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## The Conscious Parallelism of Wolf Packs: Applying the Antitrust Conspiracy Framework to Section 13(d) Activist Group Formation

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**THE CONSCIOUS PARALLELISM OF WOLF  
PACKS: APPLYING THE ANTITRUST  
CONSPIRACY FRAMEWORK TO SECTION 13(D)  
ACTIVIST GROUP FORMATION**

*William R. Tevlin\**

*Section 13(d) of the Williams Act requires all persons and groups that acquire 5 percent or more of an issuer’s outstanding stock to disclose their holdings to the Securities and Exchange Commission. Whether a group is formed under section 13(d) often is unclear. The legal precedent is ambiguous; courts give more weight to certain forms of circumstantial evidence than others without explaining why. With the substantial increase of hedge fund activism—in particular, the wolf pack tactic—further clarity or uniformity is necessary. A “wolf pack” is a loose association of hedge funds that employs parallel activist strategies toward a target corporation while intentionally avoiding group status under section 13(d).*

*Rather than develop a new rule, courts should apply the antitrust conspiracy framework from section 1 of the Sherman Antitrust Act. The antitrust precedent identifies conscious parallelism and plus factors as evidence of price-fixing conspiracies. It is based on statutory language, and courts are familiar with the precedent, largely because the case law is similar to section 13(d) law. This Note provides a survey of the modern section 13(d) group formation landscape and addresses certain forms of circumstantial evidence that apply to the wolf pack strategy. This Note then advocates that courts should apply the antitrust precedent to section 13(d) as a two-part solution: first by utilizing conscious parallelism and second by considering novel plus factors. Finally, this Note suggests plus factors that would be useful in identifying when wolf packs form 13(d) groups while avoiding overpunishing those wolf packs.*

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## INTRODUCTION

In the current hedge fund activism era, shareholder disclosure rules in the United States are alarmingly vague and, therefore, require a clear legal formula.<sup>1</sup> Activism is shareholder conduct for the purpose of instituting change within a company without taking actual control of the company.<sup>2</sup> Hedge funds—as opposed to traditional shareholders—are playing a larger role in activist campaigns.<sup>3</sup> Shareholders, including activists, who acquire 5 percent or more of an issuer’s stock must file a Schedule 13D with the Securities and Exchange Commission (SEC) under section 13(d) of the Williams Act.<sup>4</sup> Further, a “group” of investors who collectively own 5 percent or more of a company’s stock is required jointly to file a Schedule 13D.<sup>5</sup>

A “group” is formed when investors act together, or “[agree] to act together[,] for the purpose of acquiring, holding, voting[,] or disposing of” an issuer’s securities.<sup>6</sup> In each case, whether a group is formed is a question of fact.<sup>7</sup> There is no checklist of factors that courts use to determine the existence of a 13(d) group.<sup>8</sup> This has led courts to place differing weights on evidentiary categories of group activity without explaining why.<sup>9</sup>

Activist hedge funds seek to avoid the 13(d) disclosure requirement.<sup>10</sup> This has contributed to the rise of the wolf pack investment strategy. A “wolf pack” is a loose association of hedge funds that employs parallel activist strategies toward a target corporation while intentionally avoiding group status under section 13(d).<sup>11</sup> Wolf packs have proved wildly

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1. See, e.g., Mary L. Schapiro, Chairman, SEC, Remarks at the Transatlantic Governance Dialogue (Dec. 15, 2011), <http://www.sec.gov/news/speech/2011/spch121511mls.htm> (“We think it’s important to modernize our rules, and we are considering whether they should be changed in light of modern investment strategies . . . .”) [<https://perma.cc/KZC7-A3V7>].

2. See Paul Rose & Bernard S. Sharfman, *Shareholder Activism As a Corrective Mechanism in Corporate Governance*, 2014 BYU L. REV. 1015, 1017.

3. See Mary Jo White, Chair, SEC, Speech at Tulane University Law School 27th Annual Corporate Law Institute: A Few Observations on Shareholders in 2015 (Mar. 19, 2015), [http://www.sec.gov/news/speech/observations-on-shareholders-2015.html#\\_ftnref5](http://www.sec.gov/news/speech/observations-on-shareholders-2015.html#_ftnref5) [<https://perma.cc/Y2GT-NLZB>].

4. 15 U.S.C. § 78m(d)(1) (2012).

5. See *id.* § 78m(d)(3).

6. See *Morales v. Quintel Entm’t, Inc.*, 249 F.3d 115, 123–24 (2d Cir. 2001).

7. See *id.* at 124.

8. See *Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 618 (2d Cir. 2002).

9. See *infra* Part II.A (discussing the varied importance that courts place on evidence categories).

10. See *infra* notes 60–74 and accompanying text (noting the reasons hedge funds avoid filing Schedule 13Ds).

11. See John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance* 28 (Columbia Law & Econ., Working Paper No. 521, 2015), <http://ssrn.com/abstract=2656325> [<https://perma.cc/VC53-L2J2>].

successful, both in implementing change in their targets and garnering profits for their members.<sup>12</sup> One example of a successful campaign is a wolf pack led by Jana Partners that forced PetSmart into a leveraged buyout in 2014.<sup>13</sup> There, the hedge funds cumulatively owned less than 20 percent of PetSmart, but received a windfall of an almost 40 percent return on their investment.<sup>14</sup>

Scholars are divided on the benefits and disadvantages that hedge fund activism provides to both corporations and the economy.<sup>15</sup> This debate focuses on whether activism provides long-term value to targeted companies.<sup>16</sup> Regardless, both sides agree that not all activism is positive.<sup>17</sup> Even renowned activist Carl Icahn said, “We definitely do not believe that all activism today is [] good . . . . There are bad activists, and we agree that it’s bad. All they want to do is get in and rock the boat and make a quick trade.”<sup>18</sup> This uncertainty and potential for abuse makes it essential that courts have a clear checklist of factors to use when determining 13(d) group formation.

While securities laws have not yet developed in this area, established antitrust law principles can serve as a model for this analysis. Section 1 of the Sherman Antitrust Act seeks to prevent price-fixing conspiracies among competitors.<sup>19</sup> Antitrust litigation often centers on whether defendants entered into an agreement.<sup>20</sup> To prove a conspiracy, plaintiffs must show the existence of both conscious parallelism and plus factors—evidence that “tends to exclude” the probability that defendants acted independently.<sup>21</sup> The antitrust precedent would also be useful in the section 13(d) group context because courts are applying a statute that requires them to find an agreement.<sup>22</sup> Given the similarities that exist between these laws,<sup>23</sup> courts would benefit from applying the antitrust doctrine to 13(d) group formation. Therefore, this Note proposes a two-part solution: courts should apply the conscious parallelism standard as the first element and then consider novel

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12. See *infra* notes 76–81 and accompanying text (discussing the success of the wolf pack strategy).

13. See Karlee Weinmann, *BC Partners Offers \$8.7B for PetSmart in 2014’s Biggest LBO*, LAW360 (Dec. 14, 2014, 7:12 PM), <http://www.law360.com/articles/604572/bc-partners-offers-8-7b-for-petsmart-in-2014-s-biggest-lbo> [<https://perma.cc/F24K-2ECP>].

14. See *id.*

15. See White, *supra* note 3.

16. See *infra* notes 100–03 and accompanying text (noting the competing arguments between legal scholars and practitioners).

17. See David Benoit & Vipal Monga, *Are Activist Investors Helping or Undermining American Companies?*, WALL STREET J. (Oct. 5, 2015, 1:55 PM), <http://www.wsj.com/articles/activist-investors-helping-or-hindering-1444067712> [<https://perma.cc/MTM9-ALLE>].

18. *Id.*

19. Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

20. See William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 399 (2011).

21. See ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 69 (2010) [hereinafter ABA ANTITRUST LAW].

22. Antitrust cases regarding price-fixing conspiracies often focus on whether an agreement was formed. Kovacic et al., *supra* note 20, at 399.

23. See *infra* Part II.A (discussing the similarities between these doctrines).

plus factors that are circumstantial evidence of wolf pack group formation. The conscious parallelism and plus factor standard of circumstantial evidence from antitrust law provides the more certain solution that section 13(d) needs.

Part I of this Note discusses section 13(d) of the Williams Act, activist investing, and the legal determinants of what constitutes a 13(d) group. Part II analyzes the weight assigned to categories of circumstantial evidence of group activity by courts, as well as the antitrust framework used to prove a price-fixing conspiracy. Finally, Part III suggests that the conscious parallelism standard should be adopted in wolf pack group formation cases and explores the plus factors that could be utilized in section 13(d) litigation without overpunishing wolf packs.

### I. THE INTERPLAY OF SECTION 13(D) GROUP FORMATION AND HEDGE FUND ACTIVISM

This part explains section 13(d) and its significance to hedge fund activism. Part I.A discusses the Williams Act and the purpose of section 13(d) in securities law, specifically when shareholders act as a group. Part I.B surveys activist investing, while focusing on the significance of wolf packs. Part I.C illustrates the vagueness of laws concerning 13(d) group formation. Finally, Part I.D describes the consequences of forming a group and the importance of developing a more certain evaluative framework.

#### A. *The Williams Act*

Added as an amendment to the Securities Exchange Act of 1934 in 1968, the Williams Act governs acquisitions and tender offers.<sup>24</sup> Section 13(d) requires persons who acquire beneficial ownership of 5 percent or more of any public company to file a Schedule 13D with the SEC within ten days.<sup>25</sup> A Schedule 13D must state the filer's identity, funding source, investment purpose, number of shares, and information about contracts, arrangements, or understandings with another person pertaining to the target company.<sup>26</sup>

When two or more persons act as a group, they are treated as a single person under section 13(d).<sup>27</sup> The SEC defined "group" when it codified the Williams Act.<sup>28</sup> Rule 13d-5(b)(1) states that a group is formed "[w]hen two or more persons *agree to act together* for the purpose of acquiring, holding, voting or disposing of" a target's stock.<sup>29</sup> Section 16(b) uses the same definition of "group" as 13(d).<sup>30</sup> Therefore, this Note will also

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24. *See* Bath Indus., Inc. v. Blot, 427 F.2d 97, 101–02 (7th Cir. 1970).

25. 15 U.S.C. § 78m(d)(1) (2015).

26. *See id.*

27. *See id.* § 78m(d)(3).

28. *See* Portsmouth Square Inc. v. S'holders Protective Comm., 770 F.2d 866, 873 (9th Cir. 1985); 17 C.F.R. § 240.13d-5(b)(1) (2016).

29. 17 C.F.R. § 240.13d-5(b)(1) (emphasis added).

30. *See id.* § 240.16a-1(a)(1); *see also* Howard O. Godnick & William H. Gussman, Jr., *Beware the Counterattack Against Activist Investors: The Group Trap*, ACTIVIST INVESTING DEV., Fall 2006, at 1.

examine section 16(b) group cases to determine what constitutes a group under section 13(d).<sup>31</sup>

The purpose of section 13(d) is to provide a tool by which a corporation's shareholders and incumbent management receive notice when a large amount of shares are purchased.<sup>32</sup> The statute was intended to ensure that investors remained informed, while giving incumbent management an opportunity to expound its position.<sup>33</sup> However, Congress recognized that shareholder activism can be useful to poorly run businesses and therefore did not intend the law to favor incumbent management or activist investors.<sup>34</sup>

### *B. Activist Investing and the Rise of Wolf Packs*

Long gone are the 1980s, which were full of corporate raiders.<sup>35</sup> Today, raiders are rebranding themselves as activist investors.<sup>36</sup> The traditional rationale for shareholder activism is to correct agency problems that arise in public corporations.<sup>37</sup> Activist shareholders can redirect corporate governance when boards of directors or management become ineffective, opportunistic, or lazy.<sup>38</sup>

Shareholders who are dissatisfied with the direction of their corporation have two choices: exit the company by selling their equity or become an active voice in the corporation to effectuate change.<sup>39</sup> Those shareholders who choose to become active participants generally are motivated by the opportunity to improve the value of their investments.<sup>40</sup>

Traditional activists concentrate on expanding shareholder rights.<sup>41</sup> Generally, these activists hold relatively few shares and employ subtle

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31. Section 16(b) applies to directors, officers, and beneficial owners of more than 10 percent of a security and requires them to disgorge any short-swing profits earned from the sale or purchase of that security. 15 U.S.C. § 78p(a)–(b).

32. See *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971).

33. See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); H.R. REP. NO. 90-1711, at 4 (1968), as reprinted in 1968 U.S.C.C.A.N. 2811, 2813; S. REP. NO. 90-550, at 3–4 (1967).

34. See *Rondeau*, 422 U.S. at 48–59; H.R. REP. NO. 90-1711, at 4, as reprinted in 1968 U.S.C.C.A.N. 2811, 2813; S. REP. NO. 90-550, at 3–4.

35. See David Futelle, *Corporate Raiders Beware: A Short History of the “Poison Pill” Takeover Defense*, TIME (Nov. 7, 2012), <http://business.time.com/2012/11/07/corporate-raiders-beware-a-short-history-of-the-poison-pill-takeover-defense/> [https://perma.cc/854R-N83C].

36. See *60 Minutes: The Icahn Lift: 60 Minutes’ Lesley Stahl Profiles the Billionaire Investor* (CBS television broadcast Mar. 9, 2008), <http://www.cbsnews.com/videos/the-icahn-lift-2/> [https://perma.cc/R86L-J92H].

37. See MARION F. HARTMANN, *SHAREHOLDER ACTIVISM: BENEFITS AND DRAWBACKS* 7 (2014) (ebook).

38. See *id.*

39. See *id.* at 5.

40. See *id.* at 6–7.

41. See Marco Becht et al., *The Returns to Hedge Fund Activism: An International Study* 8 (Eur. Corp. Governance Inst., Working Paper No. 402, 2014), <http://ssrn.com/abstract=2376271> (noting that this is accomplished by dismantling shareholder rights plans, implementing cumulative voting, and changing corporate responsibility policies) [https://perma.cc/DV7J-MQCH].

methods to induce change, including writing letters to corporations' board and management, participating in shareholders' meetings, and talking to the press.<sup>42</sup> Holding a small number of shares relegates traditional activists to being voices that advocate for change, rather than being vehicles that effect change.<sup>43</sup>

In recent years, hedge funds have become the most distinguished activist investors.<sup>44</sup> These institutional investors can provide tremendous value to a target corporation by effecting change.<sup>45</sup> In contrast to traditional activist shareholders, hedge funds have vast amounts of capital.<sup>46</sup> Hedge fund activists aim to control a target corporation's business strategy and management directly.<sup>47</sup> Additionally, hedge funds take more involved steps to influence corporate strategy than traditional activists.<sup>48</sup> Activist hedge funds predominantly employ one of three strategies: push the target to be acquired by another corporation at a premium rate, push the target to spin off its assets, or push the target to pay dividends to their shareholders.<sup>49</sup> News of a hedge fund activism campaign causes the target's stock price to rise,<sup>50</sup> as investors expect that activists will improve the performance of target corporations.<sup>51</sup>

Activist hedge funds have been particularly effective in their implementation of the wolf pack tactic. Generally, a wolf pack includes a lead hedge fund that acquires a larger stake in the target and smaller hedge funds that provide support to the lead wolf.<sup>52</sup> The lead activist buys equity in a target corporation and then tips off other hedge funds regarding its plans.<sup>53</sup> Generally, these tips are done behind closed doors,<sup>54</sup> but

42. See *id.* at 9.

43. See HARTMANN, *supra* note 37, at 5.

44. See Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1028 (2007).

45. See GEORGE P. SCHWARTZ, *SHAREHOLDER REBELLION: HOW INVESTORS ARE CHANGING THE WAY AMERICA'S COMPANIES ARE RUN* 57 (1995).

46. See Becht et al., *supra* note 41, at 9.

47. See *id.* at 8–9 (noting that hedge funds aim to induce spin-offs, the sale of subsidiaries, the overhaul of balance sheets, payouts to shareholders, and changes to corporate governance); Kahan & Rock, *supra* note 44, at 1029 (stating that activist hedge funds demand changes to business strategy, run proxy contests over current or additional board seats, and bring lawsuits against past and present management).

48. See Becht et al., *supra* note 41, at 9 (noting that these steps include requesting meetings with corporate management and threatening changes to boards of directors or litigation).

49. See HARTMANN, *supra* note 37, at 15.

50. See Lucian A. Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1122 (2015).

51. See *id.*

52. See Alon Brav et al., *Wolf Pack Activism* 3–4 (Robert H. Smith Sch., Working Paper No. RHS 2529230, 2015) [hereinafter *Wolf Pack Activism*], <http://ssrn.com/abstract=2529230> [<https://perma.cc/ZNG8-EKFN>]. The lead wolf usually will be the one to speak on behalf of all of the wolves. Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence*, 7 VA. L. & BUS. REV. 459, 491 (2013).

53. See Coffee, Jr. & Palia, *supra* note 11, at 34. Tipping leads other activist funds to invest in the target, which strengthens the wolf pack's leverage. See *id.* These tips are not considered insider trading because the hedge funds owe no fiduciary duty to the target. See



sometimes hedge funds tip the media<sup>55</sup> or announce their investments during presentations at activist conferences.<sup>56</sup> If a hedge fund acquires more than 5 percent of a target's stock, the wolf pack is formed during the ten-day window preceding the Schedule 13D's filing.<sup>57</sup> This strategy is appealing to hedge funds because each can purchase a small share in a target—oftentimes less than 5 percent—but their combined stake will be significant.<sup>58</sup> In order to maximize profits, these activist campaigns are relatively short; once a wolf pack achieves its objective, its members sell their shares and move on to their next targets.<sup>59</sup>

There are several reasons hedge funds avoid becoming a group.<sup>60</sup> First, a lawsuit alleging 13(d) group status can be very costly for a group's members to defend.<sup>61</sup> Every hedge fund seeks to avoid cutting into profits.

Second, avoiding filing a Schedule 13D can increase profits. A hedge fund may purchase up to 5 percent of the target corporation's stock largely undetected and, therefore, at a lower cost.<sup>62</sup> Upon crossing the 5 percent equity threshold, the ten-day window allowed by section 13(d) begins.<sup>63</sup> While the target's stock price may have risen since crossing the 5 percent threshold, it generally will be cheaper during this time than after the Schedule 13D is filed and the market is alerted to the acquisition.<sup>64</sup> Thus, there is a large incentive to delay the ten-day window while the stock's value is low.

Finally, upon filing a Schedule 13D, the target corporation's board of directors is made aware of the investor's identity. Directors have a right, and are often encouraged, to employ defensive measures when they fear a

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*id.* at 35 n.72 (citing *United States v. O'Hagan*, 521 U.S. 642 (1997); *Dirks v. SEC*, 463 U.S. 646 (1983)).

54. See Susan Pulliam et al., *Activist Investors Often Leak Their Plans to a Favored Few*, WALL STREET J. (Mar. 26, 2014, 10:37 PM), <http://www.wsj.com/news/articles/SB10001424052702304888404579381250791474792> [<https://perma.cc/S8UY-KSPT>].

55. See Richa Naidu, *Starboard Takes Stake in Advance Auto, Urges Changes*, REUTERS (Sept. 30, 2015, 10:38 AM), <http://www.reuters.com/article/us-starboard-value-advance-auto-idUSKCN0RU0AV20150930#dtGoVOWosASpppEa.97> [<https://perma.cc/8APQ-WG4E>].

56. See William Alden, *Ackman Outlines Bet Against Herbalife*, N.Y. TIMES: DEALB%K (Dec. 20, 2012, 2:08 PM), <http://dealbook.nytimes.com/2012/12/20/ackman-outlines-bet-against-herbalife/> [<https://perma.cc/YPC4-CKYC>].

57. See Coffee, Jr. & Palia, *supra* note 11, at 33–34. The ten-day window refers to the ten days between when a shareholder crosses the 5 percent threshold and when the shareholder must file a Schedule 13D under section 13(d). *Id.* at 32.

58. One study found that a wolf pack's combined median stake is 17.21 percent of a target's stock. Katelouzou, *supra* note 52, at 491.

59. See Bernard S. Sharfman, *Activist Hedge Funds in a World of Board Independence: Creators or Destroyers of Long-Term Value?*, 2015 COLUM. BUS. L. REV. 813, 825.

60. See Coffee, Jr. & Palia, *supra* note 11, at 28.

61. See *id.* at 29. A lawsuit like this occurs when a target corporation alleges that hedge funds formed a group that acquired over 5 percent of the target's stock. See *id.*

62. See *id.*

63. 15 U.S.C. § 78m(d)(1) (2012).

64. See Coffee, Jr. & Palia, *supra* note 11, at 29.

hostile takeover.<sup>65</sup> Corporations tend to adopt a shareholder rights plan (more commonly known as a “poison pill”) when facing this threat.<sup>66</sup> Generally, poison pills provide that a “right” is distributed with each share of an issuer’s common stock and that right remains with that stock until the poison pill is triggered.<sup>67</sup> The pill is triggered when an investor acquires an identified percentage of the issuer’s common stock, determined by the board.<sup>68</sup> Once triggered, the rights holders are allowed to purchase additional voting securities from the issuer at a steep discount.<sup>69</sup> Poison pills make a corporation an unattractive target by significantly diluting the value of the acquirer’s voting power and the value of his shares if the pill is triggered.<sup>70</sup>

Wolf packs are a particularly useful method to avoid triggering poison pills. The average hedge fund that files a Schedule 13D reports owning slightly less than 10 percent of the issuer’s stock.<sup>71</sup> In a wolf pack, other smaller hedge funds concurrently buy up the target corporation’s stock.<sup>72</sup> A standard poison pill is triggered when a person acquires 10 to 20 percent of a company.<sup>73</sup> So if the smaller wolf pack members acquire, in total, an additional 12 to 15 percent during the ten-day window, the poison pill would be triggered when the Schedule 13D is filed if those hedge funds formed a group.<sup>74</sup> Because each smaller member acquires less than 5 percent of the target, the wolf pack avoids triggering poison pills.

The rate of independent hedge fund activism and the use of the wolf pack tactic have increased.<sup>75</sup> Activist campaigns have a high probability of

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65. See Rose & Sharfman, *supra* note 2, at 1024; see also Bebchuk et al., *supra* note 50, at 1154. While hedge funds do not take a controlling share, the wolf pack is analogous to a hostile takeover. See Mike Burkart & Samuel Lee, *Hedge Fund Activism Vs. Hostile Takeover Bids* 22 (Swedish House of Finance, Working Paper No. 15-04, 2015), <http://ssrn.com/abstract=2585836> (suggesting that wolf packs are a substitute for hostile tender offers) [<https://perma.cc/5Z73-SQ7V>].

66. See Coffee, Jr. & Palia, *supra* note 11, at 30–31.

67. CHARLES E. SIMON & CO., CORPORATE ANTI-TAKEOVER DEFENSES: THE POISON PILL DEVICE 1 (1997 ed., Clark Boardman Callaghan ed., 1997).

68. See *id.* at xv.

69. See *id.* at 1.

70. See *id.* at xv.

71. See Lucian A. Bebchuk et al., *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy*, 39 J. CORP. L. 1, 12 (2013) (finding that the average initial holding is 8.8 percent); Alon Brav et al., *Hedge Fund Activism: A Review*, 4 FOUND. & TRENDS FINANCE 185, 203 (2010) (noting that the average initial holding is 5.3 to 8.8 percent); Nicole M. Boyson & Robert M. Mooradian, *Hedge Funds As Shareholder Activists from 1994–2005*, at 29 (July 31, 2007) (unpublished manuscript), [http://www.fredgehm.com/images/boyson\\_mooradian\\_activism\\_FINAL.pdf](http://www.fredgehm.com/images/boyson_mooradian_activism_FINAL.pdf) (finding that the average initial holding was 8.83 percent) [<https://perma.cc/WC3W-7PXG>].

72. See *Wolf Pack Activism*, *supra* note 52, at 5.

73. See Alexandros Seretakos, *Hedge Fund Activism Coming to Europe: Lessons from the American Experience*, 8 BROOK. J. CORP. FIN. & COM. L. 438, 465 n.165 (2014).

74. See Coffee, Jr. & Palia, *supra* note 11, at 31.

75. See *id.* at 2. This is in part due to high profit margins and reductions in the costs of activism. See *id.* at 4. Costs have decreased due to the dwindling use of staggered boards, changes in the powers of proxy advisors, and new SEC regulations. See *id.* at 18–26. Courts have contributed to the increase of shareholder activism by reducing the punishments available when section 13(d) is violated. See Daniel Reynolds, *Recent Business Law Case:*

success.<sup>76</sup> On average, these activist funds receive abnormally high returns of 7 to 8 percent in the twenty days before and after filing a Schedule 13D.<sup>77</sup> In the first six months of 2014, activist hedge funds outperformed hedge funds as a group by over 3 percent.<sup>78</sup>

Wolf packs produce appreciably greater returns than endeavors waged by single activist funds.<sup>79</sup> Wolf packs have at least some success in 78 percent of their campaigns, compared to only 46 percent success by hedge funds acting independently.<sup>80</sup> This amounts to wolf packs receiving, on average, 14 percent returns, while hedge funds acting independently receive only 6 percent returns.<sup>81</sup>

This success has led to a sharp increase in activist campaigns in the last fifteen years.<sup>82</sup> In 2014, activists initiated approximately 250 to 344 different public campaigns.<sup>83</sup> In reality, many more corporations likely are targeted each year, given that activists consistently report that public campaigns represent less than a third of their total engagements.<sup>84</sup>

Moreover, activist hedge funds have begun targeting larger corporations. In 2013, approximately one-third of all campaigns targeted corporations

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CSX Corporation v. The Children's Investment Fund, DRCHIFFRES (Oct. 19, 2014), <http://drchiffres.com/2014/10/19/recent-business-law-case-csx-corporation-v-the-childrens-investment-fund/> [<https://perma.cc/23LK-G8YK>].

76. See Becht et al., *supra* note 41, at 3 (finding that the probability of achieving success is 53 percent globally and 61 percent in North America); see also ACTIVIST INVESTING: AN ANNUAL REVIEW OF TRENDS IN SHAREHOLDER ACTIVISM 9 (Josh Black ed., 2015) [hereinafter ACTIVIST INVESTING], [http://www.shareholderforum.com/access/Library/20150130\\_ActivistInsight-SRZ.pdf](http://www.shareholderforum.com/access/Library/20150130_ActivistInsight-SRZ.pdf) (observing that 75 percent of activist campaigns were at least "partially successful" in 2014, compared to 67 percent in 2013) [<https://perma.cc/R374-52PX>]; Coffee, Jr. & Palia, *supra* note 11, at 16 (noting that activist hedge funds won nineteen of the twenty-four proxy contests they launched in 2013).

77. See Becht et al., *supra* note 41, at 2 (finding 7 percent abnormal returns); see also Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1730 (2008) (observing 7 to 8 percent abnormal returns).

78. See Rob Copeland, *Returns from Activist Hedge Funds Are Causing a Stir*, WALL STREET J. (July 7, 2014, 6:45 PM), <http://www.wsj.com/articles/returns-from-activist-hedge-funds-are-causing-a-stir-1404773120> (noting that activist funds had a 6.5 percent rate of return while hedge funds as a group had a 3.1 percent rate of return during that time) [<https://perma.cc/VU6J-WGJD>].

79. See Becht et al., *supra* note 41, at 5, 32, 59.

80. See *id.* at 32.

81. See *id.* at 5.

82. See Adam O. Emmerich & Trevor S. Norwitz, *Activist-Strategic Buyer Tag-Teams: A New Hostile Takeover Template?*, in INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: MERGERS & ACQUISITIONS 2015, at 14 (9th ed. 2015), <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23878.15.pdf> (noting that twenty-seven public activist campaigns occurred in 2000 compared to approximately 250 in 2014) [<https://perma.cc/QL43-CXCV>].

83. See *id.*; ACTIVIST INVESTING, *supra* note 76, at 8 (noting that 344 public activist campaigns occurred in 2014, compared to 291 in 2013). For the purpose of this Note, a public campaign occurs when a hedge fund files a Schedule 13D or publicly announces its investment.

84. See ACTIVIST INVESTING, *supra* note 76, at 8.

with a market capitalization of over \$2 billion.<sup>85</sup> Further, activist campaigns are targeting more corporations with a market cap of over \$10 billion than ever before.<sup>86</sup> This is due in part to activist hedge funds' increase in assets under management<sup>87</sup> (AUM). Today, these funds manage approximately \$166 billion in assets, compared to only \$23 billion in 2002.<sup>88</sup> Some of these individual funds report AUMs over \$10 billion.<sup>89</sup>

In 2014, wolf pack efforts were particularly successful. Apart from PetSmart,<sup>90</sup> another noteworthy campaign was a wolf pack led by Starboard Value, which succeeded in replacing Darden Restaurant's entire board of directors.<sup>91</sup> Starboard was busy in 2014, beginning eighteen new campaigns that year.<sup>92</sup> This includes Starboard's effort to merge Staples and Office Depot,<sup>93</sup> which resulted in Staples's \$6.3 billion offer to acquire Office Depot.<sup>94</sup>

Not all activist campaigns, however, have been viewed so kindly. Pershing Square Capital took a substantial stake in pharmaceutical company Allergan in an effort to pressure Allergan into a hostile takeover by Valeant Pharmaceutical—a company notorious for cutting the research and development departments of its acquisitions.<sup>95</sup> This campaign led to

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85. See Richard Lee & Jason D. Schloetzer, *Director Notes: The Activism of Carl Icahn and Bill Ackman* 3 (The Conference Board, Working Paper No. DN-V6N10, 2014), <http://ssrn.com/abstract=2442317> [<https://perma.cc/3KB8-KJNF>].

86. See *id.* (noting that in 2013, activists targeted forty-two companies with a market capitalization of \$10 billion, compared to only seventeen companies in 2010).

87. See *id.* at 2.

88. See *id.*

89. See ACTIVIST INVESTING, *supra* note 76, at 8.

90. See *supra* notes 13–14.

91. See Alexandra Stevenson, *Activist Hedge Fund Starboard Succeeds in Replacing Darden Board*, N.Y. TIMES: DEALB%K (Oct. 10, 2014, 10:42 AM), [http://dealbook.nytimes.com/2014/10/10/activist-hedge-fund-starboard-succeeds-in-replacing-darden-board/?\\_r=0](http://dealbook.nytimes.com/2014/10/10/activist-hedge-fund-starboard-succeeds-in-replacing-darden-board/?_r=0) [<https://perma.cc/E6GQ-H3BH>]. This endeavor left the world with the gift of the infamous, nearly 300-page long PowerPoint criticizing, among other policies, Olive Garden's unlimited breadsticks. See David Benoit, *Starboard's Olive Garden Slides: Salting the Water, Custom Straws and More*, WALL STREET J.: MONEYBEAT (Sept. 12, 2014, 12:24 PM), <http://blogs.wsj.com/moneybeat/2014/09/12/starboards-olive-garden-slides-salting-the-water-custom-straws-and-more/> [<https://perma.cc/TQ4P-G9WK>].

92. See ACTIVIST INVESTING, *supra* note 76, at 14.

93. See John Jannarone, *Starboard Letter Urges Staples to Merge with Office Depot*, CNBC (Jan. 20, 2015, 1:33 PM), <http://www.cnbc.com/2015/01/20/starboard-letter-urges-staples-to-merge-with-office-depot.html> (purchasing a 6.1 percent stake in Staples and a 9.9 percent stake in Office Depot) [<https://perma.cc/9HP5-43PJ>].

94. See Taryn Luna, *Staples' Merger with Office Depot Faces Antitrust Questions*, BOS. GLOBE (Sept. 10, 2015), <https://www.bostonglobe.com/business/2015/09/09/staples-proposed-merger-with-office-depot-faces-antitrust-questions/fvzf4Ri783iiaR757tTPsL/story.html> [<https://perma.cc/K6FH-BFRJ>].

95. See Steve Denning, *Case Study: Activist Hedge Funds in Practice—Bill Ackman*, FORBES (Feb. 15, 2015, 4:46 PM), <http://www.forbes.com/sites/stevedenning/2015/02/15/case-study-activist-hedge-funds-in-practice-bill-ackman/> [<https://perma.cc/JU7B-HX4D>]; Richard Rubin, *Ackman 'Wolf Pack' Sent Allergan to Foreigners, Ex-CEO Says*, BLOOMBERG: BLOOMBERGBUSINESS (July 30, 2015, 11:14 AM), <http://www.bloomberg.com/news/articles/2015-07-30/ackman-s-wolf-pack-sent-allergan-to-foreign-hands-ex-ceo-says> [<https://perma.cc/4TFQ-4PVU>]. Pershing Square's stake was 9.7 percent of Allergan. *Id.*

Allergan's acquisition by white knight<sup>96</sup> Actavis, a foreign pharmaceutical company, for \$66 billion.<sup>97</sup> Although the acquisition was friendly, many were angry that Pershing Square drove Allergan to a foreign corporation, and investors felt slighted because they sold their shares to the hedge fund without knowing about the upcoming takeover.<sup>98</sup>

In addition to upset investors, hedge fund activism is not without its critics. Legal experts, most notably Martin Lipton, contend that hedge fund activism weakens the long-term value of targeted corporations.<sup>99</sup> These critics claim that hedge funds are interested in short-term gains and, thus, make short-term changes without thought for their long-term effects—such as cutting a target's research and development budget before selling their stock.<sup>100</sup> However, research has yet to validate these claims.<sup>101</sup> Conversely, proponents of activism point to studies demonstrating that hedge fund interventions raise the long-term value of target corporations.<sup>102</sup>

Those legal scholars who argue over the long-term value of activism are the same ones that debate the usefulness of activists themselves. Supporters of activism claim that activists are a check on executives while critics contend that activism scares management away from making smart long-term corporate decisions.<sup>103</sup> Regardless of these arguments, the increase in activism has led to greater dialogue between companies and their shareholders, a generally beneficial consequence.<sup>104</sup>

### C. Group Formation Under Section 13(d)

Investors commonly interact with one another. Determining that a group exists is difficult because of the normalcy of discussion among similarly situated market actors who have no intention of working together. In the preeminent group formation case, *Morales v. Quintel Entertainment, Inc.*,<sup>105</sup> the Second Circuit held that investors are a group for purposes of section 13(d) when they act together, or “agree[] to act together[,] for the purpose of acquiring, holding, voting[,] or disposing of” an issuer's

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96. A “white knight” refers to the acquiring company in a friendly takeover as a response to saving a corporation in danger of a hostile takeover. Jay M. Zitter, Annotation, *Lockup Option Defense to Hostile Corporate Takeover*, 66 A.L.R. 4th 180, 2[a] (1988).

97. See Denning, *supra* note 95; Rubin, *supra* note 95.

98. See Denning, *supra* note 95; Rubin, *supra* note 95.

99. Martin Lipton, *The Threat to Shareholders and the Economy from Activist Hedge Funds*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Jan. 14, 2015), <http://corpgov.law.harvard.edu/2015/01/14/the-threat-to-shareholders-and-the-economy-from-activist-hedge-funds/> [https://perma.cc/4TNA-CZL8]; see also Sharfman, *supra* note 59, at 103.

100. See Coffee, Jr. & Palia, *supra* note 11, at 47.

101. For an extensive discussion of hedge fund activism and long-term value, compare Bebchuk et al., *supra* note 50, at 1100 (providing empirical evidence of long-term value creation), with Coffee, Jr. & Palia, *supra* note 11, at 84 (discrediting Bebchuk's study, and arguing that long-term value is destroyed).

102. See Bebchuk et al., *supra* note 50, at 1105–06, 1155.

103. See Benoit & Monga, *supra* note 17.

104. See White, *supra* note 3.

105. 249 F.3d 115 (2d Cir. 2001).

securities.<sup>106</sup> Further, group members are not required to commit to an agreement on specified terms; it is merely enough to share a common objective regarding one of the above actions.<sup>107</sup> Essentially, the agreement must be to take concerted action for one of those purposes.<sup>108</sup>

Plaintiff-corporations must present direct or circumstantial evidence that an agreement exists between group members.<sup>109</sup> This agreement may be “formal or informal, written or unwritten.”<sup>110</sup> Courts generally are looking for a “meeting of the minds” between group members.<sup>111</sup> Determining when a group exists is difficult for several reasons. First, whether a group was formed is a question of fact in each case.<sup>112</sup> Second, courts do not have a checklist of factors to determine the existence of a 13(d) group.<sup>113</sup> Finally, activist investors are not required to have identical goals on every issue or even “march in lockstep” to be labeled a group.<sup>114</sup>

#### D. Consequences of Forming a Section 13(d) Group

The greatest threats to investors who form a group are litigation and poison pills. However, activist hedge funds do not seem to fear going to court<sup>115</sup> because in the past, the SEC rarely scrutinized activist investors.<sup>116</sup> Its approach generally has been hands-off.<sup>117</sup> Nevertheless, the SEC recently has revamped its efforts to investigate and enforce disclosure regulations.<sup>118</sup> In March 2015, the agency charged eight directors and corporate fiduciaries with section 13(d) violations.<sup>119</sup> More recently, the SEC has begun investigating a number of activist hedge funds that it believes formed 13(d) groups without filing a Schedule 13D.<sup>120</sup>

When hedge funds are sued for violating section 13(d), courts are reluctant to hold that activists investing in the same target are an

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106. *Id.* at 123–24; *see also* Morales v. Freund, 163 F.3d 763, 766 (2d Cir. 1999).

107. *See Quintel Entm't, Inc.*, 249 F.3d at 124.

108. *See* SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1163 (D.C. Cir. 1978); Kahan & Rock, *supra* note 44, at 1079.

109. *See Savoy Indus., Inc.*, 587 F.2d at 1163.

110. *Id.*

111. *Id.*; *see also Quintel Entm't, Inc.*, 249 F.3d at 124.

112. *See Quintel Entm't, Inc.*, 249 F.3d at 124.

113. *See* Hallwood Realty Partners v. Gotham Partners, 286 F.3d 613, 618 (2d Cir. 2002).

114. Schaffer *ex rel.* Lasersight Inc. v. CC Invs., LDC, No. 99 Civ. 2821 (VM), 2002 U.S. Dist. LEXIS 24511, at \*14, \*33 (S.D.N.Y. Dec. 19, 2002) (quoting Morales v. New Valley Corp., 99 F. Supp. 470, 475–76 (S.D.N.Y. 1998)).

115. *See* Lawrence Delevinge, *Activist Hedge Funds Shrug Off SEC Collusion Inquiry*, CNBC (June 5, 2015, 3:25 PM), <http://www.cnbc.com/2015/06/05/activist-hedge-funds-shrug-off-sec-collusion-inquiry.html> [<https://perma.cc/K8MR-F228>].

116. *See* Liz Hoffman et al., *SEC Probes Activist Funds Over Whether They Secretly Acted in Concert*, WALL STREET J. (June 4, 2015, 4:53 PM), <http://www.wsj.com/articles/sec-probes-activist-funds-over-whether-they-secretly-acted-in-concert-1433451205> [<https://perma.cc/D3VT-FGHF>].

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

undisclosed group.<sup>121</sup> Even if a court is willing to find that activist investors formed a group, punishments for violating section 13(d) have become relatively lenient: courts may enjoin defendants' right to vote on the shares they acquired or may order the group members to correct their Schedule 13D disclosures.<sup>122</sup> To receive an injunction, an issuer must prove that it suffered irreparable harm<sup>123</sup> and that "some cognizable danger of recurrent violation[s]" exists.<sup>124</sup> Further, in the case of a proxy contest, an injunction is inapposite under section 13(d) when the necessary disclosures were made "in sufficient time for shareholders to cast informed votes."<sup>125</sup> This rule makes it difficult for an issuer to obtain an injunction against group members from casting their votes.<sup>126</sup> Moreover, courts are likely only to order that defendants file an accurate Schedule 13D.<sup>127</sup> The lack of harsh punitive measures explains why activists do not fear litigation.

Regardless of judicial punishment, hedge funds seek to avoid 13(d) group status because boards of target corporations utilize various defensive maneuvers.<sup>128</sup> In a wolf pack, no member holds enough stock to trigger a poison pill individually.<sup>129</sup> However, if classified as a group, pack members may hold enough to trigger a standard pill.<sup>130</sup>

In *Third Point LLC v. Ruprecht*,<sup>131</sup> the Delaware Chancery Court recently upheld a two-tiered poison pill that was adopted to fend off activists.<sup>132</sup> The pill could be triggered by passive investors, those who disclose ownership by filing a Schedule 13G, when they acquired 20 percent of the corporation.<sup>133</sup> For all other investors who must disclose ownership by filing a Schedule 13D, including activists, the pill could be triggered when they acquired 10 percent of the corporation.<sup>134</sup> The court specifically noted that this pill could combat the conscious parallelism that was part of wolf pack activism, which helped the court reach its decision.<sup>135</sup>

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121. See Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 691 (2007); Kahan & Rock, *supra* note 44, at 1079.

122. See, e.g., *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 286 (2d Cir. 2011); Steven Davidoff Solomon, *Anticlimax in Long-Running CSX Railroad Court Case*, N.Y. TIMES: DEALB%K (July 19, 2011, 3:22 PM), [http://dealbook.nytimes.com/2011/07/19/anticlimax-in-long-running-csx-court-case/?\\_r=0](http://dealbook.nytimes.com/2011/07/19/anticlimax-in-long-running-csx-court-case/?_r=0) [<https://perma.cc/F655-FAQ7>].

123. *CSX Corp.*, 654 F.3d at 284–85 (citing *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975)).

124. *Id.* at 285 (quoting *Rondeau*, 422 U.S. at 59).

125. *Id.* at 287 (citing *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 380 (2d Cir. 1980)).

126. See Coffee, Jr. & Palia, *supra* note 11, at 41–42.

127. See *id.* at 42.

128. See *supra* notes 65–74.

129. See *supra* notes 71–74 and accompanying text.

130. See Coffee, Jr. & Palia, *supra* note 11, at 31–32.

131. No. 9469-VCP, 2014 WL 1922029 (Del. Ch. May 2, 2014).

132. *Id.* at \*20.

133. See *id.* at \*10.

134. See *id.* The pill also features a one-year term and a "qualifying offer" exception. *Id.* The court noted that the pill discriminated against activists, but held it was legal regardless. *Id.* at \*20.

135. See *id.* Carmen X.W. Lu argues that the *Third Point* decision suggests that the two-tiered pill limits even relatively loose wolf packs. Carmen X.W. Lu, Comment, *Unpacking*

This type of shareholders' rights plan has become more common and has been used by corporations such as Sotheby's and Netflix.<sup>136</sup>

The two-tiered poison pill is not the only defense mechanism corporations may utilize to fight off wolf packs. Latham & Watkins LLP has designed a "standing" poison pill, which uses broad language that applies to shareholders "acting in concert" or working "in conscious parallelism."<sup>137</sup> Additionally, Fried, Frank, Shriver & Jacobson LLP has reportedly developed a "window-closing" pill, whereby investors must file a Schedule 13D within a time frame much shorter than the ten-day window required by section 13(d).<sup>138</sup> The window is shortened when investors pass a threshold ownership level of 5.1 percent.<sup>139</sup> With new defensive mechanisms available for targeted corporations, it is more important than ever to adopt a structured formula to understand when a 13(d) group is formed.

## II. SECTION 13(D) AND ANTITRUST LAW: CATEGORIES OF CIRCUMSTANTIAL EVIDENCE

This part looks to judicial interpretations of group formation and price-fixing conspiracies to show their similarities. Part II.A surveys section 13(d) precedent, and Part II.B investigates the use of circumstantial evidence in proving an agreement under the Sherman Antitrust Act.

### A. Section 13(d) Evidence of Group Activity

Courts tend to assign different weight to different categories of section 13(d) evidence. Part II.A.1 analyzes parallel purchasing as evidence of 13(d) group formation. Part II.A.2 examines communication between alleged group members as circumstantial evidence. Similarly, Part II.A.3 evaluates representations to third parties that a group exists. Part II.A.4 investigates whether courts look to past relationships in 13(d) group cases. Part II.A.5 explores circumstantial evidence of actions taken to affect the corporate direction of the target company.

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*Wolf Packs*, 125 YALE L.J. 773, 780 (2016). Lu writes that applying conscious parallelism to wolf packs risks overregulating activist hedge funds. *Id.*

136. See CADWALADER, WICKERSHAM & TAFT LLP, M&A UPDATE: DELAWARE COURT UPHOLDS SOTHEBY'S POISON PILL DEFENSE AGAINST ACTIVIST CITING "NEGATIVE CONTROL" AS A CORPORATE THREAT (2014), <http://www.cadwalader.com/resources/clients-friends-memos/delaware-upholds-sothebys-poison-pill-defense-against-activist-citing-negative-control-as-a-corporate-threat> [https://perma.cc/D7R8-MY9B]; see also Steven Davidoff Solomon, *Netflix's Poison Pill Has a Shareholder-Friendly Flavor*, N.Y. TIMES: DEALB%K (Nov. 6, 2012, 2:14 PM), <http://dealbook.nytimes.com/2012/11/06/netflixs-poison-pill-has-a-shareholder-friendly-flavor/> [https://perma.cc/L2H4-HKGR].

137. See Coffee, Jr. & Palia, *supra* note 11, at 97 & n.240.

138. See *id.* at 97-98, 98 n.241.

139. See *id.* at 97-98. Unlike the two-tiered poison pill, it is unclear whether these two newly developed pills would be valid, but should they be upheld they also would prove to be effective wolf pack defenses. See *id.* at 98 n.241.



### 1. Parallel Purchasing and Selling of a Target's Stock

When courts decide issues of 13(d) group formation, they often look to whether defendants engaged in parallel acquisitions or sales of stock. Trading patterns among investors are circumstantial evidence of a group.<sup>140</sup> This is because the purpose of the Williams Act is to require disclosure by persons who have acquired a substantial interest in a company in a short period of time.<sup>141</sup> It is important to note that not all trades must be “in sync” for parallel transactions to be strong evidence of coordination.<sup>142</sup> In nearly every case where powerful evidence of parallel purchasing has existed, the court has held that a group was formed.<sup>143</sup>

One example is the preeminent wolf pack group formation case, *CSX Corp. v. Children's Investment Fund Management (UK) LLP*.<sup>144</sup> There, the Second Circuit affirmed the Southern District of New York's decision that activist hedge funds formed a group.<sup>145</sup> The Southern District cited “parallel proxy fight preparations” and “parallel investments in the same company” as evidence of group formation in its decision.<sup>146</sup> Judge Ralph K. Winter—in his concurring opinion—stated that the parallel conduct was the strongest evidence of group formation.<sup>147</sup>

To constitute parallel purchasing, the transactions must occur over a relatively short period of time and involve a large number of shares.<sup>148</sup> A short period of time amounts to purchases and sales within the same days or weeks.<sup>149</sup> Transactions occurring over the course of a season or a month are too far apart to be considered parallel.<sup>150</sup> Similarly, purchasing a near identical amount of a target's shares evidences parallel purchasing.<sup>151</sup> Furthermore, courts have cited a lack of parallel transactions as a rationale

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140. See *Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 618 (2d Cir. 2002).

141. See H.R. REP. NO. 90-1711, at 8 (1968), as reprinted in 1968 U.S.C.C.A.N. 2811, 2818.

142. *Schaffer ex rel. Triton Energy Corp. v. Soros*, No. 92 Civ. 1233 (LMM), 1994 U.S. Dist. LEXIS 15508, at \*14 (S.D.N.Y. Oct. 31, 1994).

143. See *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 95–96 (1st Cir. 1977); *Triton Energy Corp.*, 1994 U.S. Dist. LEXIS 15508, at \*14, \*16; *Int'l Banknote Co. v. Muller*, 713 F. Supp. 612, 619 (S.D.N.Y. 1989); *Champion Parts Rebuilders, Inc. v. Cormier Corp.* 661 F. Supp. 825, 832–34 (N.D. Ill. 1987); *Breaud v. Amato*, 657 So. 2d 1337, 1343–44 (La. Ct. App. 1995). But see *Hallwood*, 286 F.3d at 616, 618.

144. 654 F.3d 276 (2d Cir. 2011). For the facts of this case, see *infra* notes 167–80 and accompanying text.

145. See *CSX Corp.*, 654 F.3d at 287–88, *aff'g* 562 F. Supp. 2d 511 (S.D.N.Y. 2008).

146. *CSX Corp.*, 562 F. Supp. at 554, *aff'd*, 654 F.3d 276.

147. *CSX Corp.*, 654 F.3d at 309 (Winter, J., concurring).

148. See *Breaud*, 657 So. 2d at 1343; *cf.* *K-N Energy, Inc. v. Gulf Interstate Co.*, 607 F. Supp. 756, 766 (D. Colo. 1983).

149. See *Schaffer ex rel. Triton Energy Corp. v. Soros*, No. 92 Civ. 1233 (LMM), 1994 U.S. Dist. LEXIS 15508, at \*14 (S.D.N.Y. Oct. 31, 1994).

150. *Cf. K-N Energy, Inc.*, 607 F. Supp. at 766.

151. See *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 95 (1st Cir. 1977) (holding that a group was formed when three investors purchased identical blocks of stock simultaneously); *Champion Parts Rebuilders, Inc. v. Cormier Corp.*, 661 F. Supp. 825, 839 n.30 (N.D. Ill. 1987) (noting that when two shareholders crossed the 5 percent threshold as a group, one owned 50,000 shares, and the other owned 50,025).

for finding that no group exists.<sup>152</sup> Therefore, parallel purchasing or selling of a target's stock is circumstantial evidence of a section 13(d) group.

## 2. Communication Between Purported "Group" Members

Communication between group members has been analyzed in several different ways. Part II.A.2.a focuses on communication between alleged group members about agreements and strategy. Part II.A.2.b addresses discussions of the target's value and purported group members' holdings. Part II.A.2.c analyzes whether sharing information is circumstantial evidence. Part II.A.2.d considers whether issuances of support for an activist campaign constitute evidence. Part II.A.2.e examines communication regarding displeasure with incumbent management. Finally, Part II.A.2.f evaluates whether discussions to avoid triggering poison pills are circumstantial evidence of 13(d) group activity.

### a. Communication Regarding Agreements and Strategy

Where alleged group members discuss their agreement, the court likely will determine that a group was formed. This type of communication has been evidence of group activity since the earliest 13(d) cases.<sup>153</sup>

Perhaps the most obvious example of group formation occurred in *Bender v. Jordan*.<sup>154</sup> There, a director who owned 21 percent of Independent Federal Savings Bank's (IFSB) stock attempted to elect two new directors to IFSB's board.<sup>155</sup> The incumbent management fought the nominations by hiring a public relations firm to send letters to shareholders urging them to vote for the current board at the next shareholders' meeting.<sup>156</sup> Further, a friend of the directors purchased 7.2 percent of IFSB's outstanding shares.<sup>157</sup>

However, the directors' most flagrant violation of section 13(d) was their plan to acquire a block of 9.47 percent of IFSB's shares.<sup>158</sup> Two shareholders owned this block: one of them attended the meeting, and both of them intended to vote for the minority slate.<sup>159</sup> At 11:00 p.m. on the night before the shareholder meeting, the directors contacted the attending shareholder and offered to purchase his shares at a premium, conditioned on his vote for the incumbent management.<sup>160</sup> The day of the meeting, the incumbent directors brought the shareholder to an expensive restaurant.<sup>161</sup> There, the incumbent directors convinced him and the nonattending shareholder to sell their block, conditioned on their vote for the incumbents'

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152. See *Dreiling v. Am. Online Inc.*, 578 F.3d 995, 1005 (9th Cir. 2009).

153. See, e.g., *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 106, 111 (7th Cir. 1970).

154. 439 F. Supp. 2d 139 (D.D.C. 2006).

155. See *id.* at 145, 147.

156. See *id.* at 149–50.

157. See *id.* at 152.

158. See *id.*

159. See *id.* at 153.

160. See *id.* at 152–53.

161. See *id.* at 153.

slate later that day.<sup>162</sup> The same friend who had purchased 7.2 percent of IFSB's shares agreed to purchase the block through a defendant-director to avoid Office of Thrift Supervision<sup>163</sup> oversight.<sup>164</sup> Several hours later, the block voted for the incumbent directors, who then won the proxy contest.<sup>165</sup> The court held that the directors' communications and subsequent scheme to acquire a block of IFSB stock an hour before the shareholder meeting evidenced the creation of a 13(d) group.<sup>166</sup>

Another case where defendants discussed agreements is *CSX Corp.*<sup>167</sup> In *CSX Corp.*, two hedge funds—the Children's Investment Fund Management (TCI) and 3G Capital (3G)—coordinated purchases of CSX Corporation stock to effectuate corporate governance changes and, eventually, a proxy contest.<sup>168</sup> TCI and 3G purchased cash-settled total-return equity swaps (TRSs) with various banks referencing CSX shares.<sup>169</sup> Both TCI and 3G were aware that the banks, who were the “short” parties to the TRSs, would likely purchase stakes in CSX that were approximately equal to the size of the TRSs.<sup>170</sup> Through TRSs and common stock, TCI acquired approximately 14.1 percent of CSX, and 3G purchased 4.9 percent.<sup>171</sup>

The hedge funds began communicating in January 2007 when TCI sent a fund under 3G's control, which invested in TCI, a letter detailing information about the industries in which TCI was investing, including “U.S. transportation.”<sup>172</sup> Alex Behring, 3G's Managing Partner, contacted Chris Hohn, the Manager of TCI, to acquire more information.<sup>173</sup> In their discussions, Hohn disclosed that TCI had invested in CSX.<sup>174</sup> Additionally, the court found that Hohn revealed the size of TCI's stake in CSX.<sup>175</sup> Shortly after the talks, 3G also began purchasing shares in CSX while remaining in communication with Hohn by email.<sup>176</sup> By February 22, the two funds took a break from their purchasing until their managers met in person on March 29.<sup>177</sup> Later that day, 3G began purchasing more CSX

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162. *See id.* at 153–54.

163. The Office of Thrift Supervision (OTS) is “the primary federal regulator of all federal and state-chartered savings institutions across the nation that belong to the Savings Association Insurance Fund (SAIF).” *About*, OFF. THRIFT SUPERVISION, <https://www.treasury.gov/about/history/Pages/ots.aspx> (last visited Mar. 27, 2016) [<https://perma.cc/CH6B-XEDB>].

164. *See Bender*, 439 F. Supp. 2d at 153.

165. *See id.* at 154–55.

166. *See id.* at 162.

167. *See CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276 (2d Cir. 2011).

168. *See id.* at 280.

169. *See id.*

170. *See id.*

171. *See CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511, 526, 532 (S.D.N.Y. 2008), *aff'd*, 654 F.3d 276.

172. *See id.* at 533.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.* at 534.

stock, which continued until April 18; during those three weeks, TCI acquired a larger stake in CSX as well.<sup>178</sup>

On December 19, 2007, the two hedge funds filed a Schedule 13D disclosing that they were a group and stating their intention to nominate a minority slate of directors to CSX's board.<sup>179</sup> The Second Circuit held that TCI and 3G, through their communications and coordinated interests, had actually formed a group on April 10, 2007, when their combined stakes in CSX crossed the 5 percent threshold, thereby requiring section 13(d) disclosure.<sup>180</sup> This case provides another example where communicating about agreements is strong evidence of group formation.

Discussions of strategy often serve as the circumstantial, informal, and unwritten evidence needed to sufficiently prove the existence of a 13(d) group. The District Court of Maryland held that family-member shareholders constituted a 13(d) group because they held daily conference calls to discuss their investment in and stock manipulation of a target company.<sup>181</sup> Similarly, the Court of Appeals for the D.C. Circuit held that a 13(d) group existed from evidence of, *inter alia*, discussions between shareholders about nominating directors and officers as they took control of a target.<sup>182</sup> The Southern District of California held that a shareholder formed a group when he spoke to a foreign investment fund about replacing an entire board with a proxy contest.<sup>183</sup> To avoid a poison pill's trigger threshold, he negotiated—and eventually came to a deal—with the fund to acquire stock on its behalf for the purpose of controlling the target corporation.<sup>184</sup> Additionally, the Southern District of New York held that a group was formed when the manager of a private equity firm communicated with the principal of a hedge fund regarding the merits of amending a preferred stock agreement and decided their positions in upcoming negotiations.<sup>185</sup>

However, discussing strategy does not always equate group formation. Communications between investors regarding strategy, subsequent to a successful effort to change management, have not been deemed evidence of group activity.<sup>186</sup> Further, in *Third Point LLC*, a director nominee—

178. *See id.*

179. *See id.* at 535–36.

180. *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 284 (2d Cir. 2011).

181. *Burt v. Maasberg*, No. ELH-12-0464, 2014 U.S. Dist. LEXIS 41982, at \*59–61 (D. Md. Mar. 28, 2014).

182. *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1164 (D.C. Cir. 1978).

183. *Med. Imaging Ctrs. of Am., Inc. v. Lichenstein*, No. 96-0039-B(AJB), 1996 U.S. Dist. LEXIS 22362, at \*9–10 (S.D. Cal. Feb. 29, 1996).

184. *See id.*

185. *See Schaffer ex rel. Lasersight Inc. v. CC Invs., LDC*, No. 99 Civ. 2821 (VM), 2002 U.S. Dist. LEXIS 24511, at \*14–18 (S.D.N.Y. Dec. 20, 2002).

186. *See Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 618 (2d Cir. 2002); Transcript of Partial Testimony at 262, *Hallwood Realty Partners v. Gotham Partners*, 95 F. Supp. 2d 169 (S.D.N.Y. 2000) (No. 12LGHal1) [hereinafter *Hallwood Mahowald Testimony*]. There, it was Bill Ackman, a notorious hedge fund activist and the manager of Pershing Square Capital, who inquired about strategy. *See id.*; Katrina Brooker, *Love Him or Hate Him, Ackman Now Runs the World's Top Hedge Fund*, BLOOMBERGBUSINESS (Jan. 6,

nominated by activist funds as part of a proxy contest—communicated his go-private plan to the lead wolf and attempted to recruit additional investors to back his plan.<sup>187</sup> The court never questioned whether the wolf pack constituted a group.<sup>188</sup> Therefore, while communications between shareholders regarding strategy do not automatically render them a group, the courts generally have required these investors jointly to file Schedule 13Ds.

*b. Communication Regarding Value of  
and Holding Size in Target Company*

Conversations about value and holding sizes, independent of strategy and agreements, are less likely to constitute circumstantial evidence of group activity. The Second Circuit seems to have held that discussions regarding the value of a target's shares are not sufficient evidence to prove group formation, standing alone.<sup>189</sup> In *Hallwood Realty Partners v. Gotham Partners*,<sup>190</sup> the Vice President of an alleged group member shared investment information about the target's value with a potential investor.<sup>191</sup> This discussion of value and holdings did not persuade the Second Circuit that a group existed.<sup>192</sup>

In *CSX Corp.*, the Southern District of New York held that a group was formed when two hedge fund managers stayed in touch for almost six months to discuss their valuations of the target and thoughts on the investment, despite having filed Schedule 13Ds independently.<sup>193</sup> The Second Circuit affirmed the decision, holding that these discussions, along with evidence of parallel stock acquisitions, were sufficient to form a group.<sup>194</sup> It is unclear whether the Second Circuit began to place greater significance on this type of conversation in the time between *Hallwood Realty Partners* and *CSX Corp.* However, the decisions suggest that discussions about value and holding size in a target company are not, standing alone, enough to constitute a 13(d) group.

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2015, 12:00 AM), <http://www.bloomberg.com/news/articles/2015-01-06/love-him-or-hate-him-ackman-now-runs-the-world-s-top-hedge-fund> [<https://perma.cc/89SG-LZ87>].

187. See Defendants' Answering Brief in Opposition to Plaintiff's Motions for Preliminary Injunction at 32–33, *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029 (Del. Ch. Apr. 29, 2014) (No. 56880461), 2015 WL 1094677 [hereinafter *Third Point Brief*].

188. See generally *Third Point LLC*, 2014 WL 1922029.

189. See e.g., *Hallwood Realty Partners*, 286 F.3d at 618; see also Hallwood Mahowald Testimony, *supra* note 186, at 258.

190. 286 F.3d 613 (2d Cir. 2002).

191. See *id.* at 617. There, Ackman told another investor his valuation of the target company, the approximate size of Gotham's holding, and the identity of other large shareholders. Hallwood Mahowald Testimony, *supra* note 186, at 258–62.

192. See *Hallwood Realty Partners*, 286 F.3d at 618; see also *infra* Part II.A.2.d (discussing the facts of *Hallwood Realty Partners*).

193. See *CSX Corp. v. Children's Inv. Fund Mgmt. (UK), LLP*, 562 F. Supp. 2d 511, 533–35 (S.D.N.Y. 2008), *aff'd*, 654 F.3d 276 (2d Cir. 2011). These hedge funds were part of a wolf pack.

194. *CSX Corp.*, 654 F.3d at 284, *aff'g* 562 F. Supp. 2d at 511.

*c. Sharing Information*

Activists who have taken a position in a target company generally may share information about that company with other potential investors and current shareholders. Courts have held that investors seeking changes in a target corporation could share information without forming a group.<sup>195</sup> Further, in *K-N Energy, Inc. v. Gulf Interstate Co.*,<sup>196</sup> the court held that when shareholders hold significant stock in a corporation, it may be understood that they share information with each other without any intention to form a group.<sup>197</sup> Additionally, shareholders may distribute information to other investors with the hope of gaining their support in an activist campaign.<sup>198</sup>

Sharing nonpublic information is actually in an activist hedge fund's best interest to gain allies to back its campaign<sup>199</sup> and is considered common practice.<sup>200</sup> Wolf pack members shared information with other hedge funds in *CSX Corp.*<sup>201</sup> In that case, prior to investing in CSX, TCI made presentations regarding an investment in CSX.<sup>202</sup> The court held that a group was formed after finding that these pitches were intended to attract hedge funds favorable to TCI's efforts.<sup>203</sup>

Courts have found that sharing information about target companies, along with other communications, is evidence of group formation.<sup>204</sup> However, this is far from the common trend.<sup>205</sup> This category of evidence has become more important as hedge funds waging public campaigns increasingly have shared information publicly.<sup>206</sup>

195. See e.g., *Burt v. Maasberg*, No. ELH-12-0464, 2014 U.S. Dist. LEXIS 41982, at \*53–54 (D. Md. Mar. 28, 2014).

196. 607 F. Supp. 756 (D. Colo. 1983).

197. See *id.* at 767 (holding that 7 percent was a significant stake, and further, the person sharing the information—while President of his company—had no power to acquire stock).

198. See *id.* at 766–67. This is true unless the lead work is making a tender offer for the target; in that case the tipping is illegal under Rule 14e-3. See *Coffee Jr. & Palia*, *supra* note 11, at 35.

199. See *Coffee, Jr. & Palia*, *supra* note 11, at 34.

200. See generally *id.*

201. See *Pulliam et al.*, *supra* note 54.

202. See *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511, 525–26 (S.D.N.Y. 2008), *aff'd*, 654 F.3d 276 (2d Cir. 2011). Chris Hohn, the founder of TCI, contacted a number of hedge funds and managers about CSX including Deccan Value Advisors, Lone Pine Capital, 3G, Seneca, Icahn, and Atticus. See *id.* at 525. Only 3G, who communicated further with TCI, was held to be a part of the group. See *CSX Corp.*, 654 F.3d at 284.

203. See *CSX Corp.*, 562 F. Supp. 2d at 525.

204. See *Schaffer ex rel. Triton Energy Corp. v. Soros*, No. 92 Civ. 1233 (LMM), 1994 U.S. Dist. LEXIS 15508, at \*10–11 (S.D.N.Y. Oct. 31, 1994).

205. See e.g., *Burt v. Maasberg*, No. ELH-12-0464, 2014 U.S. Dist. LEXIS 41982, at \*53–54 (D. Md. Mar. 28, 2014).

206. See Alexandra Stevenson, *Activist Investors Get a Welcome Seat at the Table*, N.Y. TIMES: DEALB%K (Nov. 4, 2015), [http://www.nytimes.com/2015/11/05/business/dealbook/activist-investors-get-a-welcome-seat-at-the-table.html?\\_r=0](http://www.nytimes.com/2015/11/05/business/dealbook/activist-investors-get-a-welcome-seat-at-the-table.html?_r=0) [https://perma.cc/FJB7-W9FQ]. Hedge funds do this by speaking to the media, creating websites, or writing letters to management in their public filings. *Id.*

d. *Communication Regarding Support  
for an Activist Campaign*

Issuances of support for lead wolves are evidence of group activity, but hold little weight. In *Hallwood Realty Partners*, the Second Circuit held that no 13(d) group existed among shareholders who sought to remove the general partner of Hallwood.<sup>207</sup> Gotham, a hedge fund managed by Bill Ackman, led the campaign by acquiring 14.82 percent of Hallwood's stock.<sup>208</sup> Gotham was joined by Interstate, a registered financial advisor, Private Management Group, Inc. (PMG), an investment manager, and EFO Liberty, Inc. (EFO), a realty investment company.<sup>209</sup> Interstate acquired 9 percent of Hallwood's shares, PMG amassed 6.5 percent of Hallwood's stock, and EFO purchased 2 percent of Hallwood.<sup>210</sup> Throughout the campaign, a PMG representative contacted Ackman and Interstate's manager to share that PMG would support actions to "realize value."<sup>211</sup>

Similarly, in *MeVC Draper Fisher Jurvetson Fund I, Inc. v. Millennium Partners*,<sup>212</sup> Millennium, a real estate investment firm, and Karpus, a registered investment advisor, sought to replace a venture capital fund's entire board in a proxy fight.<sup>213</sup> During the campaign, Millennium acquired 6.7 percent of the target's shares, while Karpus bought 3.9 percent.<sup>214</sup> Over ten months, Karpus representatives emailed Millennium six times and called it once about its investment.<sup>215</sup> In most of these emails, Karpus informed Millennium of its general support for Millennium's efforts to upend the target's board.<sup>216</sup> The court held that these communications did not sufficiently allege the existence of a 13(d) group.<sup>217</sup>

In a recent Delaware Chancery Court case, a hedge fund and the Institutional Shareholder Services<sup>218</sup> issued statements supporting a lead wolf's slate of directors in a proxy battle.<sup>219</sup> The court did not address the issue of whether the hedge funds were a group.<sup>220</sup> Similarly, the Eastern District of Pennsylvania held that expressions of support, even when paired

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207. *Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 615, 618 (2d Cir. 2002).

208. *See id.* at 616.

209. *See id.*

210. *See id.*

211. Transcript of Partial Testimony at 335, 340, 347–49, 380, *id.* (No. 12L4HAL4) [hereinafter *Hallwood Reiland Testimony*].

212. 260 F. Supp. 2d 616 (S.D.N.Y. 2003).

213. *See id.* at 617, 619.

214. *See id.* at 618.

215. *See id.* at 632.

216. *See id.* at 632 n.28.

217. *See id.* at 632.

218. The "Institutional Shareholder Services Inc. (ISS) is the world's leading provider of corporate governance and socially responsible investment (SRI) solutions for asset owners, asset managers, hedge funds, and asset service providers." *About ISS*, ISS, <http://www.issgovernance.com/about/about-iss/> (last visited Mar. 27, 2016) [<https://perma.cc/MKX9-F5VZ>].

219. *See Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at \*12 n.5 (Del. Ch. May 2, 2014); *Third Point Brief*, *supra* note 187, at 60.

220. *See Third Point LLC*, 2014 WL 1922029, at \*1.

with communicating dissatisfaction with management, does not make investors a 13(d) group.<sup>221</sup> Conversely, the Seventh Circuit held that investors who expressed support for a shareholder's plan to change management were part of a group.<sup>222</sup> These cases stand for the proposition that communicating support for an activist campaign is circumstantial, although weak, evidence of 13(d) group activity.

*e. Communication Regarding Displeasure  
with Incumbent Management*

Discussions among shareholders who voice their dissatisfaction with a target's current management likely are not enough, standing alone, to form a 13(d) group. Generally, courts have declined to find group formation resting on this evidence.<sup>223</sup> As stated in Part II.A.2.d, even criticism of management paired with issuances of support is not enough to form a group.<sup>224</sup> Like evidence of support, communicating displeasure with incumbent management has been evidence of group formation in prior case law.<sup>225</sup> However, it is clear that this evidentiary category is entitled to little weight.<sup>226</sup>

*f. Communication to Avoid Triggering Poison Pills*

Discussions among shareholders to avoid triggering poison pills have not been held to be evidence of 13(d) group activity. In *Third Point LLC*, Third Point, an activist hedge fund managed by Dan Loeb, a prominent activist investor, purchased shares in Sotheby's.<sup>227</sup> Third Point planned to take Sotheby's private and replace its directors with Loeb and his allies.<sup>228</sup> Subsequently, a wolf pack was formed when two other hedge funds, Marcato Capital Management LLC ("Marcato") and Trian Fund Management, L.P. ("Trian") also purchased stock in Sotheby's.<sup>229</sup> Third Point and Marcato eventually filed and amended separate Schedule 13Ds until Third Point held 9.62 percent of Sotheby's shares and Marcato owned

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221. *Quigley Corp. v. Karkus*, No. 09-1725, 2009 U.S. Dist. LEXIS 41296, at \*11, \*18 (E.D. Pa. May 15, 2009).

222. *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 106, 112 (7th Cir. 1970), *aff'g* 305 F. Supp. 526 (E.D. Wis. 1969). There, however, the court found that the defendants also had made an agreement to "pool" their shares, which ultimately led to the group holding. *Id.* at 104.

223. *See Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 618 (2d Cir. 2002); *Charming Shoppes, Inc. v. Crescendo Partners II*, 557 F. Supp. 2d 621, 625 (E.D. Pa. 2008); *Hallwood Mahowald Testimony*, *supra* note 186, at 258 (noting that Bill Ackman told the vice president of an alleged group member that he "was not particularly fond of [the target's] management").

224. *See Quigley Corp.*, 2009 U.S. Dist. LEXIS 41296, at \*18.

225. *See, e.g., Bath Indus., Inc.*, 427 F.2d at 106. However, the court's decision rested on evidence that defendants agreed to pool their shares. *Id.* at 104.

226. *See, e.g., id.*

227. *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at \*3-4 (Del. Ch. May 2, 2014).

228. *See id.* at \*4.

229. *See id.* \*3-4.



6.61 percent.<sup>230</sup> Additionally, Trian acquired approximately 3 percent of Sotheby's outstanding shares.<sup>231</sup> Other hedge funds, such as York Capital Management and Eton Park Capital Management joined the wolf pack by acquiring Sotheby's stock during this time.<sup>232</sup>

After the funds acquired significant positions in Sotheby's, Third Point's Chief Operating Officer met with Marcato's General Counsel to ensure that the funds "didn't do anything to inadvertently trigger the pill."<sup>233</sup> This resulted in "some, but not extensive" communications between the two hedge funds.<sup>234</sup> The court in *Third Point LLC* affirmed the legality of using the two-tiered poison pill to ward off activist campaigns addressed in Part I.D of this Note.<sup>235</sup> However, the court ignored a potential section 13(d) issue, which implies that a group was not formed in this case.<sup>236</sup> Similarly, in *Hallwood Realty Partners*, defendant-shareholders discussed a target's poison pill.<sup>237</sup> However, the court held that no group was formed.<sup>238</sup> These cases show that communication about poison pills, without further discussions, does not require investors to disclose group membership under section 13(d).

### 3. Representations to Outside Parties That a Group Was Formed

Courts assign different weights to evidence that defendants communicated with third parties. Part II.A.3.a analyzes whether referencing that a "group" was formed is circumstantial evidence of an agreement. Part II.A.3.b examines the extent to which representations that individually owned shares are part of a "block" qualifies as evidence of group activity.

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230. *See id.* at \*4, \*12.

231. *See id.* at \*6 (filing a Schedule 13D was unnecessary because Trian never surpassed the 5 percent threshold).

232. *See* Svea Herbst-Baylss & Siddharth Cavale, *UPDATE 1-Hedge Fund Manager Loeb Launches Proxy Battle at Sotheby's*, REUTERS (Feb. 27, 2014, 4:45 PM), <http://www.reuters.com/article/2014/02/27/thirdpoint-sothebys-idUSL3N0LW4WO20140227#8M56SW7eI1JQ0d2u.97> [<https://perma.cc/3U82-QB3Z>].

233. *See Third Point LLC*, 2014 WL 1922029, at \*11.

234. *See id.*

235. *See supra* Part I.D; *supra* notes 132–36; *Third Point LLC*, 2014 WL 1922029, at \*20. While the poison pill prevented Third Point from acquiring a larger stake, the wolf pack proved effective: Sotheby's settled with Third Point and expanded its board by adding Loeb and his two director nominees. *See* David Benoit & Sara Germano, *Sotheby's, Third Point Reach Settlement: Sotheby's Board Expanded; Daniel Loeb, Olivier Reza, and Harry Wilson Appointed*, WALL STREET J. (May 5, 2014, 7:23 PM), <http://www.wsj.com/articles/SB10001424052702303647204579543581203051454> [<https://perma.cc/K4WT-XP9X>].

236. *See Third Point LLC*, 2014 WL 1922029, at \*1.

237. *See* Hallwood Mahowald Testimony, *supra* note 186, at 263.

238. *See* *Hallwood Realty Partners v. Gotham Partners*, 95 F. Supp. 2d 169 (S.D.N.Y. 2000).

*a. Referencing a “Group” to a Third Party*

Courts tend to find that a group has been formed where there is evidence that defendants represented that they were a “group” to third parties. An example of this occurred when a shareholder publicly stated that a “group” was formed with the intent to take control of a target.<sup>239</sup> Similarly, where four directors sought to acquire their corporation with a shell company and filed a joint Schedule 13D to that end, the court held that the directors violated section 13(d) by not filing earlier.<sup>240</sup> The court held that the defendants formed a group when they revealed their takeover plan to the remaining directors at a board meeting.<sup>241</sup> Finally, where a letter to a corporation’s stock transfer agent represented that a group of individuals had purchased warrants from a single issuer on the same date, the court held that this was sufficient proof of group formation.<sup>242</sup>

However, several courts have held that no group existed in cases where defendants represented themselves as a “group.” In *Transcon Lines v. A.G. Becker, Inc.*,<sup>243</sup> Becker Warburg Paribus Group Inc. (BWP), a securities broker, sought to acquire an interest in Transcon with the help of Jerry G. Rubenstein, a controlling shareholder of shipping and management companies.<sup>244</sup> Rubenstein and BWP met with many major corporations, seeking additional funding for the acquisition.<sup>245</sup> In each meeting, the potential investors were told that Rubenstein would be involved in Transcon’s future management.<sup>246</sup> This was reflected in a number of internal documents that included Transcon financial projections with references to Rubenstein and his associates’ involvement in management.<sup>247</sup> Other documents stated that “Rubenstein-BWP,” a partnership between Rubenstein and BWP, would be part of the acquisition.<sup>248</sup> Despite these representations, the court held that Rubenstein was not part of a group with BWP because he was not a beneficial owner of Transcon stock, and the group disclosed him as an advisor in their Schedule 13D.<sup>249</sup>

Similarly, in *Hallwood Realty Partners*, where several hedge funds and investment advisors sought to remove a target company’s general partner, the target hired a private investigator (PI) to gather evidence of group activity from alleged group members.<sup>250</sup> One of the defendants told the PI,

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239. See *Hollywood Casino Corp. v. Simmons*, No. 3:02-CV-0325-M, 2002 U.S. Dist. LEXIS 13182, at \*10 (N.D. Tex. July 18, 2002).

240. See *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 50, 60 (D.N.J. 1974).

241. See *id.* at 59–60.

242. See *Podesta v. Calumet Indus., Inc.*, No. 78 C 1005, 1978 U.S. Dist. LEXIS 17847, at \*8, \*37 (N.D. Ill. May 9, 1978).

243. 470 F. Supp. 356 (S.D.N.Y. 1979).

244. See *id.* at 359–61.

245. See *id.* at 361.

246. See *id.*

247. See *id.* at 379.

248. *Id.* at 362.

249. See *id.* at 371, 374.

250. *Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 616–17 (2d Cir. 2002).

who was posing as a prospective investor, that a “Gotham-led group designed to take over” the target existed.<sup>251</sup> Another defendant gave the PI investment materials about the target that “could be read to imply that [the defendant-investment advisor] was part of a Gotham-led attempt . . . to take over [the target] and to ‘realize value.’”<sup>252</sup> The court held that this circumstantial evidence was not enough to find that a group had been formed.<sup>253</sup> *Transcon Lines* and *Hallwood Realty Partners* stand for the proposition that in some cases, defendants’ representations alone that a “group” exists is not enough to prove 13(d) group formation.

*b. Representations That Shares  
Owned by Individuals Are Part of a “Block”*

The Fifth Circuit held that a mark of group formation is statements to outside parties by group members “that its members together ‘control’ a block of shares, even though those shares are on the record of the company as owned by individual group members.”<sup>254</sup> District courts have expressed this sentiment as well.<sup>255</sup>

In *Wellman v. Dickinson*,<sup>256</sup> defendant-shareholders sought to interest major corporations to acquire a minority interest in a target to affect a complete takeover.<sup>257</sup> The defendant made identical presentations to several companies, whereby stocks owned by one of the defendants, a brokerage house, and the defendants’ friends were advertised as a “block” that “would provide a sufficient base from which to launch a more extensive acquisition” of the target’s shares.<sup>258</sup> The court relied on these representations to potential investors as proof of a 13(d) group.<sup>259</sup> Overwhelming precedent shows that statements that shares owned by individuals are part of a “block” is evidence of a 13(d) group.<sup>260</sup>

#### 4. Past Relationships Indicative of a “Group”

The majority of courts do not consider past relationships between defendants when deciding the issue of 13(d) group formation. In *Texasgulf, Inc. v. Canada Development Corporation*,<sup>261</sup> the Southern District of Texas formulated the prevailing rule that “[m]ere relationship[s], among persons or entities, whether family, personal[,] or business, [are] insufficient to create a group which is deemed to be a statutory person. There must be [an]

251. *Id.* at 617.

252. *Id.*

253. *See id.* at 618.

254. *Breud v. Amato*, 657 So. 2d 1337, 1343 (La. Ct. App. 1995).

255. *See Simon Prop. Grp., Inc. v. Taubman Ctrs., Inc.*, 261 F. Supp. 2d 919, 943 (E.D. Mich. 2003); *see also Jewelcor Inc. v. Pearlman*, 397 F. Supp. 221, 250 (S.D.N.Y. 1975).

256. 682 F.2d 355 (2d Cir. 1982).

257. *Id.* at 356–57.

258. *Id.* at 359.

259. *See id.* at 363.

260. *See, e.g., id.*

261. 366 F. Supp. 374 (S.D. Tex. 1973).

agreement to act in concert.”<sup>262</sup> Most courts have adopted this rule verbatim when faced with similar section 13(d) questions.<sup>263</sup> Still others convey this same principle with different language.<sup>264</sup>

Further, courts generally show no bias in considering the type of relationship between defendants as evidence of group formation. This lack of bias is illustrated by courts’ holdings in different cases that a group did or did not exist when the relationship at issue was between friends,<sup>265</sup> family,<sup>266</sup> clients,<sup>267</sup> coworkers,<sup>268</sup> or colleagues from separate companies.<sup>269</sup> Interestingly, the Southern District of New York has recently stated that an employer-employee relationship is not indicative of group membership either.<sup>270</sup> Further, the Eastern District of Pennsylvania has declared that being Facebook “friends” is not significant to group formation.<sup>271</sup>

Although courts generally show no preference regarding the type of relationship between defendants, this does not prevent some courts from placing significance on evidence of prior relationships. For example, the District Court of Maryland, in *Burt v. Maasberg*,<sup>272</sup> adopted the *Texasgulf* rule,<sup>273</sup> but then stated that past relationships are circumstantial evidence that may be used to show group membership.<sup>274</sup> Additionally, the Northern

262. *Id.* at 403.

263. *See, e.g.*, *Forward Indus. v. Wise*, No. 14-cv-5365 (JSR), 2014 U.S. Dist. LEXIS 144030, at \*7 (S.D.N.Y. Sept. 20, 2014).

264. *See In re Charter Commc’ns*, 419 B.R. 221, 240 (Bankr. S.D.N.Y. 2009); *Torchmark Corp. v. Bixby*, 708 F. Supp. 1070, 1083 (W.D. Mo. 1988); *K-N Energy, Inc. v. Gulf Interstate Co.*, 607 F. Supp. 756, 765 (D. Colo. 1983).

265. *Compare Quigley v. Karkus*, No. 09-1725, 2009 U.S. Dist. LEXIS 41296, at \*12, \*18 (E.D. Pa. May 15, 2009) (holding that no group existed between friends), *with Hollywood Casino Corp. v. Simmons*, No. 3:02-CV-0325-M, 2002 U.S. Dist. LEXIS 13182, at \*10 (N.D. Tex. July 19, 2002) (holding that friends formed a group).

266. *Compare Torchmark Corp.*, 708 F. Supp. at 1072, 1083 (holding that no group existed between family members), *with Burt v. Maasberg*, No. ELH-12-0464, 2014 U.S. Dist. LEXIS 41982, at \*3, \*55 (D. Md. Mar. 28, 2014) (holding that family members formed a group).

267. *Compare Bayly Corp. v. Marantette*, No. 82-1354, 1982 WL 1337, at \*4, \*13 (D.D.C. Oct. 19, 1982) (holding that no group existed between stockbroker and customer), *with Med. Imaging Ctrs. of Am., Inc. v. Lichtenstein*, No. 96-0039-B(AJB), 1996 U.S. Dist. LEXIS 22362, at \*10-12 (S.D. Cal. Feb. 29, 1996) (holding that shareholder and clients formed a group).

268. *Compare K-N Energy, Inc.*, 607 F. Supp. at 759, 767 (holding that management of a company was not a group), *with Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 51-52, 58 (D.N.J. 1974) (holding that directors of the same corporation formed a group).

269. *Compare Texasgulf, Inc. v. Can. Dev. Corp.* 366 F. Supp. 374, 387, 404-05 (S.D. Tex. 1973) (holding that no group existed between two mining companies), *with Schaffer ex rel. Triton Energy Corp. v. Soros*, No. 92 Civ. 1233 (LMM), 1994 U.S. Dist. LEXIS 15508, at \*1, \*16 (S.D.N.Y. Oct. 28, 1994) (holding that separate hedge funds formed a group).

270. *Forward Indus. v. Wise*, No. 14-cv-5365 (JSR), 2014 U.S. Dist. LEXIS 144030, at \*7 (S.D.N.Y. Sept. 20, 2014).

271. *Quigley Corp. v. Karkus*, No. 09-1725, 2009 U.S. Dist. LEXIS 41296, at \*16-17, \*17 n.3 (E.D. Pa. May 15, 2009).

272. No. ELH-12-0464, 2014 U.S. Dist. LEXIS 41982 (D. Md. Mar. 28, 2014).

273. *See id.* at \*53.

274. *See id.* at \*54.

District of Texas has contemplated prior relationships while determining group formation.<sup>275</sup>

The Southern District of New York has been inconsistent in considering prior relationships as evidence of group activity, and the Second Circuit has done little to clear up the confusion. Most Southern District cases contemplating the issue have applied the *Texasgulf* rule and have not used relationships as evidence.<sup>276</sup> However, Judge Alvin K. Hellerstein of the Southern District has implied that “pre-existing common relationship[s]” are a relevant consideration in determining group formation.<sup>277</sup> Additionally, Judge Lewis A. Kaplan, also of the Southern District, has twice considered relationships between shareholders as evidence in deciding group membership.<sup>278</sup> The Second Circuit has not explicitly approved the use of prior relationships as circumstantial evidence, but it has addressed it before.<sup>279</sup> In *Hallwood Realty Partners*, the Second Circuit seemingly signed off on Judge Kaplan’s consideration of past relationships as evidence of a group.<sup>280</sup> And in *CSX Corp.*, the majority opinion did not address this issue, but Judge Winter’s concurrence stated that the relationship between the defendants was evidence of group formation.<sup>281</sup> Nonetheless, Judge Winter cautioned that this evidence should be balanced by the idea that it is “an explanation for frequent conversations that do not involve [the target].”<sup>282</sup> Therefore, a discrepancy exists between whether past relationships are circumstantial evidence at all.

##### 5. Actions Taken to Affect the Corporate Direction of the Target Company

Some courts use “action[s] taken by the group to affect the corporate direction of the company” as evidence of group formation.<sup>283</sup> An example of an activity undertaken to affect the corporate direction of a target that

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275. *Hollywood Casino Corp. v. Simmons*, No. 3:02-CV-0325-M, 2002 U.S. Dist. LEXIS 13182, at \*10 (N.D. Tex. July 18, 2002).

276. *Forward Indus.*, 2014 U.S. Dist. LEXIS 144030, at \*7; *Triton Energy Corp.*, 1994 U.S. Dist. LEXIS 15508, at \*11; *Transcon Lines v. A. G. Becker, Inc.*, 470 F. Supp. 356, 375 (S.D.N.Y. 1979).

277. *Litzler v. CC Invs., L.D.C.*, 411 F. Supp. 2d 411, 416 (S.D.N.Y. 2006) (citing *Morales v. Quintel Entm’t, Inc.* 249 F.3d 115, 127 (2d Cir. 2001)) (distinguishing the present case from *Quintel Entertainment*, where Judge Hellerstein stated that the court took relationships into consideration). Interestingly, the Second Circuit’s *Quintel Entertainment* opinion does not seem to address the defendants’ relationship in its consideration of group status. *See* 249 F.3d at 127.

278. *CSX Corp. v. Children’s Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511, 533–34 (S.D.N.Y. 2008); *Hallwood Realty Partners v. Gotham Partners*, 95 F. Supp. 2d 169, 173 (S.D.N.Y. 2000).

279. *See CSX Corp. v. Children’s Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 309 (2d Cir. 2011) (Winter, J., concurring); *Hallwood Realty Partners v. Gotham Partners*, 286 F.3d 613, 618 (2d Cir. 2002).

280. *Hallwood Realty Corp.*, 286 F.3d at 618.

281. *CSX Corp.*, 654 F.3d at 309 (Winter, J., concurring).

282. *Id.*

283. *Breaud v. Amato*, 657 So. 2d 1337, 1344 (La. Ct. App. 1995); *Simon Prop. Grp., Inc. v. Taubman Ctrs., Inc.*, 261 F. Supp. 2d 919, 943 (E.D. Mich. 2003).

was sufficient enough to be evidence of a group occurred when activist shareholders vetoed a profitable offer to purchase a company.<sup>284</sup> Further, efforts to direct a target into a new industry have constituted evidence of group activity.<sup>285</sup> Finally, seeking a company to effectuate a takeover of a target corporation has been sufficient evidence to warrant a holding that shareholders were a group.<sup>286</sup> Although it is considered infrequently, conduct to affect a target's direction is evidence of a 13(d) group.

*B. Proving an Agreement by Circumstantial Evidence  
Under the Sherman Antitrust Act*

As noted in Part I.C, courts making Williams Act determinations do not follow a defined set of factors. Looking to the Sherman Antitrust Act, which contains a more rigid and developed factor-based system of analysis, can guide courts through group formation cases alleging section 13(d) violations.

To prevent cartel price-fixing schemes, section 1 of the Sherman Antitrust Act makes “[e]very contract . . . or conspiracy, in restraint of trade or commerce . . . illegal.”<sup>287</sup> Congress intended this statute to ensure that business markets remained competitive.<sup>288</sup> Antitrust litigation often focuses on whether defendants formed an agreement.<sup>289</sup> Beginning in the twentieth century, the Supreme Court developed the “agreement” issue by defining concerted action.<sup>290</sup> In *Interstate Circuit, Inc. v. United States*,<sup>291</sup> the Court stated that an “agreement . . . [is] not a prerequisite to an unlawful conspiracy. It [is] enough that, knowing that concerted action [is] contemplated and invited, the distributors [give] their adherence to the scheme and participate[] in it.”<sup>292</sup> Further, a competitor's acceptance of a plan, without a formal agreement, is enough to form a conspiracy under section 1 of the Sherman Act.<sup>293</sup> A decade later, the Supreme Court echoed this rule, holding that “it is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.”<sup>294</sup> Therefore, the Supreme Court has repeatedly looked to circumstantial evidence in price-fixing cases.

More recently, in *Monsanto Co v. Spray-Rite Service Corp.*,<sup>295</sup> the Court held that evidence must exist that “tends to exclude the possibility of

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284. See *Breaud*, 657 So.2d at 1344; *Simon Prop. Grp.*, 261 F. Supp. 2d at 943.

285. See *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1164–65 (D.D.C. 1978).

286. See *Wellman v. Dickinson*, 682 F.2d 355, 363–64 (2d Cir. 1982).

287. Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

288. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 491–95, 493 n.15 (1940).

289. See *Kovacic et al.*, *supra* note 20, at 399.

290. See *id.*

291. 306 U.S. 208 (1939).

292. *Id.* at 226.

293. See *id.* at 227.

294. *United States v. Paramount Pictures*, 334 U.S. 131, 142 (1948); see also *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946).

295. 465 U.S. 752 (1984).

independent action.”<sup>296</sup> This requires “direct or circumstantial evidence” to prove that that parties “had a conscious commitment to a common scheme.”<sup>297</sup> The “tends to exclude” standard was significant because the Court sought to prevent the mistaken interpretations of conspiracy that would deter companies from offering low prices and thereby hurt consumers.<sup>298</sup>

Further, the Supreme Court has held that the key question in antitrust cases is “whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express.”<sup>299</sup> Proving the existence of an agreement by direct evidence is rare; far more often, an agreement is shown through circumstantial evidence.<sup>300</sup> Using circumstantial evidence, plaintiffs generally must show that defendants acted in conscious parallelism.<sup>301</sup> Conscious parallelism means that companies intentionally espouse the practices of their competitors.<sup>302</sup> Showing conscious parallelism requires plaintiffs to prove two elements: that defendants engaged in similar acts and that they were conscious of their actions.<sup>303</sup> Evidence of conscious parallelism does not require that pricing be uniform; price changes may occur nonsimultaneously and need not be the same between competitors.<sup>304</sup>

The Supreme Court held that allegations of conscious parallelism are not enough to prove a conspiracy, standing alone.<sup>305</sup> Plaintiffs must also prove plus factors—evidence that “tends to exclude” the probability that defendants acted independently.<sup>306</sup> Generally, more than one plus factor must be shown to prove that a conspiracy exists.<sup>307</sup> Courts are given broad discretion to determine plus factors,<sup>308</sup> as there is no all-inclusive list.<sup>309</sup>

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296. *See id.* at 768.

297. *See id.*

298. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593–94 (1986).

299. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). The court looks for a “meeting of the minds.” *Id.* at 557.

300. *See* ABA ANTITRUST LAW, *supra* note 21, at 56.

301. *See id.* at 63. The Supreme Court has stated that “evidence of consciously parallel behavior . . . [has] made heavy inroads into the traditional judicial attitude toward conspirac[ies].” *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).

302. *See* Dennis D. Palmer & Adam K. Fuemmeler, *Motions to Dismiss in Parallel Conduct and Plus Factors: Antitrust Cases After Twombly and Iqbal*, 2012 LEXISNEXIS EMERGING ISSUES ANALYSIS 6240, [http://www.polsinelli.com/~media/Articles%20by%20Attorneys/Palmer\\_Fuemmeler\\_Parts12](http://www.polsinelli.com/~media/Articles%20by%20Attorneys/Palmer_Fuemmeler_Parts12) [<https://perma.cc/2VRX-K6Y6>]. Courts also have called this “tacit collusion.” *See* ABA ANTITRUST LAW, *supra* note 21, at 63 n.61; *see also* RICHARD A. POSNER, ANTITRUST LAW 55 (2d ed. 2001).

303. *See* ABA ANTITRUST LAW, *supra* note 21, at 63, 65. However, courts rarely address these elements independently. *Id.* at 65.

304. *See* Palmer & Fuemmeler, *supra* note 302, at 6.

305. *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54, 556–57, 561 n.7 (2007).

306. *See* ABA ANTITRUST LAW, *supra* note 21, at 69.

307. *See id.* at 68.

308. *See* Kovacic et al., *supra* note 20, at 405.

309. *See* ABA ANTITRUST LAW, *supra* note 21, at 69.

Given that plus factors still can be somewhat ambiguous, it can be difficult to prove concerted action in the antitrust context.<sup>310</sup>

This section focuses on nine common plus factors: the eight common plus factors that the American Bar Association (ABA) has identified—(1) “actions against the defendant’s independent self-interest,” (2) “motive to conspire,” (3) “opportunity to conspire,” (4) “market concentrations and structure,” (5) “pretextual explanations for anticompetitive conduct,” (6) “sharing of price information,” (7) “signaling,” and (8) “involvement in other conspiracies”<sup>311</sup>—as well as legal scholars Phillip E. Areeda and Herbert Hovenkamp’s plus factor, (9) “customary indications of traditional conspiracy.”<sup>312</sup>

The plus factor “actions against the defendant’s independent self-interest” is evidence of a conspiracy when an action would be against a company’s interest acting independently, but would be in its interest while acting in a conspiracy.<sup>313</sup> This plus factor is important because its presence generally removes the risk of misidentifying a competitive market as a cartel.<sup>314</sup> An example of this plus factor evincing a conspiracy is two companies abstaining from competing to steal each other’s customers.<sup>315</sup> Despite this, courts recognize that actions against a company’s self-interest are sometimes only a sign of interdependence.<sup>316</sup>

Like conduct against a defendant’s independent self-interest, the plus factor “motive to conspire” is important because its existence lessens the chance of mistaking a noncompetitive market as competitive.<sup>317</sup> However, courts are skeptical of this plus factor, so it is rarely alleged standing alone.<sup>318</sup> This skepticism is due to motivation to conspire being synonymous with interdependence.<sup>319</sup> For this reason, courts hold that oligopolists may raise their prices with the hope that others will follow, without giving rise to an inference of conspiracy.<sup>320</sup> Further, to be a plus factor, the defendant’s motive must be more than a wish to increase profits.<sup>321</sup>

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310. See Kahan & Rock, *supra* note 44, at 1079.

311. *Id.*; ABA ANTITRUST LAW, *supra* note 21, at 69–91.

312. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1434b, at 267–68 (3d ed. 2010). This Note will not focus on Judge Richard A. Posner’s suggested plus factors because they generally pertain to price fixing specifically, however the ABA addresses some of his factors. See POSNER, *supra* note 302, at 79–93.

313. See ABA ANTITRUST LAW, *supra* note 21, at 69–70.

314. See AREEDA & HOVENKAMP, *supra* note 312, at 265–66.

315. See *Petruzzi’s IGA Supermarkets v. Darling-Del. Co.*, 998 F.2d 1224, 1244–46 (3d Cir. 1993).

316. See AREEDA & HOVENKAMP, *supra* note 312, at 269–70.

317. See *id.* at 265.

318. See ABA ANTITRUST LAW, *supra* note 21, at 74.

319. See *id.*

320. See, e.g., *In re Dig. Music Antitrust Litig.*, 592 F. Supp. 2d 435, 444 (S.D.N.Y. 2008).

321. See ABA ANTITRUST LAW, *supra* note 21, at 74.



“Opportunity to conspire” generally means meetings or conversations between defendants.<sup>322</sup> Oftentimes, plaintiffs allege this plus factor when defendants attend the same trade association meetings,<sup>323</sup> although this plus factor is given little weight.<sup>324</sup> The Supreme Court dismissed the proposition that membership in the same trade association was, standing alone, a sufficient plus factor to evidence a conspiracy.<sup>325</sup> Lower courts have echoed this sentiment for several decades.<sup>326</sup> Nonetheless, if alleged with other plus factors, many courts still believe it is circumstantial evidence of a conspiracy.<sup>327</sup>

The Supreme Court has stated that the “structure of the industry” is one of the “most prominent[]” factors used to identify a conspiracy.<sup>328</sup> While this plus factor, standing alone, is not enough to prove conspiracy, combined with other plus factors, it is probative evidence.<sup>329</sup> Judge Richard A. Posner also recognizes “market concentration and structure” as evidence of conspiracy: he argues that “fixed relative market shares” is proof of noncompetitiveness.<sup>330</sup> This plus factor is particularly evincing of a conspiracy in sell-side markets.<sup>331</sup> Nonetheless, courts generally hold that just because a market is an oligopoly does not necessarily mean that there has been a conspiracy.<sup>332</sup> To prove that a market’s concentration and structure are susceptible to collusion, plaintiffs must show a market is concentrated and has “fungible products subject to inelastic demand.”<sup>333</sup>

Evidence of “pretextual explanations for anticompetitive conduct” refutes the possibility of independent action.<sup>334</sup> An illustration of a pretextual explanation that can serve as a plus factor is a defendant’s explanation for refusing to sell a product because of a distributorship agreement, followed by an explanation that the refusal was not because of an agreement, but because the defendant had a policy not to sell products outside its territory.<sup>335</sup> However, this plus factor alone generally is insufficient to show a conspiracy.<sup>336</sup>

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322. *See id.* at 76.

323. *See id.* at 77.

324. *See id.* at 76.

325. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 n.12 (2007).

326. *See Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293–94 (5th Cir. 1988).

327. *See, e.g., In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1017 (E.D. Mich. 2010).

328. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

329. *See ABA ANTITRUST LAW*, *supra* note 21, at 78.

330. *See POSNER*, *supra* note 302, at 79. Fixed market shares occur within an industry when large companies maintain near identical market shares relative to each other for a considerable amount of time. *Id.*

331. *See ABA ANTITRUST LAW*, *supra* note 21, at 78.

332. *See id.* at 80.

333. *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001).

334. *See ABA ANTITRUST LAW*, *supra* note 21, at 81.

335. *See Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1479 (9th Cir. 1986).

336. *See ABA ANTITRUST LAW*, *supra* note 21, at 81.

“Sharing of price information,” in certain situations, is strong circumstantial evidence of a conspiracy.<sup>337</sup> However, the Supreme Court held that sharing price data is not a per se violation of the Sherman Antitrust Act<sup>338</sup> because exchanging information also can indicate competitive action.<sup>339</sup> But systems of price sharing are more likely to be evidence of a conspiracy,<sup>340</sup> so long as evidence that defendants agreed to fix prices also exists.<sup>341</sup> The Court did not explain a “system” beyond the facts of the case, but Merriam-Webster defines “system” as “a group of related parts that move or work together.”<sup>342</sup> Lower courts have held that systems of price sharing can refer to the authority level of the representatives of each defendant exchanging information.<sup>343</sup> Where the price sharing occurs at higher levels, it is more indicative of a conspiracy than an exchange between employees, who do not have the authority to make pricing decisions.<sup>344</sup> Significantly, in examining price sharing, courts will also look to whether there is a “legitimate, nonpretextual business rationale” for the exchange to rebut allegations of conspiracy.<sup>345</sup>

The plus factor “signaling” occurs when companies transmit pricing information or competitive plans to their coconspirators through indirect communications, including third parties and the media.<sup>346</sup> Sometimes, conferences with industry analysts have proved to be evidence of the signaling plus factor.<sup>347</sup> However, in *Williamson Oil Co. v. Philip Morris USA*,<sup>348</sup> the Eleventh Circuit held that no conspiracy existed when a defendant’s CEO announced the defendant’s plan to adopt a strategy other than price reductions at a conference with stock analysts.<sup>349</sup> Two reasons for the holding, among others, were that: “in an oligopoly, each company is aware of the others’ actions,” and the announcements neither eliminated the chance of independent action nor substantiated a price-fixing conspiracy.<sup>350</sup> Under the signaling plus factor, courts scrutinize price increase

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337. *See id.* at 83.

338. *United States v. U.S. Gypsum Co.* 438 U.S. 422, 441 n.16 (1978).

339. *See* ABA ANTITRUST LAW, *supra* note 21, at 84.

340. *See* POSNER, *supra* note 302, at 87.

341. *See* ABA ANTITRUST LAW, *supra* note 21, at 84; *see also* *United States v. Container Corp. of Am.*, 393 U.S. 333, 336–37 (1969). There, the Supreme Court held that a system whereby defendants exchanged prices upon request, with the recognition that each defendant would provide data in return, was evidence of a conspiracy where there was additional evidence that the system had a negative effect on the market. *Id.*

342. *System*, MERRIAM-WEBSTER DICTIONARY (2015), <http://www.merriam-webster.com/dictionary/system> [<https://perma.cc/89BS-MU7Q>].

343. *See, e.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004).

344. *Compare id.* (holding that a conspiracy existed when higher-ups exchanged pricing data), *with In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125–26 (3d Cir. 1999) (holding that information exchange by a lowly salesman working for a defendant was not evidence of a conspiracy).

345. *See* ABA ANTITRUST LAW, *supra* note 21, at 85.

346. *See id.* at 87.

347. *See id.* at 88.

348. 346 F.3d 1287 (11th Cir. 2003).

349. *See id.* at 1305.

350. *See id.* at 1305–06.

announcements that occur far before changes are implemented.<sup>351</sup> However, like the “sharing price information” plus factor, defendants can rebut this scrutiny by showing a legitimate business rationale for their announcements.<sup>352</sup>

While plaintiffs have alleged that “involvement in other conspiracies” should be considered in antitrust cases, courts are skeptical of this plus factor’s usefulness.<sup>353</sup> Further, the Supreme Court stated that “a conspiracy . . . in one market does not tend to show a conspiracy” in other markets if the “conduct is consistent with other, equally plausible explanations.”<sup>354</sup> Therefore, this plus factor provides little strength to plaintiffs’ conspiracy allegations.

The plus factor “customary indications of traditional conspiracy” refers to proof that alleged conspirators met and “exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.”<sup>355</sup> This plus factor has led at least one court to infer a conspiracy existed when defendants had simultaneous meetings and then implemented a set formula for bidding on contracts.<sup>356</sup> This plus factor also sufficiently proved a conspiracy where defendants exchanged salary information and assured each other that they were going to rely on that information.<sup>357</sup> “Customary indications of traditional conspiracy” provide strong circumstantial evidence of conspiracy.

While these plus factors are not bright-line rules, they have proven to be a sufficient framework in price-conspiracy cases. The strength of antitrust conspiracy law is demonstrated by the Supreme Court’s continued reliance on conscious parallelism and plus factors.

### III. SECTION 13(D) GROUP FORMATION SHOULD BE ANALYZED USING THE ANTITRUST CONSPIRACY FRAMEWORK

This part argues that 13(d) group formation cases should be examined under the antitrust conspiracy framework. Part III.A suggests that the antitrust precedent of conscious parallelism should be adopted as the first element in determining that a wolf pack forms a 13(d) group. Part III.B evaluates antitrust plus factors and 13(d) group evidence to propose plus factors that should be used in section 13(d) cases.

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351. See POSNER, *supra* note 302, at 87.

352. See *id.*; ABA ANTITRUST LAW, *supra* note 21, at 88.

353. See ABA ANTITRUST LAW, *supra* note 21, at 89.

354. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596 (1986).

355. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004); AREEDA & HOVENKAMP, *supra* note 312, at 267–68.

356. See *Alexander v. Phx. Bond & Indem. Co.*, 149 F. Supp. 2d 989, 999 (N.D. Ill. 2001).

357. See *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).

*A. Adopting the Conscious Parallelism Standard  
As the First Element in a Wolf Pack Group Formation Rule*

While there currently is no “checklist” of factors to determine 13(d) group formation,<sup>358</sup> the substantial increase in hedge fund activism, specifically the wolf pack tactic,<sup>359</sup> requires the development of a clearer rule. The conscious parallelism and plus factor standard of circumstantial evidence from antitrust law provides the more certain solution that section 13(d) needs.

Rule 13d-5(b)(1) states that a 13(d) “group” is formed “[w]hen two or more persons *agree to act together* for the purpose of acquiring, holding, voting or disposing of . . . securities.”<sup>360</sup> Similarly, section 1 of the Sherman Antitrust Act makes “[e]very contract . . . or conspiracy, in restraint of trade or commerce . . . illegal.”<sup>361</sup> The Supreme Court held that in deciding whether a conspiracy exists, the key question is “whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express.”<sup>362</sup> Both the 13(d) and antitrust standards require an agreement to be formed.

*Quintel Entertainment*, the preeminent 13(d) group case, states that an agreement can be “formal or informal.”<sup>363</sup> Further, group members must only “combine[] to further a common objective” regarding “acquiring, holding, voting, or disposing of . . . securities”—specific terms are unnecessary.<sup>364</sup> Likewise, antitrust conspiracies only require that a concert of action be intended and that defendants conformed to the understanding; they do not require an express agreement.<sup>365</sup> Both standards essentially require a “meeting of the minds.”<sup>366</sup> Additionally, both rules may be proved by direct or circumstantial evidence.<sup>367</sup>

Conscious parallelism is implicit in both standards. The wolf pack tactic requires parallel investing strategies, usually ones that involve buying up a target’s stock in a short window of time.<sup>368</sup> And in antitrust law, “evidence of consciously parallel behavior . . . [has] made heavy inroads into the traditional attitude toward conspirac[ies].”<sup>369</sup> Even the level of parallel behavior required is equivalent. Under section 13(d), actors do not need to “march in lockstep,” and their parallel trades need not be “in sync” to be strong evidence of coordination.<sup>370</sup> Antitrust conscious parallelism does

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358. *See supra* text accompanying notes 112–13.

359. *See* Coffee, Jr. & Palia, *supra* note 11, at 2.

360. 17 C.F.R. § 240.13d-5(b)(1) (2015) (emphasis added).

361. 15 U.S.C. § 1 (2012).

362. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

363. *Morales v. Quintel Entm’t, Inc.*, 249 F.3d 115, 124 (2d Cir. 2001).

364. *See supra* text accompanying notes 106–07.

365. *See* *United States v. Paramount Pictures*, 334 U.S. 131, 142 (1948).

366. *See supra* notes 111, 299 and accompanying text.

367. *See supra* notes 109, 297 and accompanying text.

368. *See supra* text accompanying notes 52, 62–64.

369. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).

370. *See supra* text accompanying notes 114, 142.

not require that pricing is uniform; price increases can occur asynchronously, and raised prices can differ.<sup>371</sup>

In nearly every case where strong evidence of parallel purchasing was present, courts have held that a 13(d) group was formed.<sup>372</sup> Further, in *CSX Corp.*, the Second Circuit affirmed the Southern District of New York's decision, which recognized parallel behavior as evidence of group activity.<sup>373</sup> Circuit Judge Winter's concurrence stated that the parallel conduct was the strongest evidence of group formation.<sup>374</sup> Given conscious parallelism's implicit role in wolf packs and courts' willingness to treat this behavior as strong evidence of group formation, it seems natural to adopt it as the first element in a clearer rule.

The Delaware Chancery Court has been willing to treat wolf packs differently than other investors in the past. In *Third Point LLC*, the court noted that the two-tiered poison pill discriminated against activist shareholders, but held that it was still appropriate.<sup>375</sup> Further, the court recognized that conscious parallelism was a fundamental part of the wolf pack strategy; this fact helped the court come to its decision.<sup>376</sup>

The wolf pack strategy's ability to evade traditional group formation has led the Delaware Chancery Court to treat wolf packs differently than traditional investors. Similarly, the court may be willing to adopt the antitrust precedent in wolf pack group formation cases to address this loophole.

Nevertheless, the antitrust-securities comparison is not perfect: though it creates more certainty than the status quo 13(d) group formation analysis, the plus factors are not bright-line factors.<sup>377</sup> But given the nature of the issue, it is unlikely any solution will get closer to an objective test. Moreover, judges have experience implementing the antitrust framework and thus could apply it adeptly to the section 13(d) context. Further, it has been suggested that using conscious parallelism to determine group formation overestimates the extent of agreements among activist hedge funds, leading to the overregulation of wolf packs.<sup>378</sup> However, this Note's proposed plus factors seek to identify clear behavior that avoids overpunishing wolf packs.<sup>379</sup> Therefore, this Note suggests that no plus

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371. See Palmer & Fuemmeler, *supra* note 302, at 6.

372. See *supra* Part II.A.1. Further, courts have held that a lack of parallel transactions was evidence that no group was formed. See *Dreiling v. Am. Online Inc.*, 578 F.3d 995, 1005 (9th Cir. 2009).

373. See *supra* text accompanying notes 144–46.

374. See *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 309 (2d Cir. 2011) (Winter, J., concurring).

375. See *supra* notes 132–35 and accompanying text.

376. See *Third Point LLC v. Ruprecht*, Nos. 9469-VCP, 9497-VCP, 9508-VCP, 2014 WL 1922029, at \*20 (Del. Ch. May 2, 2014).

377. See *supra* text accompanying notes 309–10.

378. See Lu, *supra* note 135, at 780.

379. See *infra* Part III.B.1–2.

factor alone—except “customary indications of traditional conspiracy”<sup>380</sup>—is enough to show that a wolf pack formed a group.<sup>381</sup>

*B. Plus Factors to Serve As the Second Element in the Proposed Wolf Pack Group Formation Rule*

This section analyzes plus factors that could serve as the second element in the proposed 13(d) group formation rule. Part III.B.1 suggests that several preexisting antitrust plus factors should be adopted in 13(d) group cases. Part III.B.2 recommends applying previously used circumstantial evidence of group activity to the proposed section 13(d) plus factor analysis. Finally, Part III.B.3 rejects certain antitrust plus factors that are irrelevant in 13(d) group formation cases.

1. Proposed Plus Factors to be Adopted from Antitrust Law

Part III.B.1.a argues that the antitrust plus factor “opportunity to conspire” should be adopted in section 13(d) law. Part III.B.1.b proposes that the plus factor “sharing of price information” deserves evidentiary weight as a 13(d) plus factor. Part III.B.1.c suggests that the plus factor “signaling” is relevant to this consideration as well. Finally, Part III.B.1.d notes the obvious benefits of adopting “customary indications of traditional conspiracy” as a section 13(d) plus factor.

*a. Opportunity to Conspire*

In antitrust practice, “opportunity to conspire” is relevant where alleged conspirators meet or communicate.<sup>382</sup> In the context of 13(d) group formation, these situations are more likely to occur when alleged group members have prior relationships. Past relationships should be evidence of group activity because they create an opportunity to conspire.

Most courts dealing with prior relationships cite the *Texasgulf* rule and do not seem to contemplate this factor while making group formation decisions.<sup>383</sup> However, several courts—particularly two judges in the Southern District of New York—do consider this factor even though they also cite *Texasgulf*.<sup>384</sup> To reconcile the discrepancies between the courts, prior relationships should be circumstantial, but weak, evidence of “group” membership. The language of the *Texasgulf* rule—“mere relationship[s] . . . [are] insufficient to create a group”<sup>385</sup>—implies that, standing alone, this evidence is not enough to prove group formation. The language leaves open the possibility of considering relationships as just one factor in this determination.

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380. See *infra* Part III.B.1.d.

381. See *infra* Part III.B.1.a–c, III.B.2.

382. See ABA ANTITRUST LAW, *supra* note 21, at 76.

383. See *supra* text accompanying notes 262–63.

384. See *supra* text accompanying notes 274–78.

385. *Texasgulf, Inc. v. Can. Dev. Corp.*, 366 F. Supp. 374, 403 (S.D. Tex. 1973).

However, courts analyzing this factor should also consider Judge Winter's point that prior relationships may be "an explanation for frequent conversations that do not involve [the target]."<sup>386</sup> Consideration that prior relationships often foster communication that is not just for investment reasons prevents relationships from being a sufficient plus factor to show a group was formed, on their own.

In antitrust cases, plaintiffs often allege that defendants have an opportunity to conspire when they attend the same trade association meetings.<sup>387</sup> Trade association meetings are similar to activist investor conferences; they give activist hedge funds an opportunity to meet and communicate about their investments.<sup>388</sup> The Supreme Court's holding that membership in a trade association is not, alone, a sufficient plus factor to show a conspiracy reinforces this proposed 13(d) group plus factor.<sup>389</sup> Like prior relationships, attending activist conferences should be weak circumstantial evidence of group activity. Due to its similarity to section 13(d) case law, the antitrust evidence "opportunity to conspire" should be adopted as a plus factor in the wolf pack group formation framework.

#### *b. Sharing of Price Information*

The plus factor "sharing of price information" should be circumstantial evidence of 13(d) group formation. In antitrust law, systems of price sharing are likely to evince a conspiracy.<sup>390</sup> The definition of "system" is a group that moves or works together.<sup>391</sup> The same principle should apply in section 13(d) cases where there is additional evidence that an agreement took place. Like antitrust precedent,<sup>392</sup> arrangements whereby activist investors provide information to other activists upon request and an understanding exists that those activists will furnish data in return should certainly be considered in a court's decision of group formation.

Communication regarding value and holding size in a target and sharing information about a target are analogous to the antitrust "sharing of price information" plus factor. However, courts are split on whether these types of communication are evidence of group activity.<sup>393</sup> Therefore, this suggested plus factor in wolf pack 13(d) group formation cases should not be enough, standing alone, to prove the existence of an agreement.

Courts hearing antitrust cases distinguish systems of information sharing between high-ranking employees from systems between low-ranking employees.<sup>394</sup> In antitrust cases, higher-ups are management or employees

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386. See *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 309 (2d Cir. 2011) (Winter, J., concurring).

387. See ABA ANTITRUST LAW, *supra* note 21, at 77.

388. See generally Alden, *supra* note 56.

389. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 n.12 (2007).

390. See *supra* notes 340–41 and accompanying text.

391. See *System*, *supra* note 342.

392. See *supra* notes 340–41 and accompanying text.

393. See *supra* Part II.A.2.b–c.

394. See *supra* notes 343–44 and accompanying text.

who have authority to make pricing decisions.<sup>395</sup> In applying this distinction to hedge funds, it should be stronger evidence of price sharing if systems involve managers and analysts who have authority to make investment decisions. Because sharing information is not a per se violation of antitrust or securities law,<sup>396</sup> this plus factor, standing alone, should not be enough to prove group formation.

In the context of hedge fund activism, this plus factor is appropriate because hedge funds invest large amounts of capital in target companies—clearly the decisions by high-ranking members with this sort of authority are determinative. An investor generally will seek to acquire as much information as possible about a corporation before purchasing stock, especially when making a large investment.

In antitrust law, defendants can rebut the presumption of conspiracy created by exchanging price information if they show a legitimate, nonpretextual business reason for sharing.<sup>397</sup> This is similar to the *K-N Energy* principle that significant shareholders may exchange information without forming a group.<sup>398</sup> There, the defendant had a 7 percent stake in the target.<sup>399</sup> By comparison, news of most activist hedge fund campaigns do not reach the public,<sup>400</sup> which means that no wolves acquire more than 5 percent of their target. Thus, in the majority of activist campaigns, hedge funds will not be able to rebut the presumption of group activity created by sharing information because there is no documentation of earlier statements regarding the reason for business decisions. In the rare situation that a wolf takes a 5 percent or larger stake—and must file Schedule 13Ds—the target’s board of directors will be aware of the activists’ presence and can inform shareholders accordingly, thus satisfying the purpose of section 13(d).<sup>401</sup> Whether the *K-N Energy* principle should apply to those activist hedge funds that reach 7 percent of a target’s stock should depend on whether the campaign will provide long-term value to the target.<sup>402</sup> Despite this determination, communication about the value of and the holding size in a target and sharing information should fall under the “sharing information” plus factor in analyzing wolf pack group formation. However, it must be alleged with other plus factors.

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395. See *supra* note 344 and accompanying text.

396. See *supra* Part II.A.2.c; see also *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

397. See ABA ANTITRUST LAW, *supra* note 21, at 85.

398. See *K-N Energy, Corp. v. Gulf Interstate Co.*, 607 F. Supp. 756, 767 (D. Colo. 1983).

399. See *id.*

400. See ACTIVIST INVESTING, *supra* note 76, at 8.

401. For the purpose of section 13(d), see *supra* text accompanying notes 32–34.

402. See *K-N Energy Corp.*, 607 F. Supp. at 767. As it is still unclear whether hedge fund activism provides long-term value to target corporations, this Note does not address whether to extend the *K-N Energy, Inc.* safe harbor to these investors.



*c. Signaling*

“Signaling” has been alleged to be circumstantial evidence of price fixing, especially where defendants made announcements at conferences with industry analysts.<sup>403</sup> Evidence of communicating support for campaigns, references that a “group” exists, and representing that shares owned by individual shareholders are part of a “block” have all been used as evidence in 13(d) group formation cases.<sup>404</sup> These types of communications are analogous to “signaling” that an activist campaign exists. Therefore, signaling should be a plus factor in determining 13(d) group membership. However, as courts seemingly assign little weight to communications of support,<sup>405</sup> this plus factor should not be enough, standing alone, to show group activity.

In antitrust law, announcements at conferences with industry analysts are evidence of the plus factor “signaling.”<sup>406</sup> This is similar to the antitrust practice of treating attendance at trade association meetings as circumstantial evidence under the “opportunity to conspire” plus factor.<sup>407</sup> For this reason, courts should hold that presentations at activist conferences are analogous to announcements at conferences with industry analysts. In contrast, *Williamson Oil Co.* disregarded these announcements as evidence of price fixing.<sup>408</sup> However, the Eleventh Circuit’s reasoning does not fit perfectly in securities law. Its first rationale, “that in an oligopoly, each company is aware of the other’s actions,”<sup>409</sup> is not relevant to wolf packs because they do not control the majority of a target’s shares. However, the court’s second rationale is relevant because, like price fixing, presenting at activist conferences does not exclude the possibility of independent action nor establish that a group is formed.<sup>410</sup> This further supports the contention that signaling, on its own, should not prove 13(d) group formation.

Defendants can rebut the presumption of signaling as evidence of price fixing by showing there was a legitimate business rationale for their actions.<sup>411</sup> Adopting this defense in section 13(d) cases would protect shareholders with ethical intentions. Activist hedge fund campaigns targeting poorly run companies would be able to present evidence that their proposals would benefit the target—and hopefully provide long-term value. The only actors that would be barred from this defense are those taking part in activist campaigns against perfectly healthy and well-run targets; presumably these investors would have no excuse.

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403. See *supra* text accompanying notes 346–47.

404. See discussion *supra* Part II.A.2.d, II.A.3.a–b.

405. See discussion *supra* Part II.A.2.d.

406. See ABA ANTITRUST LAW, *supra* note 21, at 88.

407. See *id.* at 77.

408. See *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1305 (11th Cir. 2003).

409. See *id.* at 1305–06.

410. See *id.*

411. See ABA ANTITRUST LAW, *supra* note 21, at 88.

Adopting this plus factor in section 13(d) cases would have a substantial effect on wolf packs because tipping is an essential part of their strategy.<sup>412</sup> An argument that this plus factor hurts shareholders' fundamental right to support better management decisions likely will fail. Traditional activist shareholders—as apart from activist hedge funds—would benefit from disclosure because the issuer's board, and presumably other shareholders, would be made aware of their campaign. Further, this plus factor would not hurt traditional activists because they and their allies generally do not hold a 5 percent stake in an issuer.<sup>413</sup> It is more likely that this plus factor will apply to wolf packs than traditional investors. By signaling instead of making express agreements, wolf packs circumvent section 13(d)'s disclosure requirements; thus, the law's purpose is not being carried out. Activist hedge funds in a wolf pack with moral intentions still could plead the legitimate business rationale defense. Therefore, signaling should be a plus factor in 13(d) group formation cases, but should be considered alongside other plus factors.

*d. Customary Indications of Traditional Conspiracy*

“Customary indications of traditional conspiracy” is the most easily recognizable form of price-fixing evidence. Similarly, evidence that wolf pack members adopted a common plan, regardless of whether a meeting took place, is easily recognizable. In cases where there is evidence of communications about agreements and support, courts overwhelmingly hold that a 13(d) group is formed.<sup>414</sup> Given that this evidence clearly shows group formation, it is the exact type of behavior that Congress believed should be disclosed. Customary indications of traditional group formation should therefore be a plus factor that holds substantial weight.

2. Proposed Plus Factors from Section 13(d) Case Law

Part III.B.2.a proposes using evidence of communicating dissatisfaction with management as a section 13(d) plus factor. Part III.B.2.b suggests that discussions to avoid triggering a poison pill also should be a plus factor. Finally, Part III.B.2.c recommends that actions taken to affect the corporate direction of a target should be a 13(d) group plus factor.

*a. Communication Regarding Displeasure  
with Incumbent Management*

Expressing dissatisfaction with management should be a plus factor because it is circumstantial evidence of group activity.<sup>415</sup> Courts have declined to find that a 13(d) group was formed from evidence of this type of

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412. See *supra* notes 53–56 and accompanying text.

413. See *supra* note 58.

414. See *supra* Part II.A.2.a.

415. See discussion *supra* Part II.A.2.e.

communication, yet they have considered it in their decisions.<sup>416</sup> Nonetheless, displeasure with an issuer's management neither discounts independent action nor substantiates group membership. Further, disgruntled shareholders may not believe that an activist campaign provides a better alternative to current management decisions. Dissatisfaction with management direction is implicit in all activism. Therefore, it is weak circumstantial evidence.

The nature of wolf packs—as compared to traditional shareholders—requires that expressing dissatisfaction with incumbent management is a plus factor. First, shareholders—like a wolf pack—that acquire 5 percent or more of an issuer have a louder voice than the traditional shareholder. Further, a fundamental part of a wolf pack is campaigning that its proposal is a better alternative to a target's current management's practices. Because courts are willing to treat wolf packs differently than traditional shareholders, evidence that activist hedge funds express displeasure with a target's management should be a plus factor, but it should still hold little weight.

*b. Communication to Avoid Triggering Poison Pills*

Evidence that shareholders spoke to avoid triggering a poison pill should be a 13(d) group formation plus factor because it provides an opportunity to come to an agreement. A shareholder would only buy a stake just short of triggering a pill if they intended to take control of the issuer. However, courts must consider that shareholders with a stake this large would worry about a pill being triggered and, therefore, likely would believe it is necessary to communicate with other parties to protect their investment.

In section 13(d) cases where plaintiffs cited this form of communication as evidence of group membership, courts did not address this factor in their analysis.<sup>417</sup> One reason for this may be that a party close to the pill's threshold would have already had to file a Schedule 13D. This satisfies the purpose of section 13(d): that the board of directors would be aware of the party's stake and could advise other shareholders accordingly.<sup>418</sup> Another reason is that a discussion to avoid triggering a poison pill with nothing more evinces that the parties are not fully aware of each other's intentions. Therefore, while this form of communication should be a plus factor, it should be considered weak circumstantial evidence.

*c. Actions Taken to Affect the  
Corporate Direction of the Target Company*

Actions to affect the corporate direction of a target should be a plus factor because they occur in all wolf packs. Several courts have considered

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416. See discussion *supra* Part II.A.2.e.

417. See, e.g., *Hallwood Realty Partners v. Gotham Partners*, 95 F. Supp. 2d 169 (S.D.N.Y. 2000); Hallwood Mahowald Testimony, *supra* note 186, at 263.

418. See *supra* text accompanying notes 32–33.

these actions, on their own, to be evidence of group activity.<sup>419</sup> In all of these cases, the actions taken were the same types that are sought by activist hedge fund campaigns.<sup>420</sup>

This plus factor may seem too broad because taking actions to affect a corporation's direction is implicit in all activism. However, it is essential for shareholders to know about these actions to make informed decisions regarding their shares. This is the exact type of knowledge that Congress intended shareholders to have.<sup>421</sup> This plus factor is particularly relevant because wolf packs have recently had so much success in implementing changes.<sup>422</sup> Therefore, this plus factor should be considered weak circumstantial evidence of group activity.

### 3. Rejection of Irrelevant Antitrust Plus Factors

While Part III.B.1 of this Note reconciled the similarities between antitrust plus factors and 13(d) group evidence, some antitrust plus factors are irrelevant in the context of 13(d) group formation.

The first unnecessary plus factor is "actions against self-interest." In antitrust cases, one common reason that plaintiffs are unable to prove a conspiracy exists is that the defendant's acts may not necessarily be against their own self-interest, and thus, the evidence would not meet *Monsanto's* "tend to exclude" standard.<sup>423</sup> This same rationale is present in all hedge fund activism: all hedge funds share the same interest in making a profit. When a normal actor invests in a poorly run company, one may be able to show that the investment was not in the actor's interest. However, activist hedge funds seek out poorly run companies, so it becomes difficult to show that an investment is not in a hedge fund's interest. Even if it were possible to show this, in corporate law, courts employ the business judgment rule to give deference to board business decisions because courts operate under the assumption that judges are not the best suited to decide investment matters. Therefore, the plus factor "actions against self-interest" has no place in 13(d) group formation.

The plus factor "motive to conspire" is also irrelevant in section 13(d) cases. In antitrust law, courts express skepticism toward "motive to conspire" because these claims may be nothing more than evidence of interdependence.<sup>424</sup> For this reason, courts hold that there is no inference of a conspiracy when an oligopolist raises prices in the hope that his competitors also will do so.<sup>425</sup> Similar to an oligopoly, hedge fund activism requires some level of interdependence because no hedge fund takes a

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419. See *Breud v. Amato*, 657 So. 2d 1337, 1344 (La. Ct. App. 1995); *Simon Prop. Grp., Inc. v. Taubman Ctrs., Inc.*, 261 F. Supp. 2d 919, 943 (E.D. Mich. 2003).

420. See discussion *supra* Part II.A.5; *supra* note 49 and accompanying text.

421. See *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971).

422. See *supra* notes 76–78 and accompanying text.

423. See *Monsanto Co. v. Spray-Rite Serv., Corp.*, 465 U.S. 752, 768 (1984).

424. See *supra* text accompanying notes 318–19.

425. See, e.g., *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 444 (S.D.N.Y. 2008).

controlling stake in the target. The presence alone of other activist hedge funds can be enough to give the lead wolf leverage. Therefore, arguing that activist hedge funds have a motive to form a group simply points out that activist campaigns require interdependence. Additionally, in antitrust law, a motive to profit is not evidence of a conspiracy.<sup>426</sup> Activist hedge funds may seek to implement changes in their targets, but their underlying motive—and the reason for their existence—is to increase their profits. Therefore, “motive to conspire” cannot be a 13(d) group plus factor.

The plus factor “market concentration and structure” also does not translate to section 13(d) cases. In antitrust law, evidence of market concentration and structure is relevant where alleged conspirators make up a majority of the market and have relatively fixed shares.<sup>427</sup> In that situation, the market is more susceptible to price fixing, especially on the selling side.<sup>428</sup> Whether a product is infungible is also important to this consideration.<sup>429</sup> A wolf pack does not take a controlling share in its targets, so it does not make up a majority of the market for those corporations’ stock. Further, hedge funds are on the buy side of the market, and their ability to purchase more shares means that the market for shares of the target’s stock is not fixed. Similarly, as any investor can buy a target’s outstanding stock, shareholders may be considered fungible themselves. Therefore, “market concentration and structure” is irrelevant in 13(d) group formation.

“Pretextual explanations” also has no place in 13(d) group cases. Most activist hedge fund campaigns are not public knowledge.<sup>430</sup> Smaller activist hedge funds can remain silent and allow the lead wolf to communicate with the target’s management.<sup>431</sup> Oftentimes, lead wolves have a preconceived notion of the change they would like to implement in the target, however, they are free to pursue a different change if they see value. Therefore, what may seem to be evidence of pretextual explanations is actually a change in direction. This remains true if an activist hedge fund announces its investment to the public. It is only when a shareholder crosses the 5 percent threshold and must file a Schedule 13D that it is required to state a purpose.<sup>432</sup> At that point, an investor is required to amend its Schedule 13D whenever their purpose changes.<sup>433</sup> If it does not amend its Schedule 13D, yet changes the purpose for its investment, section 13(d) is violated and the target—or its shareholders—may bring suit. In that situation, pretextual explanations will be evidence of a section 13(d) violation, but they will not be evidence of group formation. Therefore, “pretextual explanations” should not be a 13(d) plus factor.

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426. See ABA ANTITRUST LAW, *supra* note 21, at 74.

427. See POSNER, *supra* note 302, at 79.

428. See ABA ANTITRUST LAW, *supra* note 21, at 78.

429. See *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001).

430. See ACTIVIST INVESTING, *supra* note 76, at 8.

431. See Katelouzou, *supra* note 52, at 491.

432. See *supra* text accompanying notes 25–26.

433. See *supra* notes 25–26 and accompanying text.

The plus factor “involvement in other conspiracies” has no place in 13(d) group formation. Even in antitrust law, courts are reluctant to consider involvement in other conspiracies as evidence of price fixing.<sup>434</sup> The Supreme Court has gone so far as to reject evidence of a different conspiracy as holding weight in later antitrust cases.<sup>435</sup> Like antitrust law, 13(d) group formation cases require another conspiracy-like determination. Given courts’ skepticism of this plus factor, it makes little sense to apply it to wolf pack formation cases.

#### CONCLUSION

The recent growth in hedge fund activism, specifically the wolf pack, necessitates a clear formula for determining when a 13(d) group is formed. The antitrust doctrine, conscious parallelism—used to discover conspiracies that are analogous to section 13(d)’s agreement requirement—should be applied in wolf pack group formation cases. Under the proposed section 13(d) framework, to show group activity, a plaintiff would need to show the first element—conscious parallelism—and plus factors to prove that defendants agreed to act for the purpose of acquiring, holding, voting, or disposing of securities.

Opportunity to conspire, sharing of price information, signaling, and customary indications of traditional conspiracy are plus factors that should be adopted from antitrust law. Additionally, communication regarding displeasure with management, discussions to avoid triggering a poison pill, and actions taken to affect the corporate direction of a target are all circumstantial evidence that should be adopted as plus factors in 13(d) group cases. Finally, the antitrust plus factors actions against self-interest, motive to conspire, market concentration and structure, pretextual explanations, and involvement in other conspiracies serve no use in wolf pack 13(d) cases and thus should be discarded. Adopting the antitrust framework would provide clearer factors to guide courts in dealing with wolf pack group formation.

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434. See ABA ANTITRUST LAW, *supra* note 21, at 89.

435. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986).