, Bebchuk recognizes that the identity of the challenger matters. For instance, his classification scheme groups contested elections mounted by potential acquirers separately. Bebchuk, *supra* note 10, at 686.

[74] Bebchuk, *supra* note 24, at 883 (noting how some shareholders have different objectives and investment strategies and referring to these shareholders as "special interests").

A. Institutional Challenges

Institutional shareholders, not individual shareholders, launched the vast majority of recent challenges. Based on information about the lead challenger identified by Georgeson, the proxy-solicitation firm, individuals led less than thirty percent of contested corporate challenges over the last ten years.[75] As the chart below shows, the lowest percentage of contests launched by individual investors was in 1999, when individuals launched only ten percent (3 out of 30) of all contests. Even at their most active (2002), individuals only led approximately thirty-nine percent (15 out of 38) of challenges at public companies. In no year did individuals launch even half of that year's challenges.

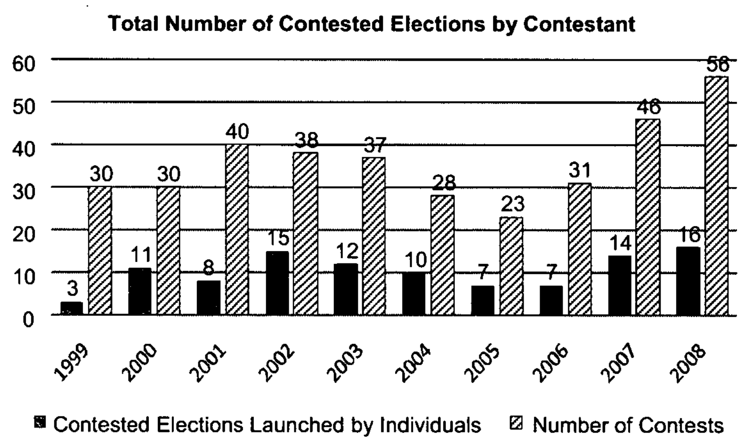

Chart C

The general finding that institutions launch a relatively large number of challenges is, in some ways, not extremely surprising. Institutional investors frequently own relatively large (though not frequently controlling)[76] stakes in public

[75] Author's calculations. For dataset, *see* GEORGESON, *supra* note 5.

[76] *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 15 (1991) (noting that there are very few controlling shareholders, even among institutional investors); Brav et al., *supra* note

companies.[77] For instance, the author's data show that from 2006 to 2008 institutional challengers controlled on average more than four million shares in target companies and nearly nine percent of outstanding stock.[78] Thus, they have sharper economic incentives to launch a contest. What is potentially troubling, however, is the nature of the institutional investors who tend to launch contests.

The institutions noted above, for example, are often *not* public pension funds, mutual funds, or other similar institutions, which also tend to own relatively large positions in public companies.[79] If public pension funds, mutual funds, or similar institutions, were launching the majority of challenges there might be good reason to believe that the interests of small retail investors were being served in those contests. Such institutions are likely more responsive to the preferences of small shareholders, since they likely draw their capital directly from a diverse investor class. Rather, the vast majority of institutional challenges came from private firms, including firms such as Everest Management, Breeden Capital Management, Steel Partners II, and PL Capital.[80]

22, at 5 (finding in a sample of activist hedge funds that the median ownership stake was about 9.1 percent).

[77] *See generally* Brav et al., *supra* note 22, at 18 (finding that the median book value of the stake in a sample of activist hedge funds was $15.8 million).

[78] Author's data:

Institutional Challenger vs. Individual Challenger Ownership (as Percentage of Outstanding Shares)									
10%		25%		Median		75%		90%	
1.66	0.00	5.34	0.33	8.19	5.14	11.94	10.0	15.23	14.54

[79] *See, e.g.*, Choi & Fisch, *supra* note 25, at 318 (noting that public pension funds manage one-fifth of public equities); SIFMA 2007 FACT BOOK, *supra* note 11, at 69 (reporting that market value of mutual funds is nearly $5 trillion and climbing).

[80] This finding is consistent with previous work that has noted increasing shareholder activism from hedge funds. *See generally* Brav et al., *supra* note 22 (reporting findings on hedge fund activism); Marcel

As an emerging and intriguing line of research led by scholars like Lynn Stout and Iman Anabtawi has shown, some of the characteristics of these private investment entities tend to suggest that they launch challenges in pursuit of a strategy that may be markedly dissimilar from that which is desired by retail investors.[81] Many of these private entities are limited partnerships, generally vehicles for wealthy individuals and institutions to deploy their capital in U.S. firms. These entities are not usually open to small stakeholders or investments from retail investors.[82] In fact, the law frequently precludes such funds from taking investments from retail investors.[83] Because they are not

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Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1024–42 (2007) (same); Briggs, *supra* note 30 (same); *see also* Choi & Fisch, *supra* note 25, at 298–301.

[81] Interestingly, Stout and Anabtawi suggest that the different characteristics of shareholders make the case for *limiting* shareholder voice in firm affairs. *See, e.g.*, Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 564–65 (2006) ("Once we recognize that shareholders have significant private interests, it becomes apparent that they may use any incremental power conferred upon them to pursue those interests to the detriment of shareholders as a class. As a result, transferring power from boards to shareholders will not necessarily benefit all shareholders . . . . This outcome, of course, is the opposite of that predicted by proponents of increasing shareholder power."). In this Article, the author reaches an opposite conclusion. That is, Stout and Anabtawi seem to suggest that policy reforms should limit the reach of shareholder rights in the hopes of tamping down the reach of the large institutional players, like hedge funds. However, another way of equalizing the playing field among heterogeneous investors is by subsidizing the activist activities of the smaller players.

[82] *See generally* Houman B. Shadab, *Fending for Themselves: Creating a U.S. Hedge Fund Market for Retail Investors*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 251, 252–53 (2007) (discussing prohibition on investment in hedge funds by retail investors).

[83] *See id.* To be sure, retail investors are arguably indirect investors in these funds through their pension contributions and investments in some mutual funds. For instance, pension funds and other institutional investors, which invest capital on behalf of individual beneficiaries, frequently have stakes in these private investment vehicles. The point, however, is that retail investors are not direct investors in these funds and have no direct voice in these funds' operations. That is, under SEC

participants in these funds, retail investors' well-being is not usually the objective of hedge-fund investment strategies.[84]

In addition to the important differences in the kinds of investors supplying capital, another characteristic of private investment entities not shared by retail investors is the composition of their portfolios. These private funds are usually run by a small cadre of investment professionals who usually have a small number of serious investments.[85] They are not beholden to regulatory requirements to diversify, as are pension funds and mutual funds, and thus they tend to concentrate their investments strategies on one or two companies.[86] The high concentration of these funds makes them very dissimilar to the investment portfolio of the average shareholder, who owns a stake in a fully-diversified pension fund or mutual fund.[87] This failure of diversification affects fund managers' strategy.

To take a generic case, consider how diversification affects an investor's tolerance for risk-taking. A failure to diversify across industry may mean that the undiversified investor will want to avoid undue risk-taking by firm

regulations, funds that raise money from average investors are deemed to have made a "public" offering, which requires several formal disclosures. *See* Schedule A (providing a list of items to be included in the registration statement for "public" offering); *see also* Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 900–01 (5th Cir. 1977) (distinguishing private placements and public offerings).

[84] *See supra* note 83.

[85] *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1279 (2008) (noting that hedge funds do not diversify, but rather "take large position in as few as two or three companies and then demand that those companies pay special dividends, launch massive stock buyback programs, sell assets, or even put themselves on the auction block . . . ."). *See generally* Lee Harris, *A Critical Theory of Private Equity*, 35 DEL. J. CORP. L. 259 (2010).

[86] *See* Anabtawi & Stout, *supra* note 85, at 1278–79.

[87] *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 583–84 (2006) (citing JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM 3 (2000)) (noting that "universal owners," defined by their diversification, "are thought of as 'owning the economy'"); *see also* SIFMA 2007 FACT BOOK, *supra* note 11, at 67 (finding that over forty percent of U.S. households own mutual funds).

managers, since these risks would have an outsized effect on their investment. On the other hand, an investor who is diversified across an industry should be more tolerant of risk-taking by a particular company, since that single company represents only a small slice of their portfolio and the risk might produce large gains.[88]

Additionally, many private investment entities, like hedge funds, are not always interested in enhancing a firm's long-term value.[89] Rather, they frequently expect to hold their investment only for a short time.[90] In fact, according to some reports, hedge funds turn over their entire portfolio, on average, three times per year.[91] This is in marked contrast from the investment horizon of average individual shareholders, who tend to hold their investments for prolonged periods.[92] This difference in time horizon also suggests that the identity of challengers in contested corporate elections is significant. Investors like hedge funds, with a shorter time horizon on their investment, likely adopt strategies that promote a sharp rise in the share price or means of a quick exit—e.g., special dividends, share

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[88] *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 585 (2006) (explaining how differences in diversification might create strong or weak preferences when it comes to negative externalities of management decisions and preferences for a merger); *see also* Joy v. North, 692 F. 2d 880, 885–86 (2d Cir. 1982) (describing risk-taking and diversification strategies of shareholders).

[89] Anabtawi, *supra* note 81, at 564 (comparing short-time horizon of hedge funds to long-term horizons of pension funds).

[90] *See* Anabtawi & Stout, *supra* note 85 at 1290–91. *But see* Brav et al., *supra* note 22, at 4, 19–20 (noting that hedge funds hold stakes somewhat longer than traditionally thought).

[91] Anabtawi, *supra* note 81, at 579 (explaining the difference between short-term and long-term investors and noting how such difference in time horizon can create different management strategies); *id.* at 581 ("For example shareholders with a short timeframe will favor the inflation of current share prices at the expense of long-run value. On the other hand, long-term investors will be willing to sacrifice immediate profits for future appreciation."); *id.* at 580 (discussing turnover rate for hedge funds).

[92] *See* Anabtawi & Stout, *supra* note 85, at 1291; *see also* Anabtawi, *supra* note 81, at 579–80 (noting that pension fund shareholders are "concerned about the long-term value of its investments").

repurchases, merger—even though such strategies might not enhance long-term firm value.[93]

Finally, these private investment entities often have several layers of relationships that create conflicts of interest, which influence their investment strategies, often at the expense of retail investors' interests.[94] Admittedly, the magnitude of this effect is disputed among academics.[95] Nonetheless, some research has shown that hedge funds often have stakes in a handful of companies and frequently use those stakes (and the accompanying right to launch a campaign) to enhance their returns in one investment, even at the expense of another. The following complex but relevant scenario helps illustrate how conflicts of interest might produce a short-sighted strategy.

Imagine that an investment firm, Fund *X*, owns shares in two companies, Company *T* for Target and Company *A* for Acquirer. Fund *X* might threaten to launch a contested corporate election against the board of Company *A*, the potential acquirer, if Company *A*'s incumbent board of directors fails to make an acquisition of Company *T*. In this way, Fund *X* can expect amplified returns on its investment

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[93] Anabtawi & Stout, *supra* note 85, at 1291 (describing several strategies that might improve short-term share price, but not necessarily improve long-term company value).

[94] *See, e.g.*, Peter Laltman, *Fortress Clashes on Both Sides*, WALL ST. J., Jul. 14, 2009, at C1 (discussing conflicts of interest when private equity firms, like Fortress, have both debt and equity in the same firm); *see also* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 816 (2005) (describing a case where Perry, a hedge fund, took a investment position in both the Target and the Acquirer to ensure that a stock-for-stock merger was consummated).

[95] *See, e.g.*, Briggs, *supra* note 30, at 702–03 (arguing that fund conflict of interest is not a significant concern) ("[H]edge fund activism has shown that hedge fund activists rarely pursue strategies that cannot withstand the light of day."); Henry Manne, *Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle*, 64 COLUM. L. REV. 1427, 1441–42 (1964) (arguing that shareholders have identical interests, with few exceptions); Brav et al., *supra* note 22, at 8 (noting that hedge funds might have fewer conflicts of interest than other potential stakeholders, like mutual funds or pension funds).

in *T*, once the acquisition goes through, even though this strategy might come at the expense of the other shareholders in *A*.[96] Although the exact incidence of such transactions is probably unknowable, the available evidence suggests that this is an increasingly common strategy among fund managers.[97]

A fund manager might also hold conflicting investments within the same company due to the different rights afforded by preferred shares, debt, options, and common stock.[98] For instance, a fund manager might manage an investment in debt and an investment in equity.[99] The fund manager

[96] The author has tried to describe this strategy as simply as possible and, as a consequence, has left out at least one important moving part. For instance, one might suppose that the gains from the run-up in share price in *T* would be offset by the loss from declines in the share price of *A*. However, the Fund anticipates this and buys "insurance" against any declines in *A*. That is, the reason Fund *X* can afford to take a loss on the decline in *A*'s stock is because prior to making the threat, Fund *X* enters into an insurance contract or otherwise hedges their position in *A*. Thus, Fund *X* merely acquires a stake in *A* to make a campaign threat, not because Fund *X* have any real economic interest in seeing *A* (and *A*'s shareholders) prosper. For a slightly more detailed description of this scenario (among others) and actual cases from which it is based, see Anabtawi & Stout, *supra* note 85, at 1258–59, 1286–88. *See generally* Hu & Black, *supra* note 94, at 811 (describing various ways funds can separate economic interest from power to vote in contested corporate elections).

[97] For recent empirical research on the incidence of conflicts of interest and hedge fund activism, see Briggs, *supra* note 30, at 681 (finding that hedge-fund activism possibly involves a conflict of interest in at least twelve percent of cases, if not more); Hu & Black, *supra* note 94, at 844-846 (explaining that the growth of decoupling strategies is likely to increase); Hu & Black, *supra* note 94, at 846 (noting that new decoupling strategies by hedge funds and others is "undisclosed, its extent is necessarily unknown").

[98] *See* Hu & Black, *supra* note 94, at 935 (describing decoupling strategy of hedge funds, like using borrowed shares to profit from put options).

[99] For a description of an investment in debt and equity in a private equity fund, see Pardus Capital, Definitive Proxy Statement (Form DEFC14A), at Annex A (Dec. 29, 2005), *available at* http://www.sec.gov/Ar

might be able to use its investment in common stock (and the accompanying rights, such as the right to launch a challenge) in order to enhance the value of its debt investment. The fund manager might do this even though the strategy might harm the value of her investment in common stock and, as a consequence, harm other shareholders.[100]

In the end, because not all shareholders are created equal, the challenger's identity can have significant consequences on the nature of a challenge and challenger strategy.[101] As seen, challengers can have markedly different characteristics along several indicators—make-up of investor class, composition of portfolio, investment horizon, and conflicts of interest. Thus, it is significant that the vast majority of challenges, as the data show, come from institutional investors rather than individuals.

B. Individual Challenges

Additionally, a close look at the individual challenges reveals that many of these challenges were not by retail investors who tend to own only a small stake in the company.[102] Rather, when individuals did launch challenges,

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chives/edgar/data/770944/000095014205003324/defc_14a-bally.txt (describing trading in Bally shares and investment in Bally debt).

[100] Anabtawi & Stout, *supra* note 85, at 1289 (noting that activist funds can use the control rights, like the right to launch a campaign, to increase the economic value of other holding types).

[101] *Cf.* Edelman & Thomas, *supra* note 26, at 455–56 (noting that shareholder voting strategy should be modeled taking into account that shareholders are "heterogeneous in their stockholding and voting behavior").

[102] This data was compiled by the author from both company and challenger proxy statements. Proxy statements are required by law to include information about the individual or entity making the solicitation, information about the largest shareholders in the firm, and information about the directors and officers of the firm, among other disclosures. For a list of items required to appear in the proxy statement, see Schedule 14A. All proxy statements are publically available on the SEC database, Edgar. *See* Company Search, http://www.sec.gov/edgar/searchedgar/companysearc

they were typically launched by either the firm's largest shareholder or former insiders.

In fact, approximately twenty-eight percent of challenges were by the largest shareholder in the company. One-half of the individual challenges were by shareholders who own more than five percent of outstanding shares, the ownership level that triggers various mandatory disclosures to the SEC.[103] For instance, in 2007 Timothy Durham led a challenger group owning over nine percent of target CLST Holdings, a sizeable stake in a public company that would require the holder to make periodic public filings.[104] Also in 2007, Carl Icahn launched a high-profile challenge against the Motorola board of directors. Although his stake in Motorola at the time (approximately three percent) was below the five percent disclosure-triggering threshold, his stake was worth more than $1 billion, an enormous investment unachievable for the average retail investor.[105]

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h.html (last visited Mar. 1, 2010). Specific source information can be found in Appendix A.

[103] *See, e.g.*, 15 U.S.C. § 78m(d), (g) (2006) (providing that five-percent holders send various disclosures to the SEC); SEC Schedules 13D, 13G, 17 C.F.R. §§ 240.13d-101 to -102 (2005). In fact, the median challenger owned approximately eight percent of outstanding shares.

Challenger Ownership (as Percentage of Outstanding Shares)				
10%	25%	Median	75%	90%
0.16	4.33	7.94	11.5	15.04

This finding is generally in line with prior research. *See, e.g.*, Ikenberry & Lakonishok, *supra* note 22, at 413 (showing that the median challenger ownership level in contested corporate elections was 10.6%, significantly more than the holdings for others, including the incumbent directors).

[104] *See generally* Timothy S. Durham et al., Definitive Proxy Statement, Contested Solicitation (Form DEFN 14A) (July 12, 2007), *available at* http://www.sec.gov/Archives/edgar/data/913590/000114420407036376/v080796_prrn-14a.htm (filed under registrant CLST Holdings, Inc.).

[105] *See* Michelle Kessler, *Icahn Goes Up Against Motorola Today*, USA TODAY, May 7, 2007, at 1B (reporting that Icahn's stake was worth more than $1.2 billion); Icahn Partners, Inc. et al., Definitive Proxy Statement, Contested Solicitations (Form DEFC 14A) (Mar. 27, 2007), *available at*

That individual challengers are often exceedingly wealthy individuals or the largest stakeholders is problematic, because if the individual challengers are unrepresentative, so too will be their challenges. These challengers frequently pursue challenges that may not align with the preferences of other shareholders.[106] For instance, some wealthy challengers may launch a challenge in order to push through a sale of the company. Carl Icahn's challenge to the Yahoo board was just such a challenge. Icahn wanted to push through a challenge in order to force the Yahoo board to sell to Microsoft. This preference might not always be the same as other longer-term shareholders' preferences.[107] Unfortunately, however, in the current corporate election climate, these smaller-position holders have neither a realistic means of voicing their concerns nor the resources to mount a counter-campaign. This also means that the board of directors is more likely to be responsive to the needs of

http://www.sec.gov/Archives/edgar/data/68505/000092847507000081/defc14a032607.txt (filed under registrant Motorola, Inc.).

[106] *See, e.g.*, Choi & Fisch, *supra* note 25, at 301 (noting that political and personal interests underly some activist challenges); Anabtawi & Stout, *supra* note 85, at 1258 (noting that the interests of activist shareholders are "heterogeneous," and that "increasingly, the economic interest of one shareholder or shareholder group conflicts with the economic interest of others . . . [t]he result is that activist shareholders are using their growing influence not to improve overall firm performance, as has been generally been assumed, but to profit at other shareholders' expense").

[107] *See, e.g.*, Sam Ali, *Investor Taking Aim at Interchange*, STAR-LEDGER (Newark, N.J.), Apr. 19, 2005, at 33 (describing New Jersey investor Lawrence Seidman's strategy of waging corporate contests to push through a sale of the company, even though this strategy may not improve long-term value); Ken Alltucker, *Shareholders Asked to Urge Inter-tel Sale*, ARIZ. REPUBLIC, Sept. 26, 2006, at D1 (reporting on Steve Mihaylo's challenge to push through sale of Inter-tel to his own private investment firm); Jaclyn Giovis, *Parluz Inc.'s CEO Forced Out; Suits End*, SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 7, 2007, at 1D (reporting on Glenn Nussdorf's strategy to push a sale of the Parlux Fragrances to his own private investment firm for approximately eleven dollars per share, less than the firm's fifty-two week high).

larger shareholders, even when their views and opinions on the direction of the firm are perhaps idiosyncratic.

Other characteristics of the individual challengers also suggest that challengers may have viewpoints and objectives that differ substantially from rank-and-file shareholders. In some cases, the individual challenger was the founder of the target company or otherwise a current or former insider. To illustrate, in 2007, George Perlegos, the founder and largest shareholder of Atmel, launched a contest against the incumbent board. These kinds of insiders usually have a substantial amount of their wealth tied up in their firms (or former firms, as the case may be).[108] As a result, their appetite for risk is much different from other shareholders who may have a more diversified portfolio of investments and, as a consequence, are less concerned with risk-taking in one of their investments.[109]

Also, many of these company insiders and former insiders who launch challenges do so after they have been ousted by the board of directors.[110] This raises the possibility that the challenger not only has a unique perspective on the target, but also has unique objectives, such as blame and revenge against former board members who played a role in his removal.

[108] Anabtawi, *supra* note 81, at 584 (noting that "inside shareholders" and "founding-family shareholders" often "have their wealth disproportionately invested in a given company").

[109] *See* Shadab, *supra* note 82, at 266–67 ("Modern finance has one overriding lesson: investors can minimize risk by placing their capital into a diverse portfolio of securities from numerous different issuers and different types of assets . . . .").

[110] For instance, AIG's former CEO Maurice "Hank" Greenberg has recently threatened a high-profile contest against the board of AIG. *See* *Hank Greenberg Trying to Get His Hands on AIG*, N.Y. MAG., Sept. 16, 2008, *available at* http://nymag.com/daily/intel/2008/09/hank_greenberg_attempts_to_sav.html. This finding is consistent with an earlier study of proxy contests. *See* Peter Dodd & Jerold B. Warner, *On Corporate Governance: A Study of Proxy Contests*, 11 J. FIN. ECON. 401, 410 (1983) (finding that, in close to half of contests for board seats between 1962 and 1978, "the dissidents include either former board members, former high ranking officials of the firm or both").

Again, take George Perlegos' fight to win control of a majority of the board seats of Atmel. Perlegos, the founder of the company, was famously ousted as CEO.[111] Shortly thereafter, Perlegos filed a lawsuit against the firm for wrongful termination, and not long after he began his corporate election contest.[112] The challenge discussed earlier, by Sam Ringer, a co-founder and former executive of Lion, Inc., presents a similar pattern. In his filing, Mr. Ringer proposed a slate of nominees suggesting that, once elected, they would consider appointing him as CEO as the first order of business.[113] Even more telling is the case of John Nano.[114] Nano was ousted as CEO of Competitive Technologies and immediately filed a lawsuit against the firm for wrongful termination.[115] His corporate contest appeared to be as much about his termination as it was about improving firm performance. As part of his campaign, he wanted the ouster of the current incumbents and his old job restored to him, and he even promised to drop his lawsuit against the firm if his campaign were successful.[116] The takeaway from this latest year of contested corporate elections is that, other than large shareholders and former insiders, individual investors rarely launch a campaign for control.

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[111] *See* Brooke A. Masters, *A Clubby World Turns Aggressive and Combative*, WASH. POST, Sept. 16, 2006, at D1 (reporting on the incumbent board's firing of Perlegos and his subsequent lawsuit against the board).

[112] *See* Floyd Norris, *A Fired Boss Seeks His Revenge*, N.Y. TIMES, May 18, 2007, at C1; *see also* Masters, *supra* note 111.

[113] Lion, Inc., Definitive Additional Materials (Form DEFA 14A) (June 18, 2007), *available at* http://www.sec.gov/Archives/edgar/data/941179/000093041307005281/c49067_defa14a.htm (noting that the challengers "may seek to appoint Sam Ringer" and asserting that "the appointment of Ringer as CEO would be disastrous").

[114] *See* Committee to Restore Stockholder Value, Definitive Proxy Statement, Contested Solicitation (Form DFRN 14A) (Dec. 27, 2006), *available at* http://www.sec.gov/Archives/edgar/data/102198/000135656406000040/cttproxystatement12262006.txt (filed under registrant Competitive Tech., Inc.).

[115] *See id.* at 11–12.

[116] *See id.* at 13.

IV. ABSENCE OF CHALLENGER SUCCESS

Last, consider the rate of success in contested corporate elections. Rate of success is significant, because if the rate of success is too low, management can safely assume that even if a campaign is launched, the challenger will lose. If this is the case, management has every reason to shirk responsibility and redirect firm resources to personal ends without the worry that their malfeasance and power will be limited by shareholder-challengers.

Right now, after all, management has many of the advantages incumbents in a political election have. They have the funding advantage, as previously mentioned. They also have a pre-existing, perhaps long-standing, relationship with shareholders. They have perhaps convened shareholders meetings in the past, sent out glossy information to shareholders regarding the firm's successes, handled conference calls with shareholders, or even held press conferences with shareholders watching.

Also, if the rate of success is too low, then this suggests a need for legal reforms that might tip the balance in favor of shareholders who launch such contests. To counterbalance the power of their incumbency, such reforms might include changes to elections that make it easier for shareholder-voters to vote against board members, like bylaw amendments that require directors to win a majority of the votes cast in order to be elected,[117] a confidential voting

[117] Right now, many firms only permit shareholders to vote to "withhold" their vote. Although a high withhold vote sends a signal that shareholders are dissatisfied with management performance, it does not usually result in their ouster. In many circumstances, incumbents are automatically reelected if they receive more votes than any other candidate. If there are no other candidates, a frequent occurrence, managers are reelected to the board with only one vote, even if the vast majority of shareholders vote to withhold. The consequence is that a vote to withhold does not necessarily lead to the ouster of an incumbent. *See* Joseph A. Grudfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 908–14, 926–36 (1993) (arguing for a "withhold" vote strategy); Macey, *supra* note 10, at 765 (describing briefly default voting rules); William Sjostrom & Young Sang

requirement,[118] or declassifying the board such that shareholders have a chance to vote out all directors in a single year.[119] However, if shareholder-challengers succeed in their contested corporate elections a significant share of the time, such reforms may not be necessary.

A. Overall Challenger Success in Contested Elections

Overall, it appears that challengers are losing a majority of their control challenges, but not obviously at dangerously low levels. According to Bebchuk, challengers lost approximately sixty-two percent of control challenges.[120] Further, in larger firms—those with stock market capitalization above $200 million—challengers lost approximately sixty-seven percent of control challenges.[121] Although challengers may be losing a majority of their challenges, Bebchuk's data do not automatically suggest that the level of management success is dangerously high.[122]

If the data suggested that management nearly always won in proxy solicitations, then managers would have little reason to fear such shareholder steps. They would have little reason to worry that the launch of a contest might lead to their ouster, to accession to shareholder preferences, or to settlement of these disputes. However, with a success rate of nearly forty percent in control challenges, this suggests that the shareholders who launch a challenge wield a strong

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Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 462–63 (2007) (describing theory of majority voting and examining over 100 public companies with so-called majority voting systems in light of theory); *see generally* Brishen Rogers, *The Complexities of Shareholder Primacy: A Response to Sanford Jacoby*, 30 COMP. LAB. L. & POL'Y. J. 95 (2008) (discussing various forms of changes in corporate governance).

[118] *See* Bebchuk, *supra* note 10, at 704–06.

[119] See *supra* note 61 (discussing staggered boards).

[120] Bebchuk, *supra* note 10, at 687.

[121] *Id.*

[122] *See, e.g.*, Veasey, *supra* note 35, at 812 (noting that the rate of success found by Bebchuk "seems fairly substantial and demonstrates to a significant extent the stockholders' ability to exert their will under the current system").

stick, as the prospect of success is real.[123] Indeed, the level of success for mid-tier companies—i.e., those with a market cap between $100 million and $200 million—was forty-six percent for the period under study.[124] This finding suggests that those who launch campaigns are not at severe funding disadvantages. Alternatively, even if challengers are at a funding disadvantage, such a disadvantage is arguably irrelevant as it does not create a severe electoral disadvantage, in that challengers are still able to win a significant percentage of contested elections.

Of course, the devil is in the details, and the numbers become even starker (or rosier, depending on your perspective and how "success" is defined) when contested solicitation is defined broadly. For instance, if contested solicitation is defined to include any type of corporate elections, not just contested campaigns for control of the firm as a stand-alone entity (which is Bebchuk's standard), challenger victory is rare.

As the chart below illustrates, in recent years (2006–2008), the data show that challengers were successful (or partially successful[125]) approximately one fourth of the time (28 successes out of 119 contested solicitations).[126] Under this definition, one could make a good case for legal reform, if such reform can be shown to tip the balance of electoral outcomes to challengers.

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[123] Others have also found that challengers have a relatively high rate of success in contested elections. For instance, Ikenberry and Lakonishok have found that challengers acquire seats, although perhaps not control of the board, in nearly fifty percent of contested corporate elections over board seats. Ikenberry & Lakonishok, *supra* note 22, at 413.

[124] Bebchuk, *supra* note 10, at 687.

[125] Frequently, challengers contest more than one issue. They may lose the shareholder vote with respect to one issue, but win with respect to another issue. *See* GEORGESON, *supra* note 5.

[126] Author's calculations. For dataset, see *id.* The dataset includes forty-four contested corporate elections in 2007. Data on two contested corporate elections were not included in this calculation—the Vitesse Semiconductor Corp and American Republic Realty Fund—because election outcome data was still pending (at the time of this writing).

However, in another sense, "success" might be broadly defined to include circumstances where the challengers and management agree to the settle their disputes.[127] For instance, Carl Icahn, a billionaire private investor and frequent corporate governance critic, recently settled a threatened high-profile challenge to Yahoo's incumbent board of directors in exchange for three seats on the company's eleven-member board of directors.[128] As in that case, although settlement might not give challengers complete control of the board, many settlements involve the challenger getting to select nominees for some board positions—a so-called "short" or "partial" slate.[129] In addition to board seats, the challenger can often also negotiate for reimbursement for their expenses as part of the settlement agreement.[130] Thus, most challengers are probably satisfied with many settlement outcomes and these cases can probably be safely described at least as partial victories.[131] If success is defined broadly to include not just cases in which challengers win control of the firm and oust incumbents (the Bebchuk standard),[132] but all cases where there was a

[127] *See* Brav et al., *supra* note 22, at 1741 (describing settlements at least as a "partial success" in the case of hedge fund activism).

[128] *See* Jessica E. Vascellaro & Matthew Karnitschnig, *Yahoo Will Add Icahn to Its Board—Investor, Associates Will Be Directors; Yang Stays as CEO*, WALL ST. J., July 22, 2008, at B2.

[129] *See* Briggs, *supra* note 30, at 708–09 (noting that settlements can be part of activism).

[130] *See, e.g.*, Parlux Fragrances, Definitive Additional Materials (Form DEFA 14A) (Feb. 2, 2007), *available at* http://www.sec.gov/Archives/edgar/data/802356/000095012307001451/y30045dadefa14a.htm (describing amicable settlement of proxy fight between Parlux Fragrances and shareholder, Glenn Nussdorf, which included board seats and $1 million for reimbursement of the shareholder-challenger's expenses).

[131] HARRIS, *supra* note 10, at 227–28 (discussing settlements and reimbursement for proxy expenses); *but see* Briggs, *supra* note 30, at 696 (describing a settlement that included two seats on the board of Time Warner a "barely face-saving settlement").

[132] Bebchuk, *supra* note 10, at 687 (noting that "success" includes cases where rivals succeed in ousting incumbents and gain control of the firm).

challenger victory and even cases where the parties settled the dispute, the numbers shoot back up. For instance, overall in recent years, challengers succeeded or settled with management almost half of the time (57 out of 119 contested corporate elections).[133]

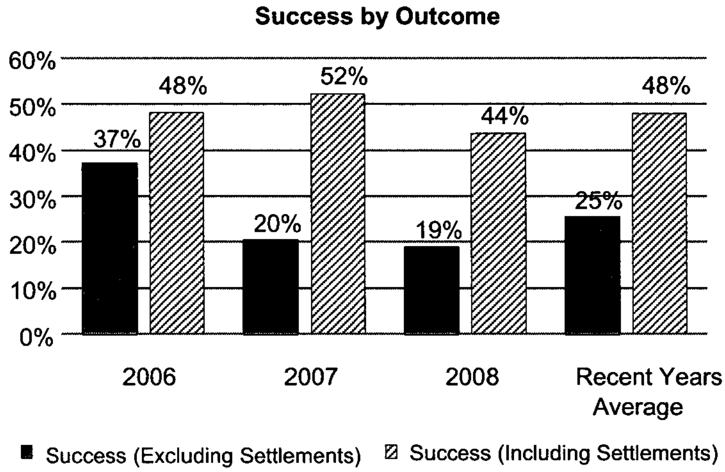

Chart D

In the end, overall rates of success seems to tell us very little about whether management is able to dismiss shareholder preferences when there is a contested solicitation. Under the Bebchuk analysis and under some of the new insights offered here, when challengers launch a challenge they seem to win or settle their disputes in a significant number of cases. This finding is important, because if levels of success are not too low, the rules may not need tweaking to improve the chances of success of shareholder-challengers. Thus, shareholders appear to have a decent chance of success in one form of another once they launch a contest.

[133] *See supra* note 126.

B. Challenger Success in Corporate Elections by Challenger-Identity

However, the narrative takes a different turn when the data is broken out by challenger-identity—by individual versus institutional investor. The data suggest that even when individual investors, particularly retail investors, launch a challenge, they have very few resources to rely on and win less frequently than institutional investors.

For instance, Table 1 below summarizes the rate of success and expenditure by challenger identity.[134] Based on information about the lead challenger identified by Georgeson, the proxy-solicitation firm, Table 1 and the data that follow divide challengers into two identity-types: individual and institutional investors. As shown, the median amount individuals spent on challenges was $100,000 and they lost nearly sixty percent of challenges.[135] Meanwhile, the median spending for institutional-challengers was more than twice as much at $250,000 and they were successful more than half of the time.

[134] Amount for expenses are author's calculations based on data from both company and challenger proxy statements. All proxy statements are publicly available on the SEC Edgar database, Company Search, http://www.sec.gov/edgar/searchedgar/webusers.htm (last visited Mar. 1, 2010). Additionally, specific source information can be found in Appendix A. Rate of loss are author's calculations based on data from Georgeson and various press reports, where available. *See* GEORGESON, *supra* note 5.

[135] For these purposes, any case where the shareholder-challenger did not win a majority of shareholder votes cast in a contested election or settle their proxy contests with incumbents prior to an election is counted as a "loss."

Proxy Campaign by Expense and Rate of Success Recent Years (2006–2008)			
	Institutional Challenger (N=93)	Individual Challengers (N=37)	All Challengers (N=130)
Expense Estimate (Median)	$250,000	$100,000	$225,000
Rate of LOSS	42%	59%	47%
Rate of SUCCESS (including Settlements)	58%	41%	53%

Table 1

Additionally, though not shown in the chart, the median spending by incumbents was $200,000, approximately twice the median spending for individual challengers. In fact, in recent years, several incumbent boards budgeted well over $1 million for election spending.[136] With such spending disparities, it is predictable that individual investors are less likely (compared to institutional challengers) to win corporate elections or force a settlement with incumbent directors.

Table 2 displays summary statistics for retail investors—defined here as individual challengers that control less than one-percent stakes. As can be seen, their success rate is poor and their spending levels even worse. In two out of the three recent years, 2006 and 2008, retail investors scored no

[136] Out of 133 corporate elections from 2006–2008, incumbent directors reported campaign expense estimates at or above $1,000,000 twenty times, fifteen percent of cases. In one case in 2007, Motorola estimated the board would spend a whopping $14 million to stave off a campaign by billionaire Carl Icahn. *See* Motorola, Inc., Definitive Proxy Statement—Contested (Form DEFC 14A), at 61 (Mar. 15, 2007).

straight victories in contested corporate elections. Overall, although retail investors have launched campaigns in ten corporate elections in the last three years, they have won only one contested corporate election, John Nano's 2007 campaign against the incumbent directors at Competitive Technologies.[137] As mentioned above, however, Nano, the ousted CEO of Competitive Technologies, was not a typical shareholder. Meanwhile, retail-investor spending on campaigns was modest and frequently paltry. For instance, in 2006, the two shareholder campaigns that were launched by retail investors were put on with less than $1,000 budgeted.[138] In fact, a majority of retail investor campaigns (6 out of 10) were put on with campaign budgets of less than $1,000.

Summary Characteristics of 10 Contests by "Retail" Investors (Individual Investors with Less than One-Percent Stake) (2006–2008)				
Challenger	Challenger Expense Estimate	Incumbent Expense Estimate	Difference (Incumbent Expense - Challenger Expense)	Outcome
Nathan Danzinger 2006	$975	$15,000	$14,025	LOST
Steve Nieman 2006	$500	$22,500	$22,000	LOST
Steve Nieman 2007	$500	$22,500	$22,000	LOST

[137] *See* Competitive Tech, Inc., Committee to Re-store Shareholder Value, Definitive Proxy Statement, Contested Election (Form DFRN 14A) (Dec. 26, 2006).

[138] The two campaigns were Nathan Danzinger's campaign against Croghan Bancshares, *see* Croghan Bancshares, Inc., Definitive Proxy Statement (DEFN Form 14A) (May 3, 2006), and Steve Nieman's campaign against Alaska Air Group, *see* Alaska Air Group, Inc., Definitive Proxy Statement (Form DEFC 14A) (May 5, 2006).

Carl Ichan	$2,750,000	$14,000,000	$11,250,000	LOST
Todd P. Robinson	$55,000	Not reported	N/A	LOST
John Nano	$50,000	$175,000	$125,000	BIGWIN
Nathan Danzinger 2007	$975	$18,000	$17,025	LOST
Nathan Danzinger 2008	$975	$5,000	$4,025	LOST
Richard Leza, Jr.	$100,000	$500,000	$400,000	LOST
Steve Nieman 2008	$350	$23,500	$23,150	LOST
Average	$295,928	$1,642,389	$1,319,692	

Table 2

Moreover, the relationship between spending, challenger-identity, and corporate election outcomes continues to hold when the data is subject to slightly more rigorous analysis. Specifically, Tables 3 through 5 present the results of a two-tailed t-test, a common test for statistically significant difference in means.[139] Table 3 demonstrates that

[139] Data is pulled from proxy statements for 2006, 2007, and 2008. In order to maintain normality, the dependent variables were calculated as followed: "Challenger expense" is the natural log of challenger expense estimates. "Incumbent expense" is the natural log of incumbent expense estimates. "Total expenses" is the natural log of the combined challenger and incumbent expense estimates. All data for expense variables comes from incumbent and challenger proxy statements. "Blockholder stake" is the natural log of the percent of outstanding target-firm shares owned by the target firm's largest shareholder. "Challenger stake" is the square root of the percent of outstanding target-firm shares owned by the Challenger. "Incumbent stake" is the square root of the percent of outstanding target-firm shares owned by officers and directors as a group. Since normality is not necessary for Wilcoxon-Mann, no data transformation took place for this test. Thus, variables for the Wilcoxon-Mann-Whitney test are as follows: "Challenger expenses" is challenger expense estimates. "Incumbent expense" is incumbent expense estimates. "Total expense" is the combined challenger and incumbent expense

institutional and individual challengers are statistically different along both mean spending variables (including challenger spending and total campaign spending) and mean ownership variables (including challenger stake). As expected, institutional shareholders spend more on contested corporate elections and own larger stakes in target companies. Finally, the data suggest that there is *no* statistically significant difference between incumbent spending on corporate elections for contests launched by institutional challengers versus those launched by individual challengers. Thus, the data suggest that, regardless of whether the challenger is an individual or institutional shareholder, average incumbent spending on corporate elections is not different at statistically significant levels.

Statistical Comparison of Individual Challenges and Institutional Challenges (2006–2008)

	Individual Challenge		Institutional Challenge		Statistically Different?	
	Mean	Std. Dev.	Mean	Std. Dev.	T-Test	Wilcoxon-Mann Whitney Test
Spending Variables						
Challenger Expense	11.29	2.49	12.47	1.36	Yes***	Yes**
Incumbent Expense	12.09	2.12	12.24	1.80	No	No
Total Expense	12.70	2.07	13.39	1.35	Yes*	Yes*
Ownership Variables						
Blockholder Stake	2.30	0.83	2.56	0.63	Yes*	No
Challenger Stake	2.00	1.38	2.81	1.13	Yes***	Yes**

estimates. "Blockholder stake" is the percent of outstanding target-firm shares owned by the target firm's largest shareholder. "Challenger stake" is the percent of outstanding target-firm shares owned by the Challenger. "Incumbent stake" is the percent of outstanding shares owned by the Challenger. All data for expense and equity stake variables comes from incumbent and challenger proxy statements.

Incumbent Stake	2.72	1.47	2.59	1.64	No	No

Table 3

Note: "Individual challenge" includes any contested corporate election (2006-2008) where the identified led challenger was an individual investor. "Institutional challenge" includes any contested corporate election (2006-2008) where the identified lead challenger was an institutional investor. Information on challenger identity is drawn from relevant Georgeson annual reports. The above reports a statistical difference if a two-tailed t-test between Individual Challenges and Institutional Challenges shows that the mean values for the two groups are different a statistically significant level of 0.001(***), 0.05(**) or 0.10(*). Wilcoxon-Mann Whitney test are also reported for confirmation purposes only. Actual results from Wilcox-Mann Whitney test are unreported.

Table 4 compares the same set of characteristics on spending and ownership, but breaks out challengers based on whether they won a corporate election, broadly defined—i.e., those who score straight victories in contested corporate election or settle with incumbents—versus those who lose corporate elections. As shown, winners and losers are statistically different along all the spending variables, including challenger spending, incumbent spending, and total spending. Curiously enough, however, the data do not show any statistically significant difference in terms of ownership in target companies. Winners do not differ in any statistically significant way in terms of ownership. One might expect winners to control, on average, more shares than losers, because it would give challengers an edge in voting—they can vote for themselves—and help make the economics of a challenge more palatable—those with relatively small stakes are likely to find challenges to be too costly to pursue.

Statistical Comparison of Mixed Victories and Loses (2006–2008)						
	ANYWIN		LOST		Statistically Different?	
	Mean	Std. Dev.	Mean	Std. Dev.	t-test	Wilcoxon-Mann Whitney Test
Spending Variables						
Challenger Expense	12.57	1.36	11.65	2.15	Yes**	Yes**
Incumbent Expense	12.50	1.89	11.86	1.83	Yes*	Yes*
Total Expense	13.50	1.36	12.85	1.79	Yes**	Yes*
Ownership Variables						
Blockholder Stake	2.57	0.61	2.40	0.79	No	Yes*
Challenger Stake	2.74	1.10	2.40	1.39	No	Yes*
Incumbent Stake	2.49	0.17	2.78	1.81	No	No

Table 4

Note: ANYWIN includes any cases where the challenger won, lost or settled a contested corporate election in 2006-2008. LOST include any cases where the challenger lost a contested corporate election in 2006-2008. Corporate election outcome data in both cases is drawn from Georgeson annual report. The above reports a statistical difference if a two-tailed t-test between ANYWIN and LOST shows that the mean values for the two groups are different a statistically significant level of 0.001(***), 0.05(**) or 0.10(*). Wilcoxon-Mann Whitney test are also reported for confirmation purposes only. Actual results from Wilcox-Mann Whitney test are unreported.

Table 5 isolates one positive outcome of a contested corporate election: settlements. The chart compares spending and ownership levels between those who are able to negotiate a settlement and those who lose a contested corporate election. Again, high spending seems to be related to corporate election outcomes. For instance, the chart reports that challengers who settled, on average, budgeted more for their contested corporate election than challengers who lost. This difference in means is statistically significant. Also, as before, ownership stake seems less important than one might intuit. That is, although challengers who were able to negotiate a settlement in contested corporate elections controlled, on average, more shares than challengers who lost contested corporate elections, that difference is not statistically significant.

Statistical Comparison of Settlements and Loses (2006–2008)						
	SETTLE		LOST		Statistically Different?	
	Mean	Std. Dev.	Mean	Std. Dev.	t-test	Wilcoxon-Mann Whitney Test
Spending Variables						
Challenger Expense	12.82	1.21	11.65	2.15	Yes**	Yes**
Incumbent Expense	12.74	1.85	11.86	1.83	Yes**	Yes**
Total Expense	13.63	1.34	12.85	1.79	Yes*	Yes*
Ownership Variables						
Blockholder Stake	2.54	0.34	2.40	0.79	No	Yes*
Challenger Stake	2.89	1.03	2.40	1.39	No	No
Incumbent Stake	2.76	1.14	2.78	1.81	No	No

Table 5

Note: SETTLE includes any cases (2006-2008) in which the challenger and incumbents settled a contested corporate election. LOST include any cases where the challenger lost a contested corporate election in 2006-2008. Corporate election outcome data in both cases is drawn from Georgeson annual report. The above reports a statistical difference if a two-tailed t-test between SETTLE and LOST shows that the mean values for the two groups are different a statistically significant level of 0.001(***), 0.05(**) or 0.10(*). Wilcoxon-Mann Whitney test are also reported for confirmation purposes only. Actual results from Wilcox-Mann Whitney test are unreported.

Thus, one of most integral issues in contested corporate-election outcomes may be election spending levels, particularly challenger spending. Spending is one of the only statistically significant mean differences that hold between institutional and individual investors, between winners and losers, and between settlers and losers. This finding makes sense insofar as campaigns require money to market to shareholders. This finding is bad news for retail investors. Campaigns by retail investors, as they currently stand, are ragtag affairs with few resources to spend, which may make them destined to fail and therefore unlikely to create responsiveness from management.

V. EXPLAINING ABSENCE

At least three rationales probably explain the above findings that there are low levels of contested corporation elections, particularly from retail investors or institutional investors that might represent retail investor interests. First, the legal rules regarding shareholder campaigns—particularly rules regarding funding—likely play a profound role in reducing and distorting campaign activity that might otherwise arise from small retail investors. Second, retail investors rarely participate in contested corporate elections due to the incentive structure in place. As will be discussed below, shareholders who launch a campaign are under-compensated in the sense that, even if successful, their benefit is limited to the size of their shareholding. The disincentive effects are even more pronounced in the case of retail investors who own extremely small stakes and, therefore, will realize very little of the economic upside of positive changes at a particular firm. Third, norms probably play a role in reducing the level of contested corporate elections from some institutional investors. That is, pension funds and mutual funds might avoid the contested corporate election as a method of reforming firm behavior, because such a contest would be perceived of as taboo (even illegal) among supposedly civilized business professionals.

A. Law

The current rules for funding shareholder campaigns create unusual disadvantages for shareholder-challengers, which partially helps explain the rareness of campaigns by retail investors. As mentioned, while incumbents are able to spend corporate resources to remain in office, shareholder-challengers are only reimbursed if they mount a successful challenge and receive majority shareholder approval.[140] The consequence of this funding rule is that retail investors are at a steep disadvantage. At least initially, they will have to rely on their own personal resources to mount a campaign.[141] Furthermore, even once their campaign succeeds, there are still additional legal limits, such as the requirements of both board and shareholder approval, on the shareholder-challenger's ability to seek reimbursement.

1. Reasonable Amount and Firm Interest

To begin with, consider the legal limits on recoverable expenditures that apply to both incumbents and challengers. According to courts, successful challengers, like incumbents, must limit their expenditures to a reasonable amount and only expenditures that serve a firm interest are properly reimbursable.[142] Thus, a contestant in a corporate election may not spend for purposes of "personal power, individual gain or private advantage" and may not spend an unreasonable amount.[143]

It is illustrative to examine *Rosenfeld v. Fairchild Engine & Airplane Corp.*, one of the early state cases that

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[140] *See* Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291, 293 (N.Y. 1955) (discussing the requirement that shareholders must vote to approve reimbursement).

[141] The rules for reimbursement do more than just create a funding advantage for incumbents. They may also encourage the incumbents to spend more than optimal—that is, more than might produce a net benefit to the firm—to remain in office or defeat a shareholder proposal that may limit their power. *See* Bebchuk, *supra* note 10, at 690 (noting that incumbents have an "*excessive* incentive to invest in opposing challenge") (emphasis in original).

[142] *See, e.g.*, *Rosenfeld*, 128 N.E.2d at 293 (noting that shareholders must spend in the best interests of the corporation and only amounts that are reasonable or "the courts will not hesitate to disallow them").

[143] *Id.* at 293.

articulated the limit for "reasonableness" and "firm interest" in corporate election spending. In the contest that was the subject of the litigation, the shareholder-challengers argued that the compensation of the firm's CEO was excessive.[144] The challengers, led by the firm's largest shareholder and company founder, sought to remove the incumbent board members and spent a substantial sum. Although the contest took place over five decades ago, each side—the challenger-shareholders and the incumbent-managers—spent more than $100,000 on their campaigns.[145] They sent letters, postcards, and circulars to campaign for the votes of the company's approximately 10,000 shareholders.[146] They hired consultants, a public relations firm, and attorneys.[147] In the end, the challengers won the contest by a large margin, took control, cancelled the CEO's employment contract, and resolved to reimburse themselves for the expenses related to the contest.[148] Together with the expenses for the former directors, the firm paid $261,522 for the contested election.[149] Although it held that these expenses could be recoverable, the *Rosenfeld* court did describe certain limits, like firm interest and reasonableness:

> That is not to say, however, that corporate directors can, under any circumstances, disport themselves in a proxy contest with the corporation's moneys to an unlimited extent. Where it is established that such moneys have been spent for personal power, individual gain or private advantage, and not in the belief that such expenditures are in the best interests of the stockholders and the corporation, or where the fairness and reasonableness of the amounts allegedly

[144] *Id.* at 294 (Desmond, J., concurring) (noting that the compensation of the company's CEO was chief concern of the challengers).

[145] *See* Rosenfeld v. Fairchild Engine & Airplane Corp., 116 N.Y.S.2d 840, 849 (Sup. Ct. 1952), *aff'd*, 132 N.Y.S.2d 273 (App. Div. 1954), *aff'd*, 128 N.E.2d 291 (N.Y. 1955).

[146] *See Rosenfeld*, 116 N.Y.S.2d at 843–44.

[147] *Id.* at 845.

[148] *Id.* at 845–48.

[149] *Rosenfeld*, 128 N.E.2d at 291.

> expended are duly and successfully challenged, the courts will not hesitate to disallow them.[150]

Significantly, however, limits for firm interest and reasonableness are in practice an extremely low hurdle for both challengers and incumbents. Courts have interpreted both limitations broadly, such that there are few actual categories of expenditures that would be found improper under either limit.

First, as to the limit for reasonable expenses, courts have suggested that the term should be defined generally. The opinions suggest that "reasonableness" is not a limit on what kind of expenditures the firm can make. For instance, the court in *Rosenfeld* suggests that an expense is unreasonable only if it is "excessive"—that is, a payment at more than the prevailing market rate.[151] Thus, the majority of courts would hold that the reasonable limit is only a limit on what the contestant can spend for a service, once it is chosen, not a limit on what services can be properly engaged.[152]

Plaintiffs who have argued that the reasonableness limitations should operate to restrict the categories of expenditures that contestants can make have generally not fared well. For instance, in a case where a board member of MGM, the mega-entertainment company, launched a proxy contest for control of that firm, the board pulled out all the stops to defend itself and its corporate strategy. MGM directed over 100 employees to call shareholders. It hired a public relations firm, attorneys, and two different

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150 *Id.* at 293.

151 Rosenfeld v. Fairchild Engine & Airplane Corp., 116 N.Y.S.2d 840, 843 (Sup. Ct. 1952), *aff'd*, 132 N.Y.S.2d 273 (App. Div. 1954), *aff'd*, 128 N.E.2d 291 (N.Y. 1995).

152 *Id.* at 292 (noting that the trial court would be required to examine challenged expenditures if plaintiff alleges that the expenditures were excessive). *But see id.* at 297 (Van Voorhis, J., dissenting) (defining "reasonableness" narrowly to include only expenditures "reasonably related to informing the stockholders fully and fairly concerning the corporate affairs").

consultancies.[153] Movie stars shot infomercials in which they voiced their support for management.[154] All told, MGM spent $125,000.[155] Even though some expenditures appeared duplicative, the court in *Levin* held that each expenditure was reasonable since none were "excessive" or above market rates.[156]

In sum, under this broad interpretation of the reasonable limitation, reasonable expenditures includes spending for purposes of notification of an upcoming meeting and basic information regarding agenda items, which the firm has a legal obligation to supply.[157] But, even more expansively, the dominant view among courts is that a firm also may reasonably expend to *persuade* shareholder-voters of the contestant's viewpoint.[158] The firm can hire consultants, charter planes, and pay for special counsel without any worry about whether courts will intervene and second-guess the decision to spend in these ways. Instead, the courts will only intervene when it can be shown that the amounts paid for services were excessive, given market rates for, say, consultants, planes, or special counsel.

Second, as to firm interests, courts have suggested that only contests over substantive policy questions related to the

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[153] Levin v. Metro-Goldwyn-Mayer, Inc., 264 F. Supp. 797, 802–03 (S.D.N.Y. 1967).

[154] *Id.* at 803.

[155] *Id.* at 802.

[156] *Id.*

[157] *See* DEL. CODE ANN. tit. 8, § 211 (2009) (providing for meeting of stockholders); *see also* Hemsman Mgmt. Servs., Inc. v. A&S Consultants, Inc., 525 A.2d 160, 166 (Del. Ch. 1987) (noting the fact that "a shareholder is entitled to notice of the date, time, and place of an annual shareholder's meeting is a proposition so fundamental as to require no citation of authority").

[158] *See, e.g.*, *Rosenfeld*, 128 N.E.2d at 294 (Desmond, J., concurring) (noting that expenses for notification and basic information are reimbursable under rules); *Rosenfeld*, 128 N.E.2d at 298 (Van Voorhis, J., dissenting) (distinguishing between notification expenses and campaign expenses and explaining that "[t]here is a difference between hiring solicitors merely to follow up proxy notices so as to obtain a quorum, and a high pressure campaign to secure votes by personal contact").

firm are properly recoverable. Disputes that are purely over matters of personality are not properly reimbursed from the corporate treasury. For instance, the disagreement in *MGM* was one of policy differences, as the challengers had a long list of disagreements with management over corporate strategy. Among other things, the board member/challenger argued that MGM should give more rights to minority stakeholders, make more movies each year, build up a cash reserve to reduce need for debt, and cut some employment-contract rights.[159] However, in the vast majority of cases, the line between contests over policy and personality questions is tangled and blurred. The MGM case, for instance, was also a personality conflict insomuch as it was a struggle for control of the company as it was about whether Levin, the challenger, would play a role in leading it.[160]

In the end, therefore, the limits for "firm interest" and "reasonableness" are rather weak regulators of spending in proxy contests. Fortunately, as shall be discussed, they are not the only limits. Unfortunately, the stronger limits on corporate-election spending are one-sided. That is, stronger checks on corporate-election spending apply with more acute force to shareholder-challengers and less so to incumbents, which likely helps explain shareholder absence in corporate elections.

2. Board Resolution

One example of bias in favor of incumbents is the rule that provides that reimbursement for expenses depends on a

[159] Levin v. Metro-Goldwyn-Mayer, Inc., 264 F. Supp. 797, 802 n.7 (S.D.N.Y. 1967).

[160] For instance, consider the court's analysis in *Steinberg v. Adams*: "The simple fact, of course, is that generally policy and personnel do not exist in separate compartments. A change in personnel is sometimes indispensable to a change in policy. A new board may be the symbol of the shift in policy as well as the means of obtaining it." 90 F. Supp. 604, 608 (S.D.N.Y. 1950).

resolution by the board of directors.[161] This was the holding of *Lawyers Advertising Co. v. Consolidated Railway Lighting & Refrigerating Co.*, one of the earliest cases to discuss the rules regarding reimbursement for campaign expenditures.[162] In that turn-of-the-century dispute, an advertising company sued to recover the unpaid bills for notices it sent to shareholders on behalf of a New York firm.[163] The plaintiff accepted the advertising work after being informed by the firm's secretary that several notices needed to go out in advance of a formal vote of shareholders.[164] The court disallowed recovery of expenditures for all these notices from the corporate treasury, except for one.[165] According to the court, the notices were not proper, since no board resolution approved the expenses.[166]

Although incumbents also need board approval of their expenses, this requirement has more devastating effects for shareholder-challengers.[167] In practice, the holdings in cases like *Lawyers' Advertising Co.* mean that successful shareholder-challenges must also usually win control (or partial control) of the firm before they can recover their expenses. If the successful shareholder's campaign leads to the replacement of a majority of the board with nominees that are loyal to the challengers, then the newly-elected board will likely pass a resolution to require reimbursement.

Even if they win partial control (i.e., short-slates), the newly-installed board members may be able to broker a deal with their board colleagues that leads to a reimbursement

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[161] *See Steinberg*, 90 F. Supp. at 607–08; *see also* Rosenfeld v. Fairchild Engine & Airplane Corp., 116 N.Y.S.2d 840, 846 (N.Y. Sup. Ct. 1952), *aff'd*, 132 N.Y.S.2d 273 (N.Y. App. Div. 1954), *aff'd*, 128 N.E.2d 291 (N.Y. 1955) (distinguishing cases where expenses were not expressly authorized by a resolution of the board of directors).

[162] 80 N.E. 199 (N.Y. 1907).

[163] *Id.* at 200.

[164] *Id.*

[165] *Id.* at 200–01.

[166] *Id.*

[167] *Cf. id.* (disallowing reimbursement for expenses for incumbents that were not properly approved by the board of directors).

resolution. For instance, directors in the minority may be able to marshal pressure on the newly-composed board from shareholders to reimburse the challengers for their expenses, since the election results usually are a good indicator of shareholder preference. However, if the shareholder-challengers do not win control of a majority of board seats (or at least partial control of the board), such shareholders have little practical ability to negotiate for a resolution calling for reimbursement. They have challenged the incumbents and lost. They have little bargaining leverage. This effectively means that such shareholders will have to bear in campaign costs on their own.[168]

Thus, it stands to reason that these rules would have an effect on both the total number of campaigns and the type of campaigns. That is, the requirement of a board resolution will likely reduce the overall number of issue campaigns (e.g., shareholder-proposal campaigns) and campaigns for short-slates, neither of which will generate technical control of the board if successful. Instead, shareholder-challengers will likely concentrate on campaigns that will lead to board control, since only then are successful shareholders guaranteed to be able to call for a board resolution for reimbursement.

3. Shareholder Approval

Furthermore, successful challengers, once in control, must have their reimbursement of expenses approved by a majority of shareholders.[169] Because the business judgment

[168] In contrast to political elections, in contested corporate elections, challengers have no ready mechanism for raising money for a shareholder contest. This leaves shareholder challengers with only one mechanism for waging a campaign—to front the initial costs of the campaign out of their own resources.

[169] *See* Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291, 293 (N.Y. 1955) (holding that "the members of the so-called new group could be reimbursed by the corporation for their expenditures in this contest by affirmative vote of the stockholders"); Steinberg v. Adams, 90 F. Supp. 604, 607–08 (S.D.N.Y. 1950) ("Once we assert that incumbent directors may employ corporate funds in policy contests to advocate their

rule permits broad discretion, the new board, once in control, may spend firm resources as it sees fit without fear of second-guessing by courts.[170] However, in the exceptional circumstance of a proxy contest, the cases have generally held that a new board must get shareholder approval before it may appropriately reimburse itself for expenses related to the campaign.[171]

The requirement of shareholder approval is one-sided. In contrast to shareholders, incumbents are able to spend from the corporate treasury without having to seek shareholder approval for their expenses.[172] For challengers the rules are different. Even once they are in control of the firm, courts have found that a resolution for reimbursement must be approved by a majority of shareholders.[173] To be sure, for the vast majority of proxy contests won by a challenger, this requirement of shareholder approval later is probably a

views to the stockholders even if the stockholders ultimately reject their views, it seems permissible to me that those who advocate a contrary policy and succeed in securing approval from the stockholders should be able to receive reimbursement, at least where there is approval by both the board of directors and a majority of the stockholders."); *see also* Bebchuk & Kahan, *supra* note 49, at 1109.

[170] *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) (holding that the business judgment rule protects director-spending decisions).

[171] *See, e.g.*, *Rosenfeld*, 128 N.E.2d at 293.

[172] Although instances are rare, incumbents even have discretion to reimburse challengers for their expenses. Choi & Fisch, *supra* note 25, at 300 (noting that "voluntary" reimbursement of challenger expenses by an incumbent board is rare).

[173] *See Rosenfeld*, 128 N.E.2d at 293 (holding that shareholder-challengers "could be reimbursed by the corporation for their expenditures in this contest by affirmative vote of the stockholders."); Steinberg v. Adams, 90 F. Supp. 604, 607–608 (S.D.N.Y. 1950) (holding that reimbursement is contingent on "approval by both the board of directors and a majority of the stockholders."); *see also* Bebchuk & Kahan, *supra* note 49, at 1109. Interestingly, a successful challenger in a derivative suit would not normally have to seek out approval from shareholders. *See Steinberg*, 90 F. Supp. at 608 (S.D.N.Y. 1950) (noting that successful derivative plaintiffs are "reimbursed regardless of the views of the stockholders").

small obstacle, as a successful challenger who has won a shareholder vote to take control of the firm will very likely win shareholder approval for reimbursement of expenses.[174] Nevertheless, this funding rule likely produces an added element of uncertainty for shareholder-challengers, since shareholder voting is not wholly predictable.

B. Effects of Legal Factors

The legal rules for reimbursement have at least three effects that show up in the data. First, the rules help explain corporate-election outcomes. As in political elections, in corporate elections, money matters and can affect election outcomes.[175] One of the reasons incumbents win a majority of contests, as revealed by the data, is likely because the rules create a subsidy for their campaign expenditures, without any real checks on spending.[176] Although no legal rule limits challenger expenses, challengers are effectively limited in expenditures by their own private interest in only spending up to the point where they expect a net benefit. This effectively limits challenger expenditures to some function of their shareholding in the company, the expected value of reform, and the likelihood of success, less the expected costs of reform. In other words, challengers will only spend so much of their own personal resources, while the rules effectively give incumbents no reason to limit their expenditures.

Second, the rules seem to partly explain the skew in the type of contested corporate elections that take place. That is, the data suggest that a majority of challenges are not

[174] In fact, the shareholder vote for expenses is frequently lopsided in favor of challengers. *See, e.g.*, *Rosenfeld*, 128 N.E.2d at 293 (finding that the successful shareholder-challenger received shareholder approval for reimbursement by a margin of sixteen to one).

[175] *See generally* Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443 (2004) (noting statistics for incumbent congressional candidates).

[176] *See supra* Parts IV–V.

contests over issues (e.g., shareholder proposals) or other matters of corporate governance. Rather, the data suggest that the great majority of challenges are contests for control of board seats.[177] This makes sense in light of the legal rules, which effectively make reimbursement available only if a challenger wins a majority of the seats on the firm's board. For anything short of winning board control, the rules contemplate no mechanism for reimbursing the challenger for her costs. One consequence of the rules is that in non-control contests a challenger, in all likelihood, will have to cover her own costs, making these types of contests less appealing. The data bear out this expectation that most challengers will tend to launch control challenges and avoid non-control challenges.[178]

Third, the rules explain the lack of diversity in contested corporate elections. It is reasonable to expect that under the current legal regime, there will be very few shareholder-led campaigns, save for campaigns launched by particularly wealthy individual shareholders or similarly-situated private investment entities who can afford the upfront costs of a campaign. The findings on challenger identity tend to bear this out. Recall that individuals launched only fifteen out of forty-six (thirty-three percent) corporate election contests in 2007.[179] Institutions launched the vast majority of contests. Furthermore, of the individual challenges, many were launched either by large, unusually wealthy stakeholders or insiders (or former insiders).

C. Simple Economics

The economics of a contested corporate campaign, under the current legal structure, fail to motivate average retail investors.

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[177] *See supra* note 40.

[178] *See supra* Part II.B.

[179] *See supra* Part III.

1. Free-Rider Problem

One would expect a small number of shareholder-led challenges because of the exorbitant costs of such campaigns when compared to their scattered and uncertain benefits. The upfront costs of mounting a challenge are staggering and, no doubt, convince many challengers to avoid pushing for reform in this way.[180] One recent article reports that shareholder-led campaigns can cost, on average, more than $6 million.[181] Even some contests taking place over five decades ago have reportedly cost each side well into six figures.[182] Finally, recall that the data presented here show that median costs exceeded $200,000 for both challengers and incumbents for proxy contests in recent years (2006–2008).

Regardless of whether the costs are several million dollars or several hundred thousand, shareholder-campaign costs likely dissuade many from launching contests. Shareholder-challengers have to pay for lawyers to make disclosures consistent with SEC rules,[183] for the dissemination costs of communicating with hundreds of

[180] *See* Choi & Fisch, *supra* note 35, at 348 (explaining that costs are an "obvious consideration" of public pension funds that tend to avoid corporate governance activities). For a discussion of the costs in several recent independent proxy solicitations, see Bebchuk, *supra* note 10, at 688–91.

[181] *See* Choi & Fisch, *supra* note 25, at 300 ("A 2001 Bloomberg Markets article reported that shareholder-sponsored proxy contests cost an average of $6.2 million each.") (citation omitted); *see also* Gordon, *supra* note 10, at 488 (noting that average printing and mailing costs are $5.64 "per set of proxy materials"). For a discussion of the fees involved and several recent examples of costly corporate elections, see Bebchuk, *supra* note 10, at 688–89.

[182] *See, e.g.*, *Rosenfeld*, 128 N.E.2d at 291 (noting combined costs over contests totaling $261,522). In all the cases discussed in the previous sections, proxy contests were significantly more than $10,000 for each side.

[183] The SEC requires a proxy statement to include several items. For a description of disclosure items, see Gordon, *supra* note 10, at 491–92.

thousands (perhaps millions) of shareholders,[184] and for the potential liability for proxy fraud if their proxy disclosure fails in some regard.[185] Also, shareholder-challengers who do not have the time or expertise to run for a director position themselves will have to identify nominees for the director position, which might be a costly endeavor in itself.[186] For instance, as Choi and Fisch have previously observed, some institutional investors likely avoid contested elections for board seats because identifying suitable nominees is likely to drain valuable human resources if they attempt to do it themselves, or otherwise would require them to hire a consultancy or other intermediary to identify potential nominees.[187]

This situation creates a free-rider problem in that the costs of leading a coordinated effort are concentrated in a few individuals, whereas the benefits are widely dispersed. The costs of a shareholder-led action are borne exclusively by the activist shareholder.[188] In light of the costs, these activist shareholders are, as other corporate scholars have put it,

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[184] The SEC has suggested that, in 2006, dissemination costs, including printing and postage, might be as much as $5.64 "per set of proxy materials." *See* Gordon, *supra* note 10, at 488. However, with the arrival of new rules that permit challengers to transmit their proxy materials via the Internet, the costs of dissemination may drop dramatically. Internet Availability of Proxy Materials, Exchange Act Release No. 52,926, Investment Company Act Release No. 27,182, 70 Fed. Reg. 74,598 (proposed Dec. 15, 2005) (to be codified at 17 C.F.R. pts. 240, 249, 274); *see also* Gordon, *supra* note 10 at 487–89 (arguing that the costs of production and dissemination—at least electronic dissemination—greatly reduces the costs of disclosure).

[185] *See* Gordon, *supra* note 10, at 478 (arguing that the risk of litigation for material misrepresentation in a proxy statement is significant).

[186] *See, e.g.*, AirTran Holdings, Inc., Definitive Proxy Statement, Contested Solicitation (Form DEFC 14A), at 19 (May 18, 2007) (filed under Midwest Air Group, Inc.), *available at* http://www.sec.gov/Archives/edgar/data/948845/000119312507118776/ddefc14a.htm (referring to fees AirTran paid its director-nominees).

[187] Choi & Fisch, *supra* note 34, at 348.

[188] *See* Choi & Fisch, *supra* note 25, at 271.

effectively "undercompensated."[189] Put another way, the activist shareholder is unable to appropriate all the benefit of his actions (assuming the campaign is value-enhancing). Instead, the benefit of the campaign is shared by all shareholders based on their respective holdings. Others who did not participate in the campaign nor bear its costs will be able to benefit freely from any value-enhancing change that occurs as a result.[190] This is particularly true with shareholder-proposal campaigns, since successful challengers do not get any other psychic and hard-to-quantify benefits from being in control of the firm. Thus, even when the action is value-enhancing, activist shareholders may think long and hard about launching a campaign where the costs are high and concentrated but the benefits are shared.

2. Shareholder Apathy

Shareholder apathy may also increase the costs of coordination among shareholders. In control contests, shareholders have little incentive to inform themselves of the relative position of incumbent managers and challengers. The average investor has a small stake and the effort it would take to become informed would be too costly, given her relative investment.[191] As a result of indifference, these shareholders will often side with management as a matter of reflex.[192] If the challengers want to win, they will have to spend resources to educate normally apathetic shareholders

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[189] *Id.* at 300; *see also* Bebchuk & Kahan, *supra* note 49, at 1093.

[190] For a numerical example of the failure of activists to internalize the benefits of launching a contest, *see* Bebchuk, *supra* note 10, at 690.

[191] For one of the most thorough discussions of this phenomenon, see Easterbrook & Fischel, *supra* note 10, at 395, *See also* Bebchuk & Kahan, *supra* note 49, at 1080 (positing that shareholders have little reason to acquire information in a contest); Bebchuk, *supra* note 10, at 692 (discussing shareholder apathy).

[192] *See generally* Bebchuk, *supra* note 24, at 877; Easterbrook & Fischel, *supra* note 10, at 395–97 (discussing management bias and uncertainty over challengers).

and convince them that it is in their interest to vote for the challenger.

3. Staggered Boards

Firm bylaws that create staggered boards also increase the costs of successfully removing a majority of the board.[193] In firms with staggered boards, only a portion of board members—usually one-third—will come up for election during an annual meeting.[194] Recall, for instance, the AirTran example, in which only one-third of the board was up for election when AirTran decided to launch its challenge to Midwest Air.[195] Thus, shareholders interested in making a control challenge during an annual meeting will have to mount a successful campaign for at least two successive elections. If the costs of a corporate contest are high, requiring multiple successive campaigns only increases this burden while decreasing the likelihood of overall success.

[193] In addition to bylaws that call for staggered director elections, other firm bylaws may make it difficult for challengers to launch a proxy contest. As a consequence of these bylaw barriers, some challengers prepare to launch two contests—in the first challenge, they seek to have the bylaws amended and, thereafter, in the second challenge, they seek to elect themselves (or their loyalists) to the board of directors. *See, e.g.*, Vineyard Nat'l Bancorp, Definitive Proxy Statement, Contested Solicitation (Form DEFC 14A) (March 10, 2008), *available at* http://www.sec.gov/Archives/edgar/data/840256/000119312508050997/ddefc14a.htm (arguing for consent to change firm bylaws); Vineyard Nat'l Bancorp, Definitive Proxy Statement, Contested Solicitation (Form DEFC 14A) (July 7, 2008), *available at* http://www.sec.gov/Archives/edgar/data/840256/000119312508147153/ddefc14a.htm#toc (arguing for election of challengers to the board of directors).

[194] HARRIS, *supra* note 10, at 127; *see also* Lucian Bebchuk, et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence & Policy*, 54 STAN. L. REV. 887, 889 (2002) (finding that fifty-nine percent of firms had staggered boards in 1998); *see supra* note 59 (discussing staggered boards).

[195] *See supra* note 61 and accompanying text.

D. Effects of Economic Factors

Economic factors have at least two effects that show up in the data. First, economic factors likely play a role in explaining the relative lack of diversity of challenger identity. Recall that the data show that challenges are frequently launched by institutional investors, the largest firm shareholder, or shareholders with an unusually large stake (for example, Carl Icahn's stake in Motorola). Because the degree to which a shareholder benefits from a challenge is a pro rata function of the shareholding, only the largest block-holders are likely to launch challenges in the first place. They have the most to gain (or lose) by firm performance. They also usually have the most to spend. This tendency in and of itself would not be problematic if the larger shareholders always shared identical interests with the rank-and-file shareholders. But, as explained, there is reason to believe they do not. Recall that some institutional investors may have interests that are in conflict with basic notions of firm performance, may have a different time horizon (short-term versus long-term) or risk profile (diversified versus undiversified holders).

Second and more generally, economic effects likely also explain the relatively low number of challenges overall, regardless of contest type. No matter whether the challenge is an issue challenge, control challenge, or other type, the benefit, if successful, will be widely shared. Thus, shareholders will have less incentive to launch any of these challenge types, as they will be unable to fully capture all of the benefit from any value-enhancing change at the firm.

E. Business Norms

Lastly, business norms might also play a role in explaining why certain institutional shareholders, like pension funds and mutual funds, might be disinclined to challenge management by mounting a campaign.[196] This is important because, as mentioned, such institutions might have a similar perspective to rank-and-file shareholders. Thus, in the absence of individual-led campaigns, these players could pick up the slack. The problem is that some of these institutional shareholders may simply prefer not to participate in a challenge to the board because of an informal code of conduct among these stakeholders.[197] These institutional shareholders would find a challenge to be outside of their normal mode of operating, outside the norms for civilized business conduct, or perhaps bordering on unlawful conduct.[198]

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[196] Norms have been used to explain a wide range of conduct in different areas from sumo wrestling to cattle ranching to reparations. *See generally* Harris, *supra* note 31, at 412.

[197] *See* Bebchuk, *supra* note 10, at 691 (noting that contested corporate elections are not part of the "modus operandi" of large mutual funds, like Vanguard and Fidelity); Stewart J. Schwab & Randall Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1080 (1998) (noting that pension funds believe that shareholder activism might be beyond scope of their ERISA-regulated duties); Roe, *supra* note 76, at 27–29 (arguing that many fund managers fear violating ERISA or that intervention in firm affairs might create a pretext for retaliatory regulation by legislators). The norms here often function similarly to legal constraints, since the players often follow norms of behavior that are highly influenced by assessments of their legal environment.

[198] Notably, there are some legal rules that constrain the activities of some of these market participants. For instance, pension funds are limited to the prudent-investor standard, which limits (however amorphously) fund activities. *See* Robert C. Illig, *What Hedge Funds Can Teach Corporate America: A Roadmap for Achieving Institutional Investor Oversight*, 57 AM. U. L. REV. 225, 307 (2007) (noting that pension funds are subject to two limits: first, the prudent investor standards, and second, the requirement of diversification "so as to minimize the risk of large losses") (citing 29 U.S.C. § 1104(a)(1)(C) (2006)). The prudent investor standard, first enunciated in *Harvard College v. Armory*, has been described as "the highest known to law." 26 Mass. (9 Pick.) 446, 461 (1830); *accord* Reich v. Valley Nat'l Bank, 837 F. Supp. 1259, 1273 (S.D.N.Y. 1993) (citing Donovan v. Bierworth, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). Meanwhile mutual funds are required to hold a diversified portfolio, which means that their stakes are frequently small and undercut the incentives to

As a result, these institutional shareholders would likely prefer to settle their disputes with managers by alternative, perhaps less formal, methods.[199] These shareholders might avoid challenges because of the time and diversion from other activities, which they have traditionally given priority.[200] Many institutional investors, like pension funds and mutual funds, and even high-profile investors (for example, Warren Buffet) prefer to concentrate their activities on buying and selling stock, not actively participating in business strategies.[201]

For instance, consider a specific example from recent research on public pension funds. Although these funds collectively control approximately one-fifth of public equities, they rarely launch a contest.[202] In fact, a recent study of

participate in some forms of shareholder activism. *See* Robert C. Illig, *The Promise of Hedge Fund Governance: How Incentive Compensation Can Enhance Institutional Investor Monitoring*, 60 ALA. L. REV. 41, 98 (2008) (citing 15 U.S.C. § 80a-5(b)(1) (2006) (noting the regulatory restriction on mutual funds to allocate seventy-five percent of assets to diversified investments)); GEORGESON, 2006 ANNUAL CORPORATE GOVERNANCE REVIEW 1 (2006), http://www.georgeson.com/usa/download/acgr/acgr2006.pdf (providing data showing that in 2006, mutual funds initiated none of the proxy proposals).

[199] Macey, *supra* note 10, at 762 (noting that market participants have a "plethora of other ways to discipline weak management that are likely to be both cheaper and more efficient than contested elections for directors"). For a list of several recent high-profile campaigns where dissidents did not formally file a proxy statement, see GEORGESON, *supra* note 5, at 49.

[200] *See* Bebchuk, *supra* note 10, at 691 ("Running a contest that demands management time and attention and might displease incumbents does not sit well with the business model of [some mutual funds, such as Fidelity or Vanguard]. Such funds are at most 'reluctant activists' to use Pozen's term, that could conceivably vote for a challenger but could not be expected to initiate contests themselves.").

[201] *See* Anabtawi & Stout, *supra* note 85, at 1278 (noting that institutional investors are small stakeholders seeking to build a diversified portfolio, and are usually unwilling to bear the costs and distraction of activist activity); Bebchuk, *supra* note 24, at 876 (noting that mutual funds are reluctant to take an active role in firm affairs). *But see* Anabtawi & Stout, *supra* note 85, at 1276 (noting that institutional investors are beginning to take a more active role in corporate strategy).

[202] Choi & Fisch, *supra* note 35, at 318.

public pension fund activities by Stephen Choi and Jill Fisch found that public pension funds are rarely active except for limited "low-visibility activities."[203] According to their survey data, public pension-fund managers reported that they almost never launch independent campaigns against incumbent directors and rarely engage in publicly confrontational behavior with management.[204] Further, the vast majority of public pension-fund managers surveyed by Choi and Fisch reported that they never support others who launch an independent campaign (71.8% of respondents), submit names of good director candidates to the firm's nominating committee (ninety percent of respondents), or informally suggest director candidates to the firm (87.5% of respondents).[205] These investors may simply want to avoid the negative publicity and opprobrium associated with being a corporate gadfly who launches challenges. For instance, according to Choi and Fisch, some public pension funds reported that they wanted "to avoid confrontational behavior" associated with a contested corporate election, even though, oddly enough, these same fund managers were quite willing to engage in basic litigation against those firms.[206] Choi and Fisch go on to suggest that

> [f]unds also appear concerned about the perceived legitimacy of their actions. Several funds reported that their trustees were uncomfortable with public demonstrations of activism. One fund also cited the "headline risk" associated with shareholder activism. These concerns may reflect, in part, the longstanding regulatory constraints on some type of shareholder activism. Institutions may perceive more recent

[203] *Id.* For instance, pension funds might participate in withhold-the-vote campaigns that operate as a vote of no-confidence for incumbent managers. This type of activism is consistent with the norm of avoiding engaging in more public activism, since it is difficult for companies to track the witheld votes and pension funds do not announce their votes publicly. *Id.* at 328.

[204] *Id.* at 329.

[205] *Id.* at 327.

[206] *Id.* at 319–20.

> efforts to encourage institutional activism, such as the SEC's relaxation of its proxy rules as equivocal, especially in light of opposition efforts to characterize activism as politically motivated or driven by special interests.[207]

Thus, some institutional investors, like pension funds and mutual funds, might do a good job of representing the interests of retail investors in corporate elections. Unfortunately, however, as the data presented here show (along with the Choi/Fisch data), such funds rarely do. The risk of being out of step with norms of conduct appears to dissuade these fund managers from shareholder activism like participating in contested corporate elections.

F. Effect of Business Norms

Thus, business norms may partly explain both the shortage of overall campaigns and shortage of control challenges. Those with the financial wherewithal, like pension funds and mutual funds, are avoiding proxy contests as a means of influencing firm governance. Also, norms likely help explain the skew when it comes to challenger identity. Recall that most challenges are institutional challenges by private investment entities, like hedge funds. What are conspicuously absent, however, are challenges from pension funds or mutual funds and other large institutional investors, which would probably have little problem funding a challenge to the incumbent board. Moreover, many of these institutions decline to fund challenges, even though they may own a large stake in the companies that would partially offset the cost of collective action. Yet, even though these investors might have the cash and significant economic incentive to pursue a challenge, they will avoid doing so because of time constraints and perceived business norms. When a large number of the largest shareholders share a similar view of their professional responsibility, this likely changes the contest

[207] *Id.* at 348–49.

landscape, leaving contests to be launched by activists, private funds, and others outside of (or unconcerned about) mainstream business norms and thinking.

VI. TOWARD A RETAIL INVESTOR PRESENCE

In general the available evidence suggests simply that there is a shortage of shareholder campaigns. But upon closer inspection the evidence is even richer and more nuanced. The evidence suggests that there is a shortage of contested elections overall and, more specifically, a shortage of contests over control of the firm. Shareholder-challengers launched on average approximately thirty-two challenges per year and, of these, significantly fewer were control challenges (either to elect an alternative slate of directors or facilitate a sale of the company to another entity).[208] At the same time, however, based on election outcomes, the evidence is mixed as to whether shareholders are at a significant disadvantage once a campaign is launched. Challengers win or settle half of contested elections, which tends to suggest that challengers who are able to launch a campaign can have a legitimate expectation that they may be able to win or extract some wanted change as part of a settlement agreement.[209]

In many ways the more important findings revolve around the identity of the contestants. Contestant identity in corporate elections has gone generally under-theorized and untested by previous empiricists. As shown here, the identity of the contestants matters significantly. Shareholders can have different, sometimes irreconcilable interests. On this point, the evidence suggests that the make-up of contestants in corporate elections is far from diverse. The vast majority of serious, well-funded contests are launched by a set of usual suspects—private-equity and hedge funds and former (arguably disgruntled) insiders.[210]

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[208] *See supra* Part II.

[209] *See supra* text accompanying notes 69–71.

[210] *See supra* Parts III–IV.

Retail investors rarely launch a campaign. When they do, they spend very little on the campaign. And in some years these investors never win.[211] These findings help point the way to legal reform in corporate elections. Although this Article does not elaborate in great detail, the data suggest at least four preliminary comments about the shape of policy reform.

First, the data help show what reforms to avoid. In contrast to what other commentators have suggested, reforms that would change election dynamics in favor of challengers are not obviously necessary in light of the data on election outcomes.[212] For instance, Bebchuk, a prominent and extremely thoughtful commentator, has suggested a raft of legal reforms to change election dynamics and, presumably, election outcomes. Among other reforms, Bebchuk suggests that director elections be based on majority voting,[213] votes be made by secret ballot,[214] and that shareholders be allowed to elect all directors.[215] Generally each of these reforms would give challengers a greater chance of winning corporate elections, once launched. However, given that, overall, challengers who launch a campaign have a relatively good chance of victory, it is not clear that any legal reform should attempt to tilt the outcome of elections, once launched, one way or another.

Second, reforms should concentrate on the correlation between corporate-election outcomes and spending. Recall that when challenger success is broken out by challenger-identity, individual challengers fare the worse. Individual challengers lose a majority of challenges compared to institutional challengers, who win most of the time.[216]

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[211] *Id.*

[212] *See, e.g.*, *id.* at 704–06 (suggesting confidential voting as a solution); *see generally* Rogers, *supra* note 117, at 95 (discussing various forms of changes in corporate governance).

[213] Bebchuk, *supra* note 10, at 701–04.

[214] *Id.* at 704–06.

[215] *Id.* at 700.

[216] *See supra* text accompanying notes 134–140.

Importantly, though, the data suggest that individual challengers may do poorly because of the amount they budget for these campaigns. Some retail investors who participate in a corporate election spend low amounts, frequently spending less than $1,000 to run their campaign, while institutional investors routinely spend into six figures and incumbents even sometimes spend into the millions. Taken together, these findings suggest that if corrective action is needed to address any unexpected result regarding election outcomes, such corrective action might focus on the campaign-spending gap between retail investors and other investors, particularly institutional investors, who participate in an election contest on the one hand, and incumbents on the other.

Thus, one reform might be to subsidize the campaign spending by individual investors.[217] Any such subsidy system must have reasonable limits for spending and terms of eligibility, or else individual investors might be inclined to overspend and the incidence of campaign activity might increase too rapidly. A subsidy might avoid these problems by making the subsidy available *ex post* only—i.e., a reimbursement for eligible expenses rather than an upfront payment. For instance, retail investors might only be reimbursed for campaign expenses if they obtain a minimal level of support from the shareholding community in the course of their campaign. A requirement that reimbursement is conditional on the shareholder-challenger achieving a threshold level of success should limit the overall number of campaigns and the level of spending (on the corporate tab) in those campaigns that do take place.

A third and, again, related point is that, given the evidence, concerned reformers should focus on a solution that is likely to increase the number of contests overall. Again, a straightforward way to do this is to subsidize (through reimbursement) the activities of those who actually

[217] For a short review of other commentators that have suggested reimbursement of challenger expenses, see Bebchuk, *supra* note 10, at 698 n.39.

launch challenges. Recall that there is reason to believe any contest can have positive disciplinary value on the conduct of managers. Since the overall number of campaigns appears remarkably low, the subsidy system should probably subsidize all campaign activities without regard to the type of campaign (e.g., shareholder proposal campaigns versus control campaigns). If a general subsidy system is created for challengers, then the overall number of challengers should expand. If the subsidy is conditional on outcomes that are too specific, then challenger activity will continue to revolve disproportionately around a limited set of firm governance issues. For instance, if reimbursement is conditional on gaining control of the board—the current legal structure—the vast majority of contestants will launch contests for board seats, even though other types of contests, such as shareholder proposals, could be beneficial to the firm.

Fourth, since the data show that the identity of contestants is highly homogenous, reform efforts should attempt to diversify the ranks of contestants. Specifically, reform efforts must pay attention to how the reform might affect the incentives of small stakeholders, like average retail investors. Here, an added layer of regulatory complexity may be unnecessary. A generalized subsidy system for challengers may do most of this work and create such an incentive. Any subsidy system is likely to have the most pronounced effect among small stakeholders for whom the subsidy will mean the most. In such a system, the marginal benefit of subsidy dollars will likely be felt greatest among retail investors for whom such dollars will seem relatively significant, since such investors tend to own small stakes and have fewer resources. In the end, the main findings here—low number of contested elections, lack of diversity among contestants, and uneven success rates among contestants—help point the way to policy reform.

VII. CONCLUSION

Incumbents in contested corporate elections will likely always have some advantages, just as incumbents do in political elections. The managers of a firm, after all, have built up important relationships with the shareholder-voting community through their time at the helm. The incumbents have sent out periodic notices to shareholders, presided over annual firm meetings, and held the lectern at important press conferences. These circumstances alone create a reasonable expectation that incumbents will often win contested corporate elections.

But, in addition, these managers historically have been able to rely on a campaign-funding advantage. As has been shown, legal rules give them almost unfettered access to corporate resources for the purposes of defending their policy and their jobs at the firm. Shareholders, particularly retail investors, who may have a technical right to campaign, are at a decided disadvantage. As a result, shareholders rarely campaign at firms. Retail investors almost never do. Although it is not obvious what can be done about the relationship advantage that incumbents will continue to enjoy in contested corporate elections, policy reform is possible to offset the financial advantage. A future project looks at what specific shape such reform should take in detail. For now, however, the data presented here suggest that such reform should attempt to encourage retail investors to be more active.

Appendix A
Proxy Data[1]

Year	Company	Challenger Name	Contested Issue(s)	Challenger Expenses	Shares Owned by Participants	Outstanding Common Shares on Record Date	Challenger Largest S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2008	1st Century Bancshares, Inc.	Palisair Capital Partners, L.P.	Director	175,000	593,702	9,913,884	No	Yes	Alan Rothenberg	905,336	37,500	No	No
2008	A. Schulman, Inc.	Ramius Capital Group LLC	Directors	250,000	2,062,795	26,132,897	No	Yes	Dimensional Fund Advisors L.P.	2,600,499	10,000	Yes	No
2007	Advocat, Inc.	Todd P. Robinson, et al.	Revocation to Adjourn Annual Meeting	55,000	100	5,871,287	No	Yes	Wallace E. Olson	637,867	Not Disclosed	No	Yes
2007	Alaska Air Group, Inc.	Stephen Nieman, et al.	Directors	500	325	42,616,739	No	Yes	Donald Smith & Co., Inc	3,829,500	22,500	No	Yes
2008	Alaska Air Group, Inc.	Stephen Nieman, et al.	Directors	350	3,275	36,575,476	No	Yes	Donald Smith & Co., Inc	4,041,511	23,500	No	Yes
2006	Alaska Air Group., Inc.	Steve Nieman, et al.	Directors	500	2,975	35,965,862	No	Yes	Donald Smith & Co., Inc.	2,747,100	22,500	No	Yes
2007	American Republic Realty Fund I	Everest Management LLC, et al.	Consent Solicitation to Remove Board	5,000	3,405	11,000	Yes	Yes	Everest Management, LLC	2,376	75,000	Pending	No
2007	Applebee's International, Inc.	Breeden Capital Management LLC, et al.	Directors	700,000	4,025,000	74,555,997	No	Yes	FMR Corp	9,773,750	400,000	Settled	No
2006	Arbinet-theexchange, Inc.	Alex Mashinsky, et al.	Directors	600,000	1,687,601	25,854,938	No	Yes	AMVESCAP PLC and related entities	3,484,641	750,000	Split	Yes

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Proxy Data[1]

Year	Company	Challenger Name	Contested Issue(s)	Challenger Expenses	Shares Owned by Participants	Outstanding Common Shares on Record Date	Challenger Largest S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2007	Arrow International, Inc	The Robert L. McNeil, Jr. 1983 Trust	Directors/ Amend By-Laws	150,000	4,624,494	46,007,344	Yes	Yes	Robert L. McNeil, Jr. 1983 Trust	4,624,494	Not Disclosed	No	No
2008	ASA Limited	Laxey Partners Limited, et al.	Directors	800,000	617,125	9,600,000	No	Yes	Lazard Asset Management LLC	882,482	1,010,000	Yes	No
2007	Atmel Corporation	George Perlegos	Directors	5,900,000	25,871,908	488,839,990	No	Yes	FMR Corp.	59,023,988	5,475,000	No	Yes
2007	Bairnco Corporation	Steel Partners II, L.P., et al.	Consent Solicitation to Remove Board	225,000	1,110,200	7,291,853	Yes	Yes	Steel Partners II, L.P.	1,110,200	500,000	Settled	No
2006	Bally Total Fitness Holding Corporation	Pardus European Special Opportunities Master Fund L.P., et al.	Director/ Option Plan	300,000	5,475,000	38,285,905	Yes	Yes	Pardus Capital Management LP	5,475,000	150,000	Yes	No
2006	Bally Total Fitness Holding Corporation	Liberation Investments, L.P., et al.	Amend By-Laws/ Option Plan	430,000	4,284,450	38,285,905	No	Yes	Pardus Capital Management LP	5,475,000	150,000	Yes	No
2007	Bancorp Rhode Island, Inc.	PL Capital LLC, et al.	Directors	150,000	392,420	4,845,821	No	Yes	Malcolm G. Chace	532,150	230,000	No	No
2008	Bancorp Rhode Island, Inc.	PL Capital LLC, et al.	Directors	150,000	387,920	4,554,485	No	Yes	Malcolm G. Chace	527,665	195,000	No	No

Appendix A
Proxy Data[1]

Year	Company	Challenger Name	Contested Issue(s)	Challenger Expenses	Shares Owned by Participants	Outstanding Common Shares on Record Date	Challenger Largest S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2008	Bassett Furniture Industries, Incorporated	Costa Brava Partnership III L.P., et al.	Directors	300,000	605,923	11,812,740	No	Yes	Aegis Financial Corporation	1,210,230	55,000	Settled	No
2008	Biogen Idec Inc.	Carl C. Icahn, et al.	Directors	1,300,000	12,435,904	291,522,405	No	Yes	ClearBridge Advisors, LLC	35,839,709	11,000,000	No	Yes
2008	Boston Financial Qualified Housing Tax Credits L.P. IV, A Limited Partnership	Everest Housing Investors 2, LP	Consent to Remove General Partners	30,000	4,354	68,043	No	Yes	Bond Purchase, LLC	10,818	25,000	Pending	No
2006	Britton & Koontz Capital Corporation	Lanneau-Metcalf Group	Director	10,000	401,435	2,117,086	Yes	Yes	Lanneau Shareholder Group	401,435	9,000	No	No
2008	Cape Fear Bank Corporation	Koury Foundation	Directors	225,000	348,690	3,841,785	Yes	Yes	Mauric J. Koury Foundation, Inc.	348,690	483,000	Settled	No
2006	Career Education Corporation	Robert Steven Bostic, et al.	Directors	1,250,000 (Mean of Estimate Range: 1,000,000–1,500,000)	1,081,340	98,139,223	No	Yes	Ariel Capital Management, LLC	13,087,354	750,000	No	Yes
2007	CVS/Caremark Corporation	Express Scripts, Inc. & Kew Corp.	Vote Against Merger	750,000	591,180	1,528,450,098	No	Yes	FMR Corp	52,274,794	35,000	No	No

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Proxy Data[1]

Year	Company	Challenger Name	Contested Issue(s)	Challenger Expenses	Shares Owned by Participants	Outstanding Common Shares on Record Date	Challenger Largest S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2007	CBOT Holdings, Inc.	IntercontinentalExchange, Inc.	Vote Against Merger	250,000	1,000	34,896,675	No	No	None	Not Found	230,000 (includes extra 150,000 CBOT pays in the event of challenge)	No	No
2007	Center Bancorp, Inc	Seidman and Associates, LLC, et al.	Directors	50,000	1,294,240	13,248,406	Yes	Yes	Lawrence Seidman and discretionary clients	1,226,740	105,000	Yes	Yes
2007	Cerdian Corporation	Pershing Square, L.P., et al.	Directors	5,800,000	21,432,734	144,167,384	Yes	Yes	Pershing Square Funds	21,432,734	350,000	Settled	No
2008	Charming Shoppes, Inc.	Crescendo Partners II L.P., Series Q, et al.	Directors	375,000	9,280,805	113,263,136	No	Yes	First Pacific Advisors, LLC	17,312,300	850,000	Settled	No
2008	Cleveland-Cliffs Inc.	Harbinger Capital Master Fund I, Ltd. & Harbinger Special Situations Fund, L.P.	Vote for Control Share Acquisition	100,000	16,616,472	106,720,355	Yes	Yes	Harbinger Capital Partners Master Fund I, Ltd	16,616,472	200,000	No	No
2007	CLST Holdings, Inc.	Timothy S. Durham, et al.	Directors	250,000	1,726,231	20,553,205	No	Yes	Micheal A. Roth and Brian J. Stark	3,262,254	10,000	Yes	Yes
2006	CNB Corporation	Willis J. Duncan	Directors	190,000	59,679	1,237,582	No	Yes	Dessie M. Ormsbee	74,558	Not Disclosed	Yes	Yes

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Proxy Data[1]

Year	Company	Challenger Name	Contested Issue(s)	Challenger Expenses	Shares Owned by Participants	Outstanding Common Shares on Record Date	Challenger Largest S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2008	Cohen & Steers REIT and Utility Income Fund, Inc.	Western Investment LLC, et al.	Directors	150,000	3,145,013	58,858,135	Yes	Yes	Western Investment LLC	3,050,913	50,000	No	No
2008	Cohen & Steers Select Utility Fund, Inc.	Western Investment LLC, et al.	Directors	150,000	3,088,075	43,320,750	Yes	Yes	Western Investment LLC	3,323,509	50,000	No	No
2008	Coinstar, Inc.	Shamrock Activist Value Fund, L.P., et al.	Directors	350,000	3,563,076	27,926,649	Yes	Yes	Shamrock Partners Activist Value Fund, L.L.C.	3,712,755	4,900,000 (Mean of Estimate Range: 3,400,000–6,400,000)	Settled	No
2007	Competitive Technologies, Inc.	John B. Nano, et al. (Committee to Restore Shareholder Value)	Directors	50,000	22	8,009,380	No	Yes	Charles J. Philippin	124,884	175,000 (Mean of Estimate Range: 150,000–200,000)	Yes	Yes
2007	Comverse Technology, Inc.	Oliver Press Partners, LLC, et al.	Consent to Call Special	100,000	3,386,614	203,594,631	No	Yes	FMR Corp	29,765,517	50,000	Settled	No
2007	Croghan Bancshares, Inc.	Nathan G. Danziger	Directors	975	2,889	1,773,918	No	Yes	James E. Bowlus/J. Terrence Wolfe	30,300 (per individual)	18,000 (total possible amount of expenses)	No	Yes
2006	Croghan Bancshares, Inc.	Nathan G. Danziger	Director	975	2,889	1,828,246	No	No	None	N/A	15,000	No	Yes

Appendix A
Proxy Data[1]

Year	Company	Challenger Name	*Contested* Issue(s)	*Challenger* Expenses	Shares *Owned by* Participants	Outstanding Common *Shares on* Record Date	Challenger *Largest* S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2008	Croghan Bancshares, Inc.	Nathan G. Danziger	Director	975	2,889	1,745,418	No	Yes	James E. Bowlus	30,425	15,000	No	Yes
2007	Crown Crafts, Inc.	Wynnefield Partners Small Cap Value, L.P., et al.	Directors	325,000	1,463,335	10,005,192	Yes	Yes	*Wynnefield* Capital Inc	1,463,335	200,000	Split	No
2007	Cryo-Cell International, Inc.	David I. Portnoy, et al.	Directors	50,000	1,546,969	11,669,629	Yes	Yes	Portnoy Group	1,546,969	51,000	No	Yes
2008	CSX Corporation	*The Childrens* Investment Fund Management (UK) LLP, et al.	Directors	9,000,000	35,054,952	404,783,890	No	Yes	Deutsche Bank AG	36,729,346	22,000,000	Yes	No
2007	CVS/Caremark Corporation	Amalgamated Bank LongView Collective Investment Fund	Vote for S'holder Proposal	Not Disclosed	541,148	1,528,450,098	No	Yes	FMR Corp	52,274,794	35,000	No	No
2007	Cyberonics, Inc.	Metropolitan Capital Advisors, Inc., et al.	Directors	500,000	1,844,312	25,711,387	No	Yes	Boston Scientific	3,570,000	480,000	Settled	No
2006	Delcath Systems, Inc. (Consent Solicitation)	Laddcap Value Partners LP	Directors	200,000	2,183,727	19,889,039	Yes	Yes	Robert Ladd	2,163,527	800,000	Pending	No
2008	DWS Global Commodities Stock Fund, Inc.	Western Investment LLC, et al.	Directors	150,000	2,760,320	19,091,808	Yes	Yes	Western Investment LLC	2,269,353	75,000	Pending	No
2008	Emageon Inc.	*Oliver Press* Partners, LLC, et al.	Director	250,000	3,569,360	21,466,391	Yes	Yes	Oliver Press Partners, LLC	3,569,360	250,000	Settled	No

Appendix A
Proxy Data[1]

Year	Company	Challenger Name	Contested Issue(s)	Challenger Expenses	Shares Owned by Participants	Outstanding Common Shares on Record Date	Challenger Largest S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2006	Engelhard Corporation	BASF Aktiengesellschaft	Directors	2,000,000	100	124,011,840	No	Yes	Dodge & Cox	15,838,050	1,000,000	Settled	No
2008	EnPro Industries, Inc.	Steel Partners II, L.P., et al.	Director	375,000	2,433,838	21,834,530	Yes	Yes	Steel Partners	2,433,838	1,200,000	Settled	No
2006	Federal Trust Corporation	Keefe Managers, LLC	Directors	250,000	796,635	9,149,343	No	Yes	James Suskiewich	805,367	100,000	No	No
2007	First Keystone Financial, Inc.	Lawrence Partners, L.P., et al.	Directors	100,000	155,850	2,427,928	No	Yes	First Keystone Financial, Inc.	386,802	13,000 (Mean of Estimate Range: 6,000–20,000)	No	No
2006	FirstPlus Financial Group, Inc.	FPFX Shareholder Value Committee	Directors	Not Disclosed	Not Disclosed	45,340,090	No	Yes	Rupen Gulenyan	3,488,300	82,500	Settled	No
2008	FNB Corporation	FNB Corporation Shareholders Committee	Vote Against Merger	150,000	279,777	10,795,943	No	No	None	N/A	35,000 (Mean of Estimate Range: 20,000–50,000)	No	No
2008	Footstar, Inc.	Outpoint Capital LP	Director	300,000	597,860	21,256,816	No	Yes	FMR Corp. and Edward C. Johnson III	2,016,000	200,000	No	No

Appendix A
Proxy Data[1]

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2008	Franklin Universal Trust	Bulldog Investors General Partnership	Directors	100,000	2,290,480	25,187,894	Yes	Yes	Bulldog Investors General Partnership and Phillip	2,724,437	322,000	No	No
2008	Furniture Brands *International, Inc.*	Sun Capital Partners	Directors	1,050,000	4,581,881	48,512,171	No	Yes	Samson Holding Ltd.	7,221,373	6,000	Yes	No
2008	*Gencor Industries,* Inc.	Lloyd I. Miller, III	Director	375,000 (Mean of Estimate Range: 250,000–500,000)	918,666	7,967,372	No	Yes	Harvey Houtkin	2,171,969	Not Disclosed	Yes	Yes
2006	Gencorp Inc.	Pirate Capital LLC	Directors	500,000	4,674,200	55,709,423	No	Yes	GAMCO Investors, Inc.	5,530,303	2,100,000	Yes	No
2007	H & R Block, Inc.	Breeden Capital Management LLC	Directors	750,000	6,000,000	326,529,658	No	Yes	Davis Selected Advisers, LP	38,390,977	4,050,000	Yes	No
2008	Hexcel Corporation	OSS Capital Management LP et al.	Directors	900,000	5,285,900	95,855,771	No	Yes	Jeffrey L. Gendell	9,432,617	1,700,000	No	No
2006	H.J. Heinz Company	Trian Fund Management L.P.	Directors/ Amend By-Laws/Auditors	7,000,000	18,245,000	332,360,964	No	Yes	Capital Research and Management Company	45,705,000	14,000,000	Split	No

Appendix A
Proxy Data[1]

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2006	Image Entertainment, Inc.	Lions Gate Entertainment Corp.	Directors	1,500,000	4,033,996	21,296,346	No	Yes	Image Investors Co.	6,069,767	Not Disclosed	No	No
2006	InfoUSA Inc.	Dolphin Limited Partnership I, L.P	Directors/ Amend By-Laws	325,000	2,000,000	55,140,753	No	Yes	Vinod Gupta	22,984,566	700,000	No	No
2008	InSite Vision Incorporated	Pinto Technology Ventures, L.P.	Directors	400,000	10,238,999	94,628,937	Yes	Yes	Pinto Technology Ventures	10,238,999	335,000	Yes	No
2008	Insituform Technologies, Inc.	Water Asset Management LLC	Directors	500,000	1,466,008	27,470,623	No	Yes	T. Rowe Price Associates, Inc	3,573,650	1,350,000	No	No
2008	Insured Municipal Income Fund Inc.	Bulldog Investors General Partnership	Directors	75,000	1,400,000	20,628,363	No	Yes	Karpus Management	1,383,614	Not Disclosed	Not Disclosed	No
2007	International Electronics, Inc.	RISCO Ltd.	Voting Rights of Tendered Shares	75,000	500	1,757,098	No	Yes	John Waldstein	267,405	150,000	Settled	No
2007	Inter-Tel (Delaware), Inc.	Steve G. Mihaylo, et al.	Vote Against Merger	500,000	5,179,498	27,280,859	Yes	Yes	Steven G. Mihaylo	5,179,498	50,000	No	Yes
2008	John Hancock Tax-Advantaged Dividend Income Fund	Western Investment LLC	Directors	150,000	1,971,145	42,077,487	No	No	None	Not Disclosed	230,000	No	No
2006	LifePoint Hospitals, Inc.	Accipiter Life Sciences Fund, LP	Directors	500,000	985,394	55,492,025	No	Yes	Janus Capital Management, LLC	3,683,890	Not Disclosed	Withdrawn	No

Appendix A
Proxy Data[1]

Year	Company	Challenger Name	Contested Issue(s)	Challenger Expenses	Shares Owned by Participants	Outstanding Common Shares on Record Date	Challenger Largest S'holder	Presence of Blockholder (i.e., >5%)	Name of Largest S'holder	Number of Shares Held by Largest S'holder	Incumbent Expenses	Challenge Success	Individual Challenger
2007	LION, Inc.	Sam Ringer, et al. (Lion Shareholder Committee)	Directors	75,000	3,414,176	38,624,272	Yes	Yes	Continental Advisors LLC	4,303,277	Not Disclosed	No	Yes
2008	LNB Bancorp, Inc.	Shareholders for a Better Bank	Amend Certificate of Inc.; Directors	100,000	510,000	7,295,663	No	Yes	AMG Investments, LLC (Crossover Membership Between AMG and Shareholders for a Better Bank)	564,905	75,000	No	No
2008	LocatePLUS Holdings Corporation	ACE Investment Group LLC, et al.	Directors	250,000	8,083,285	17,424,451	No	Yes	Special Situation Funds	1,410,000	20,000	No	No
2006	Longview Fibre Co.	Obsidian Finance Group, LLC	Consent to Call Special	180,000	201	51,076,567	No	Yes	Dimensional Fund Advisors Inc	4,338,028	Not Disclosed	No	No
2008	Luby's, Inc.	Ramius Capital Group	Directors	300,000	1,956,100	27,946,443	No	Yes	Harris J. Pappas	3,936,673	Not disclosed	No	No
2006	Massey Energy Company	Third Point LLC	Directors	500,000	14,400,000	81,980,097	No	Yes	The PNC Financial Services Group, Inc.	7,498,053	200,000	Yes	No

Appendix A
Proxy Data[1]

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2008	Maxim Tep, Inc.	Maxim Tep Limited	Remove 3 Directors and Elect 2 New Directors	30,000	21,700,000	125,365,980	Yes	Yes	Maxim Tep Limited	21,700,000	Not Disclosed	Pending	No
2008	Media General, Inc.	Harbinger Capital Partners	Directors	600,000	4,058,454	22,301,728	No	Yes	Mario J. Gabelli and affiliates	4,835,947	975,000	Yes	No
2008	MedQuist Inc.	Costa Brava Partnership III, L.P., et al.	Directors	350,000	1,940,821	37,487,323	No	Yes	Koninklijke Philips Electronics N.V.	26,085,086	153,780	No	No
2008	MFS (R) Intermediate Income Trust	Karpus Management, Inc.	Directors	132,500 (Mean of Estimate Range: 125,000–140,000)	13,402,625	116,512,419	No	Yes	MFS Intermediate Income Trust	110,728,231	69,169	None	No
2008	Micrel, Incorporated	Obrem Capital Management, LLC	Directors	650,000	10,735,690	71,370,628	No	Yes	Raymond D. Zinn	11,893,542	2,000,000	Withdrawn	No
2007	Midwest Air Group, Inc.	AirTran Holdings, Inc. et al.	Directors	570,000	200	24,589,217	No	Yes	Octavian Master Fund, L.P.	1,460,000	225,000	Yes	No
2008	MMC Energy, Inc.	Energy Holdings Limited LLC	Directors	450,000	1,278,775	14,144,347	No	Yes	Stephens Investment Management, LLC	2,702,192	60,000	No	No

Appendix A
Proxy Data[1]

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2006	Motient Corporation	Highland Capital Management, L.P., et al.	Directors/ Option Plan	2,050,500	9,024,326	63,249,639	Yes	Yes	Highland Capital Management	9,024,326	770,000	No	No
2007	Motorola, Inc.	Carl C. Icahn	Director	2,750,000	11,700,000	2,385,724,367	No	Yes	Barclays Global Investors, NA	168,280,301	14,000,000	No	Yes
2008	Napster, Inc.	Perry H. Rod, et al.	Directors	90,000 (Mean of Estimate Range: 80,000–100,000)	708,181	47,853,159	No	Yes	Eminence Capital, LLC	4,275,838	140,000	Postponed	Yes
2008	National Fuel Gas Company	New Mountain Vantage Advisers	Directors	3,500,000	8,076,206	83,946,575	Yes	Yes	New Mountain Vantage, GP L.L.C.	8,076,206	7,100,000	Settled	No
2007	Neuberger Berman Realty Income Fund Inc.	Western Investment LLC	Directors	100,000	2,505,821	27,372,139	Yes	Yes	Western Investment LLC	2,254,021	25,000	Settled	No
2006	The New Germany Fund, Inc.	Phillip Goldstein	Directors/ Terminate Mgt. Agreement / Realize NAV	35,000	2,092,372	24,804,698	No	Yes	The Coalition for Shareholder Democracy	4,207,802	120,000	Split	Yes
2006	Novoste Corporation	Steel Partners II, L.P., et al.	Vote Against Asset Sale	175,000	608,301	4,083,721	Yes	Yes	Steel Partners II, L.P.	608,301	9,500	Settled	No

Appendix A
Proxy Data[1]

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2008	Office Depot, Inc.	Levitt Corporation, et al.	Directors	3,860,000	3,000,200	273,009,214	No	Yes	Barclays Global Investors, NA	19,721,908	13,500	Withdrawn	No
2007	Openwave Systems Inc.	Harbinger Capital Partners, et al.	Directors	1,500,000	10,000,000	83,218,688	No	Yes	FMR Corp	13,448,277	10,000	No	No
2007	Parlux Fragrances, Inc.	Glenn Nussdorf	Consent Solicitation to Remove Board	600,000	2,212,629	18,909,912	Yes	Yes	Glenn Nussdorf	2,212,629	7,500	Settled	Yes
2007	Peerless Systems Corporation	Pembridge Capital Management LLC	Directors	225,000	1,511,152	17,282,836	No	Yes	State of Wisconsin Investment Board	1,579,975	375,000	Settled	No
2008	The Phoenix Companies, Inc.	Oliver Press Partners, LLC, et al.	Directors	4,500,000	5,688,206	114,381,336	No	Yes	Dimensional Fund Advisors LP	6,002,951	7,000,000	Settled	No
2007	Phoenix Technologies Ltd.	Starboard Value and Opportunity Master Fund Ltd.	Directors	175,000	3,502,941	25,574,579	Yes	Yes	The Starboard Group	3,502,941	275,000	Settled	No
2007	Pioneer Tax Advantaged Balanced Trust	Western Investment LLC	Directors	100,000	1,662,841	28,706,981	No	Yes	Cede& Co	28,687,275	460,000	Yes	No
2008	Point Blank Solutions, Inc.	Steel Partners II, L.P.	Directors	400,000	4,018,087	51,085,885	No	Yes	David H. Brooks	11,712,978	500,000	Yes	No
2007	Pomeroy IT Solutions, Inc.	Flagg Street Capital LLC, et al.	Directors	120,000	1,249,325	12,701,863	No	Yes	David B. Pomeroy, II	2,208,315	300,000	Settled	No

Appendix A
Proxy Data[1]

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2007	Prudential Bancorp, Inc. of Pennsylvania	Joseph Stilwell, et al.	Withhold on Directors	50,000	1,116,400	12,017,750	No	Yes	Prudential Mutual Holding Company	6,910,062	Not Disclosed	No	Yes
2008	Prudential Bancorp, Inc., of Pennsylvania	Joseph Stilwell, et al.	Withhold Campaign	50,000	1,116,400	11,069,866	No	Yes	Prudential Mutual Holding Company	7,059,062	Not Disclosed	No	Yes
2008	Quality Systems, Inc.	Ahmed Hussein, et al.	Directors	250,000	4,683,100	27,765,027	No	Yes	Sheldon Razin	5,179,380	675,000	No	Yes
2008	Rackable Systems, Inc.	Richard L. Leza, Jr. & Steve Montoya	Directors	100,000	4,000	29,631,306	No	Yes	Galleon Management, L.P and Raj Rajaratnam	2,618,556	500,000	No	Yes
2007	Riviera Holdings Corporation	Flag Luxury Riv, LLC, et al.	Directors	435,000 (Mean of Estimate Range: 385,000–485,000)	1,587,230	12,463,755	No	Yes	D.E. Shaw & Co.	1,219,400	Not Disclosed	Settled	No
2007	RMR Hospitality and Real Estate Fund	Phillip Goldstein/Bulldog Investors General Partnership	Directors/ Terminate Advisory Agreement	10,000	217,400	2,485,000	Yes	Yes	Bulldog Investors General Partnership	368,400	500,000	No	No
2007	Roma Financial Corporation	Stilwell Group, et al.	Withhold on Directors	50,000	1,966,000	32,731,875	Yes	Yes	Stillwell group	1,966,000	Not Disclosed	No	No

Appendix A
Proxy Data[1]

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2007	Ryerson Inc.	Harbinger Capital Partners Master Fund I, Ltd. & Harbinger Capital Partners Special Situation Fund, L.P.	Directors/ Amend By-Laws	2,500,000	2,550,000	26,670,386	Yes	Yes	Harbinger Capital Partners Master Fund I	2,550,000	2,000,000	No	No
2006	SCPIE Holdings Inc.	Stilwell Value Partners III, L.P., et al.	Directors	70,000	625,700	9,549,516	No	Yes	Aegis Financial Corporation	1,012,700	1,200,000	No	No
2008	SCPIE Holdings Inc.	Joseph Stilwell	Vote Against Merger	150,000	950,100	9,583,165	Yes	Yes	The Stilwell Group	950,100	350,000	No	Yes
2008	Sierra Bancorp	Patricia Childress & Carol A. Bates	Director	137,500 (Mean of Estimate Range: 125,000–150,000)	1,218,068	9,521,273	Yes	Yes	Patricia Childress	665,615	87,500 (Mean of Estimate Range: 75,000–100,000)	No	Yes
2007	Simon Worldwide, Inc.	Everest Special Situations Fund L.P., et al.	Directors/ S'holder Proposal	70,000	2,158,732	16,673,193	No	Yes	Yucaipa and Affiliates	4,021,320	95,000	Split	No
2008	SM&A	Steven S. Myers, et al.	Directors	500,000	3,037,225	19,055,021	Yes	Yes	Steven Myers	2,997,225	550,000	Settled	Yes
2008	The Steak n Shake Company	The Lion Fund L.P., et al.	Directors	300,000	2,423,945	28,492,799	No	Yes	MSD Capital, L.P.	2,782,300	350,000	No	No

Appendix A
Proxy Data[1]

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2006	Synergy Financial Group, Inc.	Financial Edge Fund, LP, et al.	Directors	125,000	1,129,015	11,445,881	Yes	Yes	Financial Edge Fund, LP	1,129,015	250,000	Yes	No
2007	Take-Two Interactive Software, Inc.	DE Shaw & Co/SAC Capital/Tudor Investment Corp	Directors	Not Disclosed	Not Disclosed	72,838,149	No	Yes	Oppenheimer Funds, Inc	17,876,995	20,000	Yes	No
2008	Team Financial, Inc.	Keith B. Edquist, et al.	Directors	75,000	154,660	3,596,103	No	Yes	Employee Stock Ownership Plan	876,415	Not Disclosed	Settled	Yes
2007	The Topps Company, Inc.	Cresendo Partners II, L.P.	Vote Against Merger	375,000	2,550,201	38,717,765	No	No			250,000	No	No
2006	The Topps Company, Inc.	Pembridge Value Opportunity Fund LP, et al.	Directors	125,000	385,722	39,323,393	No	Yes	Private Capital Management, Inc.	9,514,371	500,000	Settled	No
2006	Tri-Continental Corporation (Annual)	Western Investment Hedged Partners L.P., et al.	Directors/ Auditors/ Voting procedures	250,000	7,281,741	107,526,521	Yes	Yes	Western Investment Hedged Partners L.P	7,281,741	685,000		No
2006	Tri-Continental Inc. (Special)	Western Investment Hedged Partners L.P., et al.	Directors	375,000	10,037,341	105,533,774	Yes	Yes	Western Investment Hedged Partners L.P	9,855,541	1,425,000	No	No
2008	TVI Corporation	Allen E. Bender	Directors	110,000	1,486,018	33,922,124	No	Yes	Royce & Associates, LLC	2,812,645	100,000	No	Yes

Appendix A
Proxy Data[1]

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2006	UbiquiTel Inc.	Deephaven Capital Management LLC, et al.	Against Merger/ Directors	75,000	16,902,417	94,453,100	Yes	Yes	Deephaven Capital Management LLC	16,977,817	50,000 (for First Two Months; 20,000 per Month Thereafter)	No	No
2007	Union Bankshares Company	Financial Analytics Investment Corporation	Directors/ S'holder Proposal	55,000	20,276	1,064,530	No	Yes	Estate of Fitz Eugene Dixon, Jr.	58,798	20,000	No	No
2008	VAALCO Energy, Inc.	Nanes Delorme Partners I LP, et al.	Directors	275,000	4,700,000	59,194,182	Yes	Yes	Nanes Delorme Partners I LP	4,700,000	70,000	Settled	No
2008	Vineyard National Bancorp	Jon W. Salmanson & Norman Morales	Consent to Amend Bylaws	75,000	427,599	9,884,441	No	Yes	NorthPointe Capital, LLC	913,214	75,000	Yes	Yes
2008	Vineyard National Bancorp	Jon W. Salmanson & Norman Morales	Directors	125,000 (Mean of Estimate Range: 100,000–150,000)	428,540	10,164,852	No	Yes	UKA, L.P.	600,000	400,000	Yes	Yes
2007	Vitesse Semiconductor Corp	Chap-cap Activists Partners Master fund, ltd	Directors	Not Disclosed			No	No	Unknown		Not Disclosed	Pending	No
2006	Warwick Valley Telephone Company	Santa Monica Partners, L.P	Directors	75,000	130,889	5,351,780	No	Yes	Julia S. Barry	361,020	10,000	No	No

Appendix A
Proxy Data[1]

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2007	WCI Communities, Inc.	Carl C. Ichan, et al	Directors	450,000	6,106,275	42,010,175	Yes	Yes	Icahn Partners	6,096,175	600,000	Settled	Yes
2006	Whitehall Jewellers, Inc.	Newcastle Partners, L.P., et al.	Directors/ Stock Issuance/ Reverse Stock Split	225,000	2,018,400	16,768,947	No	Yes	Prentice Capital Management, LP	11,660,328	N/A	Withdrawn (Co-acquired)	No
2007	Wilshire Enterprises, Inc.	Full Value Partners L.P. & Bull Dog Investors	Directors/ S'holder Proposal	20,000	470,500	7,926,248	Yes	Yes	Phillip Goldstein/ Bulldog Investors and Andrew Dakos	1,173,650	175000 (Mean of Estimate Range: 150,000–200,000)	No	No
2008	Yahoo! Inc.	Carl C. Icahn, et al.	Directors	2,250,000	68,786,320	1,381,008,701	No	Yes	Capital World Investors	135,542,600	12,000,000	Settled	Yes
2006	Yardville National Bancrop	Lawrence B. Seidman, et al.	Directors	100,000	903,049	10,950,779	Yes	Yes	Lawrence B. Seidman	903,039	200,000	No	Yes

	Challenger Expenses	Outstanding Common Shares on Record Date
Median	$225,000	26,401,642
Minimum	$350	11,000
Maximum	$9,000,000	2,385,724,367

[1] These data are collected from listed proxy statements and GEORGESON, 2008 ANN. CORP. GOVERNANCE REV., http://www.georgeson.com/usa/download/acgr/acgr2008.pdf; GEORGESON, 2007 ANN. CORP. GOVERNANCE REV., http://www.georgeson.com/usa/download/acgr/acgr2007.pdf; GEORGESON, 2006 ANN. CORP. GOVERNANCE REV., http://www.georgeson.com/usa/download/acgr/acgr2006.pdf.

Appendix B
Proxy URL

Year	Company	Challenger Name	Challenger Proxy Statement Link	Incumbent Proxy Statement Link
2008	1st Century Bancshares, Inc.	Palisair Capital Partners, L.P.	http://www.sec.gov/Archives/edgar/data/1412698/000092189508001325/defc14a07206002_05292008.htm	http://www.sec.gov/Archives/edgar/data/1420525/000110465908029910/a08-11149_1defc14a.htm
2008	A. Schulman, Inc.	Ramius Capital Group LLC	http://www.sec.gov/Archives/edgar/data/87565/000092189507002874/defn14a06297022_12192007.htm	http://www.sec.gov/Archives/edgar/data/87565/000095015208009644/l32892bdef14a.htm
2007	Advocat, Inc.	Todd P. Robinson, et al.	http://www.sec.gov/Archives/edgar/data/919956/000119312507115659/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/919956/000095014407003339/g06650ddef14a.htm
2007	Alaska Air Group, Inc.	Stephen Nieman, et al.	http://www.sec.gov/Archives/edgar/data/766421/000121715007000013/nemo14a4def070605.htm	http://www.sec.gov/Archives/edgar/data/766421/000119312507096065/ddefc14a.htm
2008	Alaska Air Group, Inc.	Stephen Nieman, et al.	http://www.sec.gov/Archives/edgar/data/766421/000121715008000011/nemo14adef080414.htm	http://www.sec.gov/Archives/edgar/data/766421/000119312508075327/ddefc14a.htm
2006	Alaska Air Group., Inc.	Steve Nieman, et al.	http://www.sec.gov/Archives/edgar/data/766421/000121715006000017/nemo14adef060505.htm	http://www.sec.gov/Archives/edgar/data/766421/000119312506079774/ddefc14a.htm
2007	American Republic Realty Fund I	Everest Management LLC, et al.	http://www.sec.gov/Archives/edgar/data/711512/000116049806000017/amrep1_defc14a102406.htm	http://www.sec.gov/Archives/edgar/data/711512/000089742306000110/def14a.htm
2007	Applebee's International, Inc.	Breeden Capital Management LLC, et al.	http://www.sec.gov/Archives/edgar/data/853665/000095012307005361/y33197ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/853665/000095013707005301/c13047ddefc14a.htm
2006	Arbinet-theexchange, Inc.	Alex Mashinsky, et al.	http://www.sec.gov/Archives/edgar/data/1136655/000095012306005766/y18832defn14a.htm	http://www.sec.gov/Archives/edgar/data/1136655/000119312506098595/ddef14a.htm
2007	Arrow International, Inc	The Robert L. McNeil, Jr. 1983 Trust	http://www.sec.gov/Archives/edgar/data/886046/000092242307001113/kl08102.htm	http://www.sec.gov/Archives/edgar/data/886046/000095012307011936/y38355adefm14a.htm
2008	ASA Limited	Laxey Partners Limited, et al.	http://www.sec.gov/Archives/edgar/data/1190021/000104746908000887/a2182400zdefc14a.htm	http://www.sec.gov/Archives/edgar/data/1230869/000113379608000022/asa80074.htm
2007	Atmel Corporation	George Perlegos	http://www.sec.gov/Archives/edgar/data/872448/000093041307003478/c47710_defc14a.htm	http://www.sec.gov/Archives/edgar/data/872448/000095013407007981/f29085dcdefc14a.htm
2007	Bairnco Corporation	Steel Partners II, L.P., et al.	http://www.sec.gov/Archives/edgar/data/350750/000092189507000100/defc14a01874049_01112007.htm	http://www.sec.gov/Archives/edgar/data/350750/000095012307000726/y28765dcdefc14a.htm
2006	Bally Total Fitness Holding Corporation	Pardus European Special Opportunities Master Fund L.P., et al.	http://www.sec.gov/Archives/edgar/data/770944/000095014205003324/defc_14a-bally.txt	http://www.sec.gov/Archives/edgar/data/770944/000095013706000170/n00536dcdefc14a.htm
2006	Bally Total Fitness Holding Corporation	Liberation Investments, L.P., et al.	http://www.sec.gov/Archives/edgar/data/1259272/000119312505250790/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/770944/000095013706000170/n00536dcdefc14a.htm
2007	Bancorp Rhode Island, Inc.	PL Capital LLC, et al.	http://www.sec.gov/Archives/edgar/data/1008845/000089706907000939/cmw2780.htm	http://www.sec.gov/Archives/edgar/data/1109525/000110465907025844/a07-7827_2defc14a.htm

Appendix B
Proxy URL

Year	Company	Challenger Name	Challenger Proxy Statement Link	Incumbent Proxy Statement Link
2008	Bancorp Rhode Island, Inc.	PL Capital LLC, et al.	http://www.sec.gov/Archives/edgar/data/1008845/000089706908000737/cmw3479.htm	http://www.sec.gov/Archives/edgar/data/1109525/000104746908004074/a2184291zdefc14a.htm
2008	Bassett Furniture Industries, Incorporated	Costa Brava Partnership III L.P., et al.	http://www.sec.gov/Archives/edgar/data/10329/000101905608000429/bassett_defc14a.htm	http://www.sec.gov/Archives/edgar/data/10329/000119312508051553/ddef14a.htm
2008	Biogen Idec Inc.	Carl C. Icahn, et al.	http://www.sec.gov/Archives/edgar/data/875045/000092847508000185/defc14a051608.txt	http://www.sec.gov/Archives/edgar/data/875045/000095013508003542/b67068dfdefc14a.htm
2008	Boston Financial Qualified Housing Tax Credits L.P. IV, A Limited Partnership	Everest Housing Investors 2, LP	http://www.sec.gov/Archives/edgar/data/845035/000135317307000019/bf4_defn14a111307.htm	http://www.sec.gov/Archives/edgar/data/845035/000114420408012788/v105440_def14a.htm
2006	Britton & Koontz Capital Corporation	Lanneau-Metcalf Group	http://www.sec.gov/Archives/edgar/data/707604/000119271806000016/defc14a060417.htm	http://www.sec.gov/Archives/edgar/data/707604/000119312506058026/ddef14a.htm
2008	Cape Fear Bank Corporation	Koury Foundation	http://www.sec.gov/Archives/edgar/data/1334872/000095013408012882/d55658ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/1334872/000119312508151309/ddefc14a.htm
2006	Career Education Corporation	Robert Steven Bostic, et al.	http://www.sec.gov/Archives/edgar/data/1046568/000091412106001145/ce727418-defc14a.txt	http://www.sec.gov/Archives/edgar/data/1046568/000104746906005243/a2169345zdefc14a.htm
2007	CVS/Caremark Corporation	Express Scripts, Inc. & Kew Corp.	http://www.sec.gov/Archives/edgar/data/885721/000095012307000722/y28701dcdefc14a.htm	http://www.corporate-ir.net/seccapsule/seccapsule.asp?m=f&c=99533&fid=4809495&dc=
2007	CBOT Holdings, Inc.	IntercontinentalExchange, Inc.	http://www.sec.gov/Archives/edgar/data/1161448/000095014407005959/g07898dcdefc14a.htm	http://www.sec.gov/Archives/edgar/data/1161448/000119312507131230/ddefm14a.htm
2007	Center Bancorp, Inc	Seidman and Associates, LLC, et al.	http://www.sec.gov/Archives/edgar/data/712771/000102608107000059/definitiveproxy2007.htm	http://www.sec.gov/Archives/edgar/data/712771/000114420407016223/v070425def14a.htm
2007	Cerdian Corporation	Pershing Square, L.P., et al.	http://www.sec.gov/Archives/edgar/data/1124887/000095013607005859/file1.htm	http://www.sec.gov/Archives/edgar/data/1124887/000110465907057287/a07-1581_1defm14a.htm
2008	Charming Shoppes, Inc.	Crescendo Partners II L.P., Series Q, et al.	http://www.sec.gov/Archives/edgar/data/19353/000092189508001039/defn14a07148002_04072008.htm	http://www.sec.gov/Archives/edgar/data/19353/000104746908004160/a2184530zdefc14a.htm
2008	Cleveland-Cliffs Inc.	*Harbinger Capital Master Fund I*, Ltd. & Harbinger Special Situations Fund, L.P.	http://www.sec.gov/Archives/edgar/data/764065/000119312508191571/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/764065/000095015208007035/l32961ddefc14a.htm
2007	CLST Holdings, Inc.	Timothy S. Durham, et al.	http://www.sec.gov/Archives/edgar/data/913590/000114420407036376/v080796_prrn-14a.htm	http://www.sec.gov/Archives/edgar/data/913590/000110465907053597/a07-16030_2def14a.htm
2006	CNB Corporation	Willis J. Duncan	http://www.sec.gov/Archives/edgar/data/764581/000094270806000122/sched14a-042006.htm	http://www.sec.gov/Archives/edgar/data/779125/000095012406002018/k04190ddef14a.txt

Appendix B
Proxy URL

Year	Company	Challenger Name	Challenger Proxy Statement Link	Incumbent Proxy Statement Link
2008	Cohen & Steers REIT and Utility Income Fund, Inc.	Western Investment LLC, et al.	http://www.sec.gov/Archives/edgar/data/1265419/000092189508000704/defc14a06290018_04012008.htm	http://www.sec.gov/Archives/edgar/data/1265419/000119312508032589/ddefc14a.htm
2008	Cohen & Steers Select Utility Fund, Inc.	Western Investment LLC, et al.	http://www.sec.gov/Archives/edgar/data/1275617/000092189508000743/defc14a06290019_03042008.htm	http://www.sec.gov/Archives/edgar/data/1275617/000119312508032620/ddefc14a.htm
2008	Coinstar, Inc.	Shamrock Activist Value Fund, L.P., et al.	http://www.sec.gov/Archives/edgar/data/941604/000119312508089848/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/941604/000095013408007773/v36976dedefc14a.htm
2007	Competitive Technologies, Inc.	John B. Nano, et al. (Committee to Restore Shareholder Value)	http://www.sec.gov/Archives/edgar/data/102198/000135656406000040/cttproxystatement12262006.txt	http://www.sec.gov/Archives/edgar/data/102198/000114420406053989/v060953_defr14a.htm
2007	Comverse Technology, Inc.	Oliver Press Partners, LLC, et al.	http://www.sec.gov/Archives/edgar/data/803014/000118811207001296/t14136_defc14a.htm	http://www.sec.gov/Archives/edgar/data/803014/000119312507104395/ddefc14a.htm
2007	Croghan Bancshares, Inc.	Nathan G. Danziger	http://www.sec.gov/Archives/edgar/data/1169751/000116975107000009/defproxy2007.txt	http://www.sec.gov/Archives/edgar/data/887149/000095015207002419/l24468bdefc14a.htm
2006	Croghan Bancshares, Inc.	Nathan G. Danziger	http://www.sec.gov/Archives/edgar/data/1169751/000116975106000010/definiativeproxyrt_2006.txt	http://www.sec.gov/Archives/edgar/data/887149/000095015206002238/l19050adefc14a.htm
2008	Croghan Bancshares, Inc.	Nathan G. Danziger	http://www.sec.gov/Archives/edgar/data/1169751/000116975108000002/prxyltrdefsec2008.txt	http://www.sec.gov/Archives/edgar/data/887149/000095015208002603/l29944bdefc14a.htm
2007	Crown Crafts, Inc.	Wynnefield Partners Small Cap Value, L.P., et al.	http://www.sec.gov/Archives/edgar/data/25895/000114420407036538/v080933defc14a.htm	http://www.sec.gov/Archives/edgar/data/25895/000095013407014943/d47927ddefc14a.htm
2007	Cryo-Cell International, Inc.	David I. Portnoy, et al.	http://www.sec.gov/Archives/edgar/data/862692/000119312507134698/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/862692/000119312507131919/ddefc14a.htm
2008	CSX Corporation	The Childrens Investment Fund Management (UK) LLP, et al.	http://www.sec.gov/Archives/edgar/data/277948/000110465908027252/a08-12469_2defc14a.htm	http://www.sec.gov/Archives/edgar/data/277948/000095014408003190/g11808dfdefc14a.htm
2007	CVS/Caremark Corporation	Amalgamated Bank LongView Collective Investment Fund	http://www.sec.gov/Archives/edgar/data/64803/000113760407000013/defcfinal.txt	http://www.corporate-ir.net/seccapsule/seccapsule.asp?m=f&c=99533&fid=4809495&dc=
2007	Cyberonics, Inc.	Metropolitan Capital Advisors, Inc., et al.	http://www.sec.gov/Archives/edgar/data/864683/000119312507001082/ddefn14a.htm	http://www.sec.gov/Archives/edgar/data/864683/000095012907000079/h42289dcdefc14a.htm
2006	Delcath Systems, Inc. (Consent Solicitation)	Laddcap Value Partners LP	http://www.sec.gov/Archives/edgar/data/872912/000118811206002560/t11329_defc14a.htm	http://www.sec.gov/Archives/edgar/data/872912/000095011706003609/a42519.htm
2008	DWS Global Commodities Stock Fund, Inc.	Western Investment LLC, et al.	http://www.sec.gov/Archives/edgar/data/1296115/000092189508002346/defc14a06290021_09052008.htm	http://www.sec.gov/Archives/edgar/data/1296115/000095012308010515/y64875defc14a.htm
2008	Emageon Inc.	Oliver Press Partners, LLC, et al.	http://www.sec.gov/Archives/edgar/data/1121439/000093041308003560/c53821_defc14a.htm	http://www.sec.gov/Archives/edgar/data/1121439/000095014408004234/g12798dcdefc14a.htm

Appendix B
Proxy URL

Year	Company	Challenger Name	Challenger Proxy Statement Link	Incumbent Proxy Statement Link
2006	Engelhard Corporation	BASF Aktiengesellschaft	http://www.sec.gov/Archives/edgar/data/352947/000104746906007075/a2170412zdefc14a.htm	http://www.sec.gov/Archives/edgar/data/352947/000093041306003769/c42564_defc14a.htm
2008	EnPro Industries, Inc.	Steel Partners II, L.P., et al.	http://www.sec.gov/Archives/edgar/data/915653/000092189508000954/defc14a01874088_03262008.htm	http://www.sec.gov/Archives/edgar/data/1164863/000095014408002248/g12145dcdefc14a.htm
2006	Federal Trust Corporation	Keefe Managers, LLC	http://www.sec.gov/Archives/edgar/data/842640/000101905606000489/fedtrust_defc14a.txt	http://www.sec.gov/Archives/edgar/data/842640/000119312506092500/ddefc14a.htm
2007	First Keystone Financial, Inc.	Lawrence Partners, L.P., et al.	http://www.sec.gov/Archives/edgar/data/856751/000113379607000030/fk70014.txt	http://www.sec.gov/Archives/edgar/data/856751/000106540707000014/proxy.txt
2006	FirstPlus Financial Group, Inc.	FPFX *Shareholder* Value Committee	http://www.sec.gov/Archives/edgar/data/1000368/000121465906000728/f33061dfrn14a.txt	http://www.sec.gov/Archives/edgar/data/1000368/000114544306001064/d18959_defc14a.htm
2008	FNB Corporation	FNB Corporation Shareholders Committee	http://www.sec.gov/Archives/edgar/data/1010961/000119312508003602/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/1010961/000119312508001046/ddefm14a.htm
2008	*Footstar, Inc.*	*Outpoint* Capital LP	http://www.sec.gov/Archives/edgar/data/1011308/000104746908006864/a2185877zdefc14a.htm	http://www.sec.gov/Archives/edgar/data/1011308/000095012308005962/y55370defc14a.htm
2008	Franklin Universal Trust	Bulldog Investors General Partnership	http://www.sec.gov/Archives/edgar/data/833040/000141168608000084/form14a.htm	http://www.sec.gov/Archives/edgar/data/833040/000083304008000015/futproxy0208.txt
2008	Furniture Brands International, Inc.	Sun Capital Partners	http://www.sec.gov/Archives/edgar/data/50957/000104746908004665/a2184776zdefc14a.htm	http://www.sec.gov/Archives/edgar/data/50957/000005095708000004/fbnproxy2008.htm
2008	Gencor Industries, Inc.	Lloyd I. Miller, III	http://www.sec.gov/Archives/edgar/data/64472/000095012308001775/y47794dndefn14a.htm	http://www.sec.gov/Archives/edgar/data/64472/000119312508013174/ddefl4a.htm
2006	Gencorp Inc.	Pirate Capital LLC	http://www.sec.gov/Archives/edgar/data/40888/000090266406001044/defc14a.txt	http://www.sec.gov/Archives/edgar/data/40888/000089161806000112/f17520dedefc14a.htm
2007	H & R Block, Inc.	Breeden Capital Management LLC	http://www.sec.gov/Archives/edgar/data/12659/000095012307010502/x37369defc14a.htm	http://www.sec.gov/Archives/edgar/data/12659/000095013707010805/c16547dcdefc14a.htm
2008	Hexcel Corporation	OSS Capital Management LP et al.	http://www.sec.gov/Archives/edgar/data/1218321/000090266408001684/p08-0808defc14a.txt	http://www.sec.gov/Archives/edgar/data/717605/000104746908003431/a2183703zdefc14a.htm
2006	H.J. Heinz Company	Trian Fund Management L.P.	http://www.sec.gov/Archives/edgar/data/46640/000095011706002970/a42230.htm	http://www.sec.gov/Archives/edgar/data/46640/000095015206005716/j20282ddefc14a.htm
2006	Image Entertainment, Inc.	Lions Gate Entertainment Corp.	http://www.sec.gov/Archives/edgar/data/216324/000095012406005129/v23416dcdefc14a.htm	http://www.sec.gov/Archives/edgar/data/216324/000110465906049960/a06-2854_1defl4a.htm
2006	InfoUSA Inc.	Dolphin Limited Partnership I, L.P	http://www.sec.gov/Archives/edgar/data/879437/000092242306000553/kl04048.htm	http://www.sec.gov/Archives/edgar/data/879437/000103570406000270/d34715defc14a.htm

Appendix B
Proxy URL

Year	Company	Challenger Name	Challenger Proxy Statement Link	Incumbent Proxy Statement Link
2008	InSite Vision Incorporated	Pinto Technology Ventures, L.P.	http://www.sec.gov/Archives/edgar/data/802724/000095013308002908/w65709defc14a.htm	http://www.sec.gov/Archives/edgar/data/802724/000114420408045387/v122280_def14a.htm
2008	Insituform Technologies, Inc.	Water Asset Management LLC	http://www.sec.gov/Archives/edgar/data/353020/000119312508086226/ddefn14a.htm	http://www.sec.gov/Archives/edgar/data/353020/000035302008000024/defproxy042108.htm
2008	Insured Municipal Income Fund Inc.	Bulldog Investors General Partnership	http://www.sec.gov/Archives/edgar/data/897802/000119380508001572/e603958_defc14a-bulldog.htm	http://www.sec.gov/Archives/edgar/data/897802/000120928608000167/e63179.htm
2007	International Electronics, Inc.	RISCO Ltd.	http://www.sec.gov/Archives/edgar/data/717751/000119312507095017/ddefn14a.htm	http://www.sec.gov/Archives/edgar/data/717751/000110465907032288/a07-8543_1defc14a.htm
2007	Inter-Tel (Delaware), Inc.	Steve G. Mihaylo, et al.	http://www.sec.gov/Archives/edgar/data/350066/000136231007001138/c70696defc14a.htm	http://www.sec.gov/Archives/edgar/data/350066/000119312507124917/ddefm14a.htm
2008	John Hancock Tax-Advantaged Dividend Income Fund	Western Investment LLC	http://www.sec.gov/Archives/edgar/data/1260041/000092189508000569/defc14a06290017_02192008.htm	http://www.sec.gov/Archives/edgar/data/1260041/000114544308000264/d22558.htm
2006	LifePoint Hospitals, Inc.	Accipiter Life Sciences Fund, LP	http://www.sec.gov/Archives/edgar/data/1301611/000092189506000969/defc14a06588002_04202006.htm	http://www.sec.gov/Archives/edgar/data/1301611/000095014406003313/g00569def14a.htm
2007	LION, Inc.	Sam Ringer, et al. (Lion Shareholder Committee)	http://www.sec.gov/Archives/edgar/data/941179/000110465907046800/a07-15653_1defc14a.htm	http://www.sec.gov/Archives/edgar/data/941179/000093041307004352/c48336_def14a.txt
2008	LNB Bancorp, Inc.	Shareholders for a Better Bank	http://www.sec.gov/Archives/edgar/data/737210/000095015208001477/l30354adefn14a.htm	http://www.sec.gov/Archives/edgar/data/737210/000095015207009223/l28714fdefc14a.htm
2008	LocatePLUS Holdings Corporation	ACE Investment Group LLC, et al.	http://www.sec.gov/Archives/edgar/data/1160084/000095015608000215/d70448_proxy.htm	http://www.sec.gov/Archives/edgar/data/1160084/000116008408000017/lp2008proxy.txt
2006	Longview Fibre Co.	Obsidian Finance Group, LLC	http://www.sec.gov/Archives/edgar/data/60302/000090342306000591/obsidiandefn14a_0531.htm	http://www.sec.gov/Archives/edgar/data/60302/000119312506039959/ddef14a.htm
2008	Luby's, Inc.	Ramius Capital Group	http://www.sec.gov/Archives/edgar/data/16099/000092189507002720/defc14a06297031_11302007.htm	http://www.sec.gov/Archives/edgar/data/16099/000001609908000024/form_proxy2008.htm
2006	Massey Energy Company	THIRD POINT LLC	http://www.sec.gov/Archives/edgar/data/37748/000113379606000090/me60711.txt	http://www.sec.gov/Archives/edgar/data/37748/000119312506083589/ddefc14a.htm
2008	Maxim Tep, Inc.	Maxim Tep Limited	http://www.sec.gov/Archives/edgar/data/1422220/000095012908003946/h58242defc14a.htm	http://www.sec.gov/Archives/edgar/data/1422220/000114420408039766/v119824_def14a.htm
2008	Media General, Inc.	Harbinger Capital Partners	http://www.sec.gov/Archives/edgar/data/216539/000119312508061006/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/216539/000119312508060535/ddefc14a.htm
2008	MedQuist Inc.	Costa Brava Partnership III, L.P., et al.	http://www.sec.gov/Archives/edgar/data/884497/000101905607001310/mequist_defn14a.htm	http://www.sec.gov/Archives/edgar/data/884497/000089322007003978/w43825fdefc14a.htm

Appendix B
Proxy URL

Year	Company	Challenger Name	Challenger Proxy Statement Link	Incumbent Proxy Statement Link
2008	MFS (R) Intermediate Income Trust	Karpus Management, Inc.	http://www.sec.gov/Archives/edgar/data/826735/000104870308000067/mindefc14av2.htm	http://www.sec.gov/Archives/edgar/data/826735/000095015608000233/d698111.txt
2008	Micrel, Incorporated	Obrem Capital Management, LLC	http://www.sec.gov/Archives/edgar/data/932111/000104746908005181/a2185068zdefn14a.htm	http://www.sec.gov/Archives/edgar/data/932111/000119312508086922/ddefc14a.htm
2007	Midwest Air Group, Inc.	AirTran Holdings, Inc. et al.	http://www.sec.gov/Archives/edgar/data/948845/000119312507118776/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/948845/000119312507116403/ddefc14a.htm
2008	MMC Energy, Inc.	Energy Holdings Limited LLC	http://www.sec.gov/Archives/edgar/data/1312206/000095012308005395/e54852ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/1312206/000114420408021732/v110238_defc14a.htm
2006	Motient Corporation	Highland Capital Management, L.P., et al.	http://www.sec.gov/Archives/edgar/data/913665/000095013406012023/d36720ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/913665/000121465906001289/f61462defc14a.htm
2007	Motorola, Inc.	Carl C. Icahn	http://www.sec.gov/Archives/edgar/data/68505/000092847507000081/defc14a032607.txt	http://www.sec.gov/Archives/edgar/data/68505/000095013707003824/c10691dcdefc14a.htm
2008	Napster, Inc.	Perry H. Rod, et al.	http://www.sec.gov/Archives/edgar/data/1122787/000136231008004533/c74615defc14a.htm	http://www.sec.gov/Archives/edgar/data/1122787/000119312508160348/ddefc14a.htm
2008	National Fuel Gas Company	New Mountain Vantage Advisers	http://www.sec.gov/Archives/edgar/data/70145/000095012308000171/e42021defc14a.htm	http://www.sec.gov/Archives/edgar/data/70145/000095015208000219/l28991ddefc14a.htm
2007	Neuberger Berman Realty Income Fund Inc.	Western Investment LLC	http://www.sec.gov/Archives/edgar/data/1221327/000092189507000847/defc14a06290013_05022007.htm	http://www.sec.gov/Archives/edgar/data/1221327/000089843207000319/nbrif_defc14a.txt
2006	The New Germany Fund, Inc.	Phillip Goldstein	http://www.sec.gov/Archives/edgar/data/858706/000106762106000016/gfdef.txt	http://www.sec.gov/Archives/edgar/data/858706/000089109206001011/e23869defc14a.txt
2006	Novoste Corporation	Steel Partners II, L.P., et al.	http://www.sec.gov/Archives/edgar/data/1012131/000092189506000300/defc14a01874085_02062006.htm	http://www.sec.gov/Archives/edgar/data/1012131/000119312506019861/ddefm14a.htm
2008	Office Depot, Inc.	Levitt Corporation, et al.	http://www.sec.gov/Archives/edgar/data/800240/000104746908003509/a2184229zdefc14a.htm	http://www.sec.gov/Archives/edgar/data/800240/000119312508055619/ddef14a.htm
2007	Openwave Systems Inc.	Harbinger Capital Partners, et al.	http://www.sec.gov/Archives/edgar/data/1082506/000095012307000162/y28664defn14a.htm	http://www.sec.gov/Archives/edgar/data/1082506/000119312507226309/ddef14a.htm
2007	Parlux Fragrances, Inc.	Glenn Nussdorf	http://www.sec.gov/Archives/edgar/data/802356/000134100407000258/revised14a.txt	http://www.sec.gov/Archives/edgar/data/802356/000111650207001680/parluxproxy.htm
2007	Peerless Systems Corporation	Pembridge Capital Management LLC	http://www.sec.gov/Archives/edgar/data/897893/000114420407028419/v076721_defc14a.htm	http://www.sec.gov/Archives/edgar/data/897893/000114420407028317/v076588_def14a.htm
2008	The Phoenix Companies, Inc.	Oliver Press Partners, LLC, et al.	http://www.sec.gov/Archives/edgar/data/1129633/000093041308001785/c52648_defn14a.htm	http://www.sec.gov/Archives/edgar/data/1129633/000119312508050264/ddefc14a.htm

Appendix B
Proxy URL

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2007	Phoenix Technologies Ltd.	Starboard Value and Opportunity Master Fund Ltd.	http://www.sec.gov/Archives/edgar/data/832767/000092189507000180/defc14a06297008_01252007.htm	http://www.sec.gov/Archives/edgar/data/832767/000095013407001230/f26564dcdefc14a.htm
2007	Pioneer Tax Advantaged Balanced Trust	Western Investment LLC	http://www.sec.gov/Archives/edgar/data/1267150/000092189507001024/defc14a06290016_06082007.htm	http://www.sec.gov/Archives/edgar/data/1267150/000114544307001117/d21164.txt
2008	Point Blank Solutions, Inc.	Steel Partners II, L.P.	http://www.sec.gov/Archives/edgar/data/899166/000092189508000937/defn14a01874124_04222008.htm	http://www.sec.gov/Archives/edgar/data/899166/000119312508063616/ddefc14a.htm
2007	Pomeroy IT Solutions, Inc.	Flagg Street Capital LLC, et al.	http://www.sec.gov/Archives/edgar/data/883979/000092189507001299/defc14a06823002_07122007.htm	http://www.sec.gov/Archives/edgar/data/883979/000113379607000174/pi71126.txt
2007	Prudential Bancorp, Inc. of Pennsylvania	Joseph Stilwell, et al.	http://www.sec.gov/Archives/edgar/data/1113303/000089291707000231/stilprudef14a122607.htm	http://www.sec.gov/Archives/edgar/data/1302324/000118811207000054/t12646_defc14a.txt
2008	Prudential Bancorp, Inc., of Pennsylvania	Joseph Stilwell, et al.	http://www.sec.gov/Archives/edgar/data/1302324/000089291707000231/stilprudef14a122607.htm	http://www.sec.gov/Archives/edgar/data/1302324/000114036108026725/formdef14a.htm
2008	Quality Systems, Inc.	Ahmed Hussein, et al.	http://www.sec.gov/Archives/edgar/data/708818/000114420408045981/v123125_defc14a.htm	http://www.sec.gov/Archives/edgar/data/708818/000095010308002027/dp10843_defc14a.htm
2008	Rackable Systems, Inc.	Richard L. Leza, Jr. & Steve Montoya	http://www.sec.gov/Archives/edgar/data/1316625/000113379608000153/rs80394.htm	http://www.sec.gov/Archives/edgar/data/1316625/000119312508093072/ddefc14a.htm
2007	Riviera Holdings Corporation	Flag Luxury Riv, LLC, et al.	http://www.sec.gov/Archives/edgar/data/899647/000091412107001180/rh8554671-14a.txt	http://www.sec.gov/Archives/edgar/data/899647/000089964707000007/rhcdef14aproxy.txt
2007	RMR Hospitality and Real Estate Fund	Phillip Goldstein/Bulldog Investors General Partnership	http://www.sec.gov/Archives/edgar/data/1278038/000136477307000005/defproxy.txt	http://www.sec.gov/Archives/edgar/data/1278038/000110465907005256/a07-1389_1defc14a.htm
2007	Roma Financial Corporation	Stilwell Group, et al.	http://www.sec.gov/Archives/edgar/data/1113303/000089291707000078/stilroma14a4207.htm	http://www.sec.gov/Archives/edgar/data/1355823/000094627507000286/def14a_042507-0375.txt
2007	Ryerson Inc.	Harbinger Capital Partners Master Fund I, Ltd. & Harbinger Capital Partners Special Situation Fund, L.P.	http://www.sec.gov/Archives/edgar/data/790528/000119312507170569/ddefn14a.htm	http://www.sec.gov/Archives/edgar/data/790528/000119312507166734/ddefc14a.htm
2006	SCPIE Holdings Inc.	Stilwell Value Partners III, L.P., et al.	http://www.sec.gov/Archives/edgar/data/1013609/000089291706000154/stil14ascpie504.htm	http://www.sec.gov/Archives/edgar/data/1013609/000119312506102443/ddefc14a.htm
2008	SCPIE Holdings Inc.	Joseph Stilwell	http://www.sec.gov/Archives/edgar/data/1013609/000089291708000038/stilscpiedefc14a020108.htm	http://www.sec.gov/Archives/edgar/data/1013609/000119312508014888/ddefc14a.htm
2008	Sierra Bancorp	Patricia Childress & Carol A. Bates	http://www.sec.gov/Archives/edgar/data/1401099/000140109908000013/chd14a.htm	http://www.sec.gov/Archives/edgar/data/1130144/000119312508092430/ddefc14a.htm

Appendix B
Proxy URL

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2007	Simon Worldwide, Inc.	Everest Special Situations Fund L.P., et al.	http://www.sec.gov/Archives/edgar/data/864264/000092189507001472/defc14a06517003_07192007.htm	http://www.sec.gov/Archives/edgar/data/864264/000095013507004183/b65783d1defc14a.htm
2008	SM&A	Steven S. Myers, et al.	http://www.sec.gov/Archives/edgar/data/1050031/000104746908004896/a2184861zdefc14a.htm	http://www.sec.gov/Archives/edgar/data/1050031/000089256908000607/a39800ddef14a.htm
2008	The Steak n Shake Company	The Lion Fund L.P., et al.	http://www.sec.gov/Archives/edgar/data/93859/000092189508000423/defc14a06824004_03072008.htm	http://www.sec.gov/Archives/edgar/data/93859/000009385908000019/proxystmt.htm
2006	Synergy Financial Group, Inc.	Financial Edge Fund, LP, et al.	http://www.sec.gov/Archives/edgar/data/1263766/000089706906000725/cmw2086.htm	http://www.sec.gov/Archives/edgar/data/1263766/000094627506000192/def14a_040406-0207.txt
2007	Take-Two Interactive Software, Inc.	DE Shaw & Co/SAC Capital/Tudor Investment Corp	None Filed	http://www.sec.gov/Archives/edgar/data/946581/000110465907015033/a07-5041_4def14a.htm
2008	Team Financial, Inc.	Keith B. Edquist, et al.	http://www.sec.gov/Archives/edgar/data/1082484/000132951108000037/defc14a.htm	http://www.sec.gov/Archives/edgar/data/1082484/000104746908005368/a2185138zdef14a.htm
2007	The Topps Company, Inc.	Cresendo Partners II, L.P.	http://www.sec.gov/Archives/edgar/data/1219602/000119380507001371/e602144_defc14a-topps.htm	http://www.sec.gov/Archives/edgar/data/812076/000095013607003642/file1.htm
2006	The Topps Company, Inc.	Pembridge Value Opportunity Fund LP, et al.	http://www.sec.gov/Archives/edgar/data/812076/000092189506001515/defc14a06369004_06232006.htm	http://www.sec.gov/Archives/edgar/data/812076/000095013606005247/file1.htm
2006	Tri-Continental Corporation (Annual)	Western Investment Hedged Partners L.P., et al.	http://www.sec.gov/Archives/edgar/data/99614/000092189506000623/defc14a06290008_02282006.htm	http://www.sec.gov/Archives/edgar/data/99614/000119312506029142/ddef14a.txt
2006	Tri-Continental Inc. (Special)	Western Investment Hedged Partners L.P., et al.	http://www.sec.gov/Archives/edgar/data/99614/000092189506001886/defc14a06290008_08222006.htm	http://www.sec.gov/Archives/edgar/data/99614/000119312506154975/ddefc14a.txt
2008	TVI Corporation	Allen E. Bender	http://www.sec.gov/Archives/edgar/data/352079/000113379608000187/tv80473.htm	http://www.sec.gov/Archives/edgar/data/352079/000119312508118907/ddefc14a.htm
2006	UbiquiTel Inc.	Deephaven Capital Management LLC, et al.	http://www.sec.gov/Archives/edgar/data/1108487/000095013606005159/file1.htm	http://www.sec.gov/Archives/edgar/data/1108487/000110465906035125/a06-8319_1defm14a.htm
2007	Union Bankshares Company	Financial Analytics Investment Corporation	http://www.sec.gov/Archives/edgar/data/745083/000095015607000303/union-defn14a_67017.htm	http://www.sec.gov/Archives/edgar/data/745083/000119312507115427/ddefc14a.htm
2008	VAALCO Energy, Inc.	Nanes Delorme Partners I LP, et al.	http://www.sec.gov/Archives/edgar/data/894627/000092189508001336/defc14a07142002_05062008.htm	http://www.sec.gov/Archives/edgar/data/894627/000119312508089199/ddef14a.htm
2008	Vineyard National Bancorp	Jon W. Salmanson & Norman Morales	http://www.sec.gov/Archives/edgar/data/840256/000119312508050997/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/840256/000084025608000026/defc14a.htm
2008	Vineyard National Bancorp	Jon W. Salmanson & Norman Morales	http://www.sec.gov/Archives/edgar/data/840256/000119312508147153/ddefc14a.htm	http://www.sec.gov/Archives/edgar/data/840256/000084025608000082/defc14a.htm

Appendix B
Proxy URL

Year	Company	Challenger Name	Challenger Proxy Statement Link	Incumbent Proxy Statement Link
2007	Vitesse Semiconductor Corp	Chap-cap Activists Partners Master fund, ltd	None Filed - Pending	None Filed - Pending
2006	Warwick Valley Telephone Company	Santa Monica Partners, L.P	http://www.sec.gov/Archives/edgar/data/104777/000090479306000046/wwvydef14a.txt	http://www.sec.gov/Archives/edgar/data/104777/000095015206002866/l17939adef14a.htm
2007	WCI Communities, Inc.	Carl C. Ichan, et al	http://www.sec.gov/Archives/edgar/data/921669/000092847507000174/defc14a052407.txt	http://www.sec.gov/Archives/edgar/data/1137778/000119312507094868/ddefc14a.htm
2006	Whitehall Jewellers, Inc.	Newcastle Partners, L.P., et al.	http://www.sec.gov/Archives/edgar/data/868984/000092189505002230/defc14a04670015_12282005.htm	http://www.sec.gov/Archives/edgar/data/868984/000113379606000126/wj60678.htm
2007	Wilshire Enterprises, Inc.	Full Value Partners L.P. & Bull Dog Investors	http://www.sec.gov/Archives/edgar/data/1067621/000106762107000022/wocdef.txt	http://www.sec.gov/Archives/edgar/data/107454/000114420407032241/v078602_defc14a.htm
2008	Yahoo! Inc.	Carl C. Icahn, et al.	http://www.sec.gov/Archives/edgar/data/1011006/000092847508000257/defc14a071108.txt	http://www.sec.gov/Archives/edgar/data/1011006/000089161808000302/f37157f2defc14a.htm
2006	Yardville National Bancrop	Lawrence B. Seidman, et al.	http://www.sec.gov/Archives/edgar/data/787849/000113379606000076/yn60627.txt	http://www.sec.gov/Archives/edgar/data/787849/000089322006000748/w18480fdefc14a.htm