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# To Be or Not to Be Both CEO and Board Chair\*

Thuy-Nga T. Vo<sup>†</sup>

The top two leadership roles in the American corporation are the chief executive officer (“CEO”) and the chairperson of the board of directors (“Chair”).<sup>1</sup> There is a large body of literature that examines the impact of the CEO’s compensation and stock ownership on the company’s performance. Much has also been written about the effects of the board’s size, director stock ownership, and director independence on the company’s success. Less attention has been given to the governance structure in which both the CEO and Chair positions are held by one individual and the impact of this dual leadership role—commonly known as “duality”<sup>2</sup>—on the corporation’s performance.

Thus far, the limited scholarship on duality takes two different analytical approaches: the theoretical underpinning of duality or the empirical effect of duality on discrete performance variables. Legal scholarship focuses primarily on theoretical concepts (e.g., conflicts of interests, entrenchment, and agency costs) to evaluate the different leadership structures of corporate entities. Literature in the areas of management, business, and financial economics, by contrast,

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<sup>1</sup> See J. Richard Harrison, David L. Torres & Sal Kukalis, *The Changing of the Guard: Turnover and Structural Change in the Top-Management Positions*, 33 ADMIN. SCI. Q. 211, 211, 221-23 (1988) (arguing that although the CEO and Chair are both at the top of the corporate leadership hierarchy, the CEO has greater power relative to the Chair).

<sup>2</sup> See B. Ram Baliga, R. Charles Moyer & Ramesh S. Rao, *CEO Duality and Firm Performance: What’s the Fuss?*, 17 STRATEGIC MGMT. J. 41, 42 (1996) (“In cases of CEO duality, the CEO of the firm wears two hats—a CEO hat and a chairperson of the board of directors hat. Nonduality implies that different individuals serve as the CEO and the chairperson.”).

focuses mostly on results from empirical tests of discrete measures (e.g., executive compensation, management turnover, and stock returns) to evaluate the different corporate leadership structures.

The pervasiveness of duality in corporate America underlies the importance of understanding this leadership structure and its impact on corporate performance. This article analyzes the impact of duality on corporate performance through an integrated framework, using concepts from legal scholarship in addition to data from management, business, and financial literature. Using these theoretical concepts and empirical results, this article analyzes whether the combination or separation of the top leadership roles better supports the foundational concept of corporate governance: directors are responsible for overseeing business operations and monitoring management to achieve corporate financial success.<sup>3</sup>

Part I of this article discusses the management and monitoring responsibilities of the board of directors. Part II explores the duality governance structure and its prevalence in corporate America. In Part III, the article examines and weighs the theoretical arguments for and against duality. Based on these arguments, this part assesses the impact of combined or separate CEO and Chair positions on the board's performance of its management and monitoring responsibilities. Part IV turns to the empirical data on the effect of combined, rather than separate, CEO-Chair roles on corporate performance. Part V explains the views of corporate stakeholders on the duality

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<sup>3</sup> See AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.01 cmt. a (1994) [hereinafter ALI PRINCIPLES]. Comment (a) to section 3.01 quotes the Corporate Director's Guidebook, which states:

Even under statutes providing that the business and affairs shall be "managed" by the board of directors, it is recognized that actual operation is a function of management. The responsibility of the board is limited to overseeing such operation. . . . It is important to emphasize that the role of the director is to monitor, in an environment of loyal but independent oversight, the conduct of the business and affairs of the corporation in behalf of those who invest in the corporation.

*Id.*; see also ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 379 (2006) ("One obvious consequence of a person's agreement to serve as a director is the understanding that he or she will strive for the corporation's financial success."); Paul Mallette & Karen L. Fowler, *Effects of Board Composition and Stock Ownership on the Adoption of "Poison Pills"*, 35 ACAD. MGMT. J. 1010, 1012 (1992) ("[I]t is widely accepted that boards are the formal representatives of firms' shareholders and that they exist to monitor top management performance and protect shareholders' rights and interests.").

debate. The article concludes that theoretical arguments and empirical evidence, as reflected in financial and nonfinancial metrics, strongly suggest that a corporate governance structure with a nonexecutive Chair, instead of a dual CEO-Chair, is better suited to the fulfillment of the directors' fundamental responsibilities to oversee business operations and monitor management for the purpose of enhancing shareholder value.

## I. BOARD OF DIRECTORS' AUTHORITY TO GOVERN

### A. *Management and Monitoring Roles*

State statutes provide the board of directors with the authority to manage and direct the operation of the corporation.<sup>4</sup> The board's management role requires directors to set enterprise policies and to make key business decisions involving matters such as financing plans, growth strategies, and executive compensation.<sup>5</sup> The board's monitoring role, on the other hand, entails hiring management personnel to operate the business and overseeing management to control weak performances or self-serving action by corporate managers.<sup>6</sup>

Both the management and monitoring roles encompass specific tasks, and it is not always easy or necessary to determine whether a task is more in the line of managing or monitoring.<sup>7</sup> For example, a board deciding whether to approve

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<sup>4</sup> See DEL. CODE ANN. tit. 8, § 141(a) (2001 & Supp. 2008) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of the board of directors . . ."); MODEL BUS. CORP. ACT § 8.01 (2008) ("[T]he business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors . . .").

<sup>5</sup> Stephen M. Bainbridge, *A Critique of the NYSE's Director Independence Listing Standards*, 30 SEC. REG. L.J. 370, 381 (2002); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251, 279 (2005); R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 836 (2003).

<sup>6</sup> Bainbridge, *supra* note 5, at 381; Clark, *supra* note 5, at 278; Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1278 (1999); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1468 (2007); Ide, *supra* note 5, at 836, 838; Idalene F. Kesner, Bart Victor & Bruce T. Lamont, *Board Composition and the Commission of Illegal Acts: An Investigation of Fortune 500 Companies*, 29 ACAD. MGMT. J. 789, 790 (1986).

<sup>7</sup> See Joel Seligman, *No One Can Serve Two Masters: Corporate and Securities Law After Enron*, 80 WASH. U. L.Q. 449, 457-62 (2002) (distinguishing the board's management function in approving the company's special purpose vehicles from

a material transaction with an inside executive is exercising not only its management role of making a fundamental business decision, but also its oversight role of ensuring that the transaction enhances shareholder value instead of merely furthering executive interests.

There has been vigorous debate over whether the board's primary role is to manage or to monitor.<sup>8</sup> It is well settled, though, that a board may delegate its management authority to corporate officers,<sup>9</sup> and that such delegation is now the norm in corporate America.<sup>10</sup> It is the officers who in fact manage most public corporations on a day-to-day basis.<sup>11</sup> Having delegated the daily management function to the executives, directors retain oversight responsibility in order to

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the board's monitoring function over the CFO's conflicts of interest in proposing and operating the special purpose vehicles).

<sup>8</sup> See FRANKLIN GEVURTZ, *GLOBAL ISSUES IN CORPORATE LAW* 68 (2006) (observing that many commentators believe the board's primary role is "to monitor management, rather than . . . manage the corporation"); Bainbridge, *supra* note 5, at 378 (recounting that the American Law Institute's first draft of its Principles of Corporate Governance generated the "hotly debated . . . issue of what role the board of directors . . . should play in corporate governance").

<sup>9</sup> See DEL. CODE ANN. tit. 8, § 142(a)-(b) (West 2010) ("Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws . . . . Officers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the laws or determined by the board of directors . . . ."); MODEL BUS. CORP. ACT § 8.40 (2008) ("The board of directors may elect individuals to fill one or more offices of the corporation . . . ."); *id.* § 8.41 ("Each officer has the authority and shall perform the functions set forth in the bylaws or, to the extent consistent with the bylaws, the functions prescribed by the board of directors . . . .").

<sup>10</sup> See Eisenberg, *supra* note 6, at 1278-81 (explaining that the management role was dominant more than twenty years ago, but the monitoring role has now been recognized as the primary function of the board); Ide, *supra* note 5, at 836 (observing that the monitoring role was less recognized than the management role until post-Enron); ALI PRINCIPLES, *supra* note 3, § 3.02 cmt. d ("In the publicly held corporation, the management function is normally vested in the principal senior executives.").

<sup>11</sup> See ALI PRINCIPLES, *supra* note 3, § 3.01 cmt. a (quoting the Corporate Director's Guidebook, which states, "It is generally recognized that the board of directors is not expected to operate the business . . . . [I]t is recognized that actual operation is a function of management. The responsibility of the board is limited to overseeing such operation."); *id.* § 3.02 cmt. d ("A basic function of the board is to select these executives and to oversee their performance (using the term 'oversee' to refer to general observation and oversight, not active supervision or day-to-day scrutiny) to determine whether the business is being properly managed . . . ."); Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 18 (2003) (explaining that after directors select executives and employees to run daily operations, the directors intervene in daily operations only on major issues).

ensure that the executives' actions advance the company's business and financial objectives.<sup>12</sup>

### B. Independence Requirements

To facilitate the board's monitoring function, federal laws and stock exchange listing standards require certain levels of director independence.<sup>13</sup> The Sarbanes-Oxley Act of 2002 requires public companies to have an audit committee composed entirely of independent directors.<sup>14</sup> Similarly, the listing standards of the New York Stock Exchange<sup>15</sup> and the Nasdaq Stock Market<sup>16</sup> require public companies to have a

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<sup>12</sup> See ALI PRINCIPLES, *supra* note 3, § 3.01 cmt. a. Specifically, comment (a) to section 3.01, quoting the Business Roundtable Statement, states that

Although the board cannot effectively conduct day-to-day operations, the board does have a major role in, and a major accountability for, the financial performance of the enterprise. This clearly requires a continuing check on corporate financial results and prospects, including profit and loss and cash flow by major business segments.

*Id.*; see also Stout, *supra* note 11, at 18 (“Just as a smoke detector may seem an idle lump of plastic and metal until an actual fire, a board of directors that appears passive most of the time can save shareholders billions of dollars, if it notices and reacts when things go wrong.”).

<sup>13</sup> See Gordon, *supra* note 6, at 1477-83 (discussing the evolution of the director independence rules).

<sup>14</sup> Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(3)(A) (2006). Being “independent” means the audit committee member may not be an affiliate of the company and may not receive fees from the company, other than fees for service on the board or board committees. *Id.* § 78j-1(m)(3)(B). An “affiliate” of the company is a person controlling, controlled by, or “under common control with” the company. 17 C.F.R. § 240.10A-3(e)(1)(i) (2010). Having “control” means having the “power to direct or cause the direction of the management and policies of” the company “through the ownership of voting securities, by contract, or otherwise.” *Id.* § 240.10A-3(e)(4).

<sup>15</sup> N.Y. STOCK EXCH., FINAL NYSE CORPORATE GOVERNANCE RULES 4-10 (2003), available at <http://www.nyse.com/pdfs/finalcorpgovrules.pdf>. Under NYSE requirements, a director is not independent if the director receives compensation of “more than \$100,000 per year” from the NYSE company, other than board fees, or if the director is an executive officer of another company that is doing business with the NYSE company in excess of the “greater of \$1 million or 2% of such other company’s consolidated gross revenues.” *Id.* In addition, a director is not considered independent “unless the board of directors affirmatively determines that the director has no material relationships with the listed company,” whether in the nature of commercial, industrial, banking, consulting, legal, accounting, charitable, or familial relationships. *Id.* Material relationships may occur directly between the director and the company, or indirectly through the director being a “partner, shareholder or officer of an organization that has a relationship with the company.” *Id.*

<sup>16</sup> *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2187, 2191, 2193 (2004) [hereinafter *Developments*]. Nasdaq’s standards for director independence are similar to the NYSE standards discussed above, but Nasdaq’s cut-off for non-board-related compensation is \$60,000 per year, and the cut-off for the director’s business payments to or income from the company is the greater of \$200,000 or “5% of the recipient’s consolidated gross revenues.” *Id.* at 2189-90.

majority of independent directors on their boards and to have the entire nominating, compensation, and audit committees composed of independent directors.

The director independence requirement is grounded in the belief that outside directors are more effective than inside directors in monitoring management conduct.<sup>17</sup> Opinions and research findings, however, are mixed on the value of director independence.<sup>18</sup> There is evidence that director independence enhances, detracts from, or has no effect on corporate performance, in both financial and nonfinancial measures.<sup>19</sup> For example, some studies find that outside directors negatively affect corporate performance because the outside directors are more likely to support management prerogatives than shareholder interests, that increasing outsider representation reduces research and development spending, and that an outsider-dominated board is more likely to award “golden parachutes” to the company’s executives.<sup>20</sup>

Other studies, on the other hand, find that increasing outsider representation on the board improves corporate

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<sup>17</sup> Gordon, *supra* note 6, at 1468-69; *see also* ALI PRINCIPLES, *supra* note 3, § 3A.01 cmt. c (“The effectiveness of the oversight function is conditioned on two prerequisites: a board that can objectively evaluate the performance of the senior executives, and an accurate and reliable flow of information to the board concerning that performance.”).

<sup>18</sup> Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 924, 942 (1999); Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 635 (1982); *Developments*, *supra* note 16, at 2200; Gordon, *supra* note 6, at 1500-09; Mallette & Fowler, *supra* note 3, at 1013; Dan L. Worrell, Carol Nemeč & Wallace N. Davidson III, *One Hat Too Many: Key Executive Plurality and Shareholder Wealth*, 18 STRATEGIC MGMT. J. 499, 501 (1997).

<sup>19</sup> Bainbridge, *supra* note 5, at 386-88; Clark, *supra* note 5, at 298-301 (summarizing studies showing positive, negative, and nominal impact of director independence on “firm profitability or performance”); Gordon, *supra* note 6, at 1468 (“One of the apparent puzzles in the empirical corporate governance literature is the lack of correlation between the presence of independent directors and the firm’s economic performance.”); Worrell et al., *supra* note 18, at 501 (noting that the presence of outside directors may lead to “positive stock price reactions” and a positive correlation between outsider presence and “bidding firms’ stock returns in acquisitions”).

<sup>20</sup> Chamu Sundaramurthy, James M. Mahoney & Joseph T. Mahoney, *Board Structure, Antitakeover Provisions, and Stockholder Wealth*, 18 STRATEGIC MGMT. J. 231, 240 (1997); *see also* Worrell et al., *supra* note 18, at 501 (“[O]utside directors are often chosen by the CEO and may be aligned to management interests.”). “Golden parachutes” are compensation arrangements “that allow covered managers to voluntarily resign and collect substantial remuneration—in some cases several million dollars—after a triggering event, usually a hostile takeover.” Philip L. Cochran, Robert A. Wood & Thomas B. Jones, *The Composition of Boards of Directors and Incidence of Golden Parachutes*, 28 ACAD. MGMT. J. 664, 664-65 (1985).

performance in financial accounting measures and stock price.<sup>21</sup> Moreover, empirical research indicates that an independent board is more likely to terminate a CEO after a period of poor financial performance.<sup>22</sup> An independent board may also enhance shareholder value by reducing the likelihood that shareholders will bring suits against the company and that the board will approve greenmail payments.<sup>23</sup>

Given the mixed results in the correlation between director independence and corporate performance, the question of whether, and what portion of, the board should be composed of independent directors has been a subject of contention.<sup>24</sup> This article explores a specific angle of the director independence question: whether corporations should separate the positions of CEO and board Chair so that each position is held by a different individual.<sup>25</sup> Thus, the focus of this article is the independence of the chairperson of the board—not the independence of directors generally.

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<sup>21</sup> James P. Walsh & James K. Seward, *On the Efficiency of Internal and External Corporate Control Mechanisms*, 15 ACAD. MGMT. REV. 421, 433 (1990); Worrell et al., *supra* note 18, at 501.

<sup>22</sup> Walsh & Seward, *supra* note 21, at 433.

<sup>23</sup> Mallette & Fowler, *supra* note 3, 1013; Sundaramurthy et al., *supra* note 20, at 240; Walsh & Seward, *supra* note 21, at 433. The corporate practice of paying a premium price to repurchase shares in order to be rid of a hostile shareholder is known as paying “greenmail” to the hostile shareholder. CHIAPPINELLI, *supra* note 3, at 244.

<sup>24</sup> See Bainbridge, *supra* note 5, at 386-88 (questioning the effect of director independence on corporate performance); Clark, *supra* note 5, at 298-301 (counseling against “one-size-fits-all governmental mandates” that impose director independence requirements on corporations); Thuy-Nga T. Vo, *Rating Management Behavior and Ethics: A Proposal to Upgrade the Corporate Governance Rating Criteria*, 34 J. CORP. L. 1, 12 (2008) (discussing the emphasis that governance rating agencies place on director independence).

<sup>25</sup> This article focuses on whether the board Chair should currently serve as the company’s CEO. Some proponents of separating the positions would prohibit not only the current CEO, but also former CEOs of the company, from serving as board Chairs. Clark, *supra* note 5, at 271. Other observers see a benefit in having a retired CEO assume the Chair position; putting the retired CEO on the board retains the company-specific knowledge valuable to the Chair’s job. James A. Brickley, Jeffrey L. Coles & Gregg Jarrell, *Leadership Structure: Separating the CEO and Chairman of the Board*, 3 J. CORP. FIN. 189, 194-95 (1997). Yet others believe that the board should have a Chair who fully satisfies the independence requirements under regulatory and listing standards. See Steven Balsam & Arun Upadhyay, *Impact of Board Leadership on Firm Performance: Does It Matter Who Heads the Board?* 21 (Mar. 16, 2009), available at <http://ssrn.com/abstract=1361255> (“[T]he benefits of having a separate chair . . . appear to only exist when that chair is an independent director.”).



### C. *Responsibility to Further Shareholder Interests*

Underlying the board's authority to govern is its responsibility to strive for the corporation's success, whether determined by financial profitability or other indices of performance.<sup>26</sup> There has been lively discussion about whether directors, when making decisions for the corporation, should consider shareholder interests alone or whether they should also consider the interests of other stakeholders<sup>27</sup> of the corporation.<sup>28</sup> Although this debate continues, after the appearance of constituency statutes in the 1980s, it became generally acknowledged that directors may consider various constituents' interests in making corporate decisions.<sup>29</sup> Although directors may consider other stakeholders' interests, and corporate success may be measured in terms other than financial metrics, a fundamental tenet of corporate law is that the board is charged with management and monitoring responsibilities to ensure that corporate actions serve shareholder best interests and maximize shareholder wealth.<sup>30</sup>

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<sup>26</sup> See *Ide*, *supra* note 5, at 837-38 (stating that the board's role to monitor corporate performance includes not only confirming that the company is meeting its financial goals but also that the company is achieving legal and regulatory compliance and human resources management); Walsh & Seward, *supra* note 21, at 423 (explaining that measures of corporate performance may include market value, employee turnover, employee satisfaction, and corporate involvement in illegal activities).

<sup>27</sup> See *infra* Part V for the definition of "stakeholders."

<sup>28</sup> See generally William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 262-81 (1992) (discussing the inconsistent conceptions of the corporation as "shareholder property" and "social entity"); Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 686-721 (2004) (explaining the debate over whether corporate fiduciaries should maximize the interests of shareholders alone or of stakeholders as a group); see also Brudney, *supra* note 18, at 602-07 (identifying the debate on whether directors should serve stockholders or other nonstockholder constituencies); Walsh & Seward, *supra* note 21, at 422-23 (distinguishing between the general view in the field of financial economics that shareholder interests are primary in corporate decisions and the general view in the field of organizational theory that the interests of many stakeholders are considered in corporate decisions).

<sup>29</sup> See, e.g., Allen, *supra* note 28, at 279-81 (explaining that this conceptual battle was won in the late 1980s with the endorsement of the entity theory, but suggesting that the war was far from over); Brudney, *supra* note 18, at 604-05 ("[A]ll—except the most devout free market economists—embrace the notion of *some* social responsibility . . . . [However,] there is a wide range of views about how much social responsibility is enough."); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 634 (1992) (explaining that constituency statutes permit directors to consider the effects of corporate action on constituent groups).

<sup>30</sup> Katherine M. Brown, *New Demands, Better Boards: Rethinking Director Compensation in an Era of Heightened Corporate Governance*, 82 N.Y.U. L. REV. 1102, 1106 (2007); Brudney, *supra* note 18, at 602; Gordon, *supra* note 6, at 1471-72; Mallette

## II. CURRENT STATUS OF DUALITY

The term “duality” describes the corporate leadership structure where one individual holds both the CEO and Chair positions.<sup>31</sup> Although duality is pervasive in corporate America, it is less popular<sup>32</sup>—or even prohibited<sup>33</sup>—in other countries.

Duality has been the dominant corporate governance structure in the United States.<sup>34</sup> According to the 1989 Forbes

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& Fowler, *supra* note 3, at 1012; Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1283 (1998); see also ALI PRINCIPLES, *supra* note 3, § 3.01 cmt. a (quoting the Corporate Director’s Guidebook that “[i]t is important to emphasize that the role of the director is to monitor, in an environment of loyal but independent oversight, the conduct of the business and affairs of the corporation in behalf of those who invest in the corporation.”); Brian R. Cheffins, *Did Corporate Governance “Fail” During the 2008 Stock Market Meltdown? The Case of the S&P 500*, 65 BUS. LAW. 1, 5-9 (2009) (discussing the evolution of corporate governance from the managerial capitalism model in post-World War II to the shareholder value model in the 1980s).

<sup>31</sup> See Baliga et al., *supra* note 2, at 42 (“In cases of CEO duality, the CEO of the firm wears two hats—a CEO hat and a chairperson of the board of directors hat. Nonduality implies that different individuals serve as the CEO and the chairperson.”); Brian K. Boyd, *CEO Duality and Firm Performance: A Contingency Model*, 16 STRATEGIC MGMT. J. 301, 301 (1995) (“CEO duality exists when a firm’s chief executive also serves as Chairman of the board of directors. Otherwise, the board is described as having an independent structure.”); Wm. Gerard Sanders & Mason A. Carpenter, *Internationalization and Firm Governance: The Roles of CEO Compensation, Top Team Composition, and Board Structure*, 41 ACAD. MGMT. J. 158, 164 (1998) (“Duality describes the situation in which an executive holds both the CEO and chairperson of the board positions.”). A small number of scholars do not use the term “duality” to specify the number of positions that the CEO holds, but instead use the term to refer to how many leaders the company has. Brickley et al., *supra* note 25, at 192. Under that definition, a unitary leadership structure signifies that there is one individual serving as both CEO and Chair, and a dual leadership structure refers to two separate people serving as CEO and Chair. *Id.*

<sup>32</sup> See Dan R. Dalton & Idalene F. Kesner, *Composition and CEO Duality in Boards of Directors: An International Perspective*, 18 J. INT’L BUS. STUD. 33, 39 (1987) (finding that duality is the governance structure for 82% of large corporations in the United States, 30% of large corporations in the United Kingdom, and 10.9% of large corporations in Japan); MILLSTEIN CTR. FOR CORP. GOVERNANCE AND PERFORMANCE, CHAIRING THE BOARD: THE CASE FOR INDEPENDENT LEADERSHIP IN CORPORATE NORTH AMERICA 17 (2009) [hereinafter MILLSTEIN REPORT], available at <http://www.cii.org/UserFiles/file/Millstein%20Center%20Rpt%20-%20Chairing%20the%20Board%203-15-09.pdf> (stating that most public companies in Australia, Belgium, Brazil, Canada, Singapore, and the United Kingdom have a nonexecutive Chair); Richard W. Stevenson, *Balancing the Power at the Corporate Top, British Style*, N.Y. TIMES, Nov. 15, 1992, at A4 (reporting that only 24% of public companies in Britain have duality and that the practice of having an independent director is common in Britain).

<sup>33</sup> See MILLSTEIN REPORT, *supra* note 32, at 17 (explaining that Germany and Holland’s requirement of a two-tier board structure by definition separates the CEO and Chair positions, and South Africa’s Johannesburg Stock Exchange requires listed companies to split the positions); Sanders & Carpenter, *supra* note 31, at 164 n.7 (noting that some countries’ regulation of board structure results in the lack of consolidation of the CEO and Chair positions).

<sup>34</sup> Sanders & Carpenter, *supra* note 31, at 164; Stevenson, *supra* note 32.

Executive Compensation Survey, out of 661 large U.S. firms, approximately 81% of the companies maintained a leadership structure where one individual held both the CEO and Chair titles; approximately 14% of the companies had different people in the two positions; and approximately 5% of the companies did not have a Chair position.<sup>35</sup> In 1992, the *New York Times* reported that 75% to 80% of companies had one executive who occupied both the CEO and Chair positions.<sup>36</sup> Similarly, a 1992 survey by executive firm Korn Ferry International affirmed that only 20% of the 1,000 largest corporations in America had a board Chair who did not also serve as the company's CEO.<sup>37</sup>

Although duality remains the most popular corporate leadership structure in the United States, the proportion of companies with duality has decreased in recent years. According to a study of the 1,500 companies in the ExecuComp database during the period from 1996 to 2005, the percentage of companies with a combined CEO-Chair steadily decreased from 76% in 1996 to 69% in 2000 and 60% in 2005.<sup>38</sup> Conversely, the proportion of companies with a separate board Chair steadily increased in that same ten-year period: 24% in 1996, 31% in 2000, and 40% in 2005.<sup>39</sup> In its 2009 board practices study, RiskMetrics Group, a provider of corporate governance services, reported that 46% of Standard & Poor's 1,500 companies had separate individuals serving in the CEO and Chair positions.<sup>40</sup>

Only a small percentage of the separate board Chairs are independent directors, but that percentage has also increased in recent years.<sup>41</sup> Prior to 2002, less than 25% of the companies that separated the CEO and Chair positions had an independent director who served as board Chair.<sup>42</sup> By 2005, more than 31% of companies that separated the two roles had an independent director serve as board Chair.<sup>43</sup> Almost half of

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<sup>35</sup> Brickley et al., *supra* note 25, at 197-98.

<sup>36</sup> Stevenson, *supra* note 32.

<sup>37</sup> Baliga et al., *supra* note 2, at 43.

<sup>38</sup> Balsam & Upadhyay, *supra* note 25, at 38-39 (all figures have been rounded).

<sup>39</sup> *Id.* (all figures have been rounded).

<sup>40</sup> Press Release, RiskMetrics Grp., RiskMetrics Group Releases 2009 Board Practices Study (Jan. 8, 2009), <http://www.riskmetrics.com/press/2009bp> [hereinafter RiskMetrics Press Release].

<sup>41</sup> See Balsam & Upadhyay, *supra* note 25, at 39 (identifying the distribution of leadership structure).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

the individuals serving as separate Chairs were independent directors as of 2009.<sup>44</sup>

Many companies that do not separate their CEO and Chair positions appoint a presiding director, commonly known as a “lead director,” to address conflicts of interest and agency-cost concerns that are inherent in duality.<sup>45</sup> The lead director’s job is to advise the CEO-Chair on selecting board committee members and setting board meeting agendas.<sup>46</sup> The lead director also presides over executive sessions of independent directors.<sup>47</sup>

Similar to the increase in the number of companies that have a separate board Chair, there has been an increase in the number of companies that have appointed a lead director to work with the individual who serves as both CEO and Chair.<sup>48</sup> Of the companies that combined the CEO and Chair positions, less than 1% had a lead director in 1996, while almost 4% had a lead director in 2000.<sup>49</sup> By 2005, almost 68% of the companies that had a combined CEO-Chair also had a lead director.<sup>50</sup>

Some corporate governance observers regard the presence of a lead director as an acceptable and effective alternative to having a separate board Chair.<sup>51</sup> Other commentators, however, view the appointment of a lead director as a mere symbolic gesture, rather than an actual attempt to preserve board independence.<sup>52</sup> Skeptics see the lead

<sup>44</sup> RiskMetrics Press Release, *supra* note 40.

<sup>45</sup> Jay W. Lorsch & Martin Lipton, *On the Leading Edge: The Lead Director*, 71 HARV. BUS. REV. 79, 79-80 (1993) (recommending that companies with duality designate one of the outside directors as the lead director because “[e]ffective leadership of the outside directors is essential to enable the board to discharge its monitoring function properly”); Millstein & MacAvoy, *supra* note 30, at 1287-88. See Balsam & Upadhyay, *supra* note 25, at 8 (“Appointing a lead director could be considered a compromise leadership structure, one that firms might adopt if they feel having a separate chair is too costly.”).

<sup>46</sup> Balsam & Upadhyay, *supra* note 25, at 8; Lorsch & Lipton, *supra* note 45, at 79. The CEO-Chair retains the power to appoint committee members and to set meeting agendas; the lead director, where there is one, provides input and suggestions to the CEO-Chair in connection with those tasks. *Id.*

<sup>47</sup> Balsam & Upadhyay, *supra* note 25, at 55; Clark, *supra* note 5, at 271. The lead director does not preside at meetings of the entire board and meetings of shareholders. Lorsch & Lipton, *supra* note 45, at 79.

<sup>48</sup> Balsam & Upadhyay, *supra* note 25, at 16.

<sup>49</sup> See *id.* at 39 (identifying five lead directors in 595 duality companies in 1996 and twenty lead directors in 542 duality companies in 2000).

<sup>50</sup> See *id.* (identifying 405 lead directors in 596 duality companies in 2005).

<sup>51</sup> Christopher Caggiano, *Call Grows for Separation of CEO and Chairman Roles*, 231 N.Y. L.J. 5, 5 (2004); Clark, *supra* note 5, at 271; Gordon, *supra* note 6, at 1495.

<sup>52</sup> See Balsam & Upadhyay, *supra* note 25, at 4 (“[W]e find the existence of a lead director either has no effect or is negatively associated with firm performance.

director's presence as inadequate to resolve the conflicts of interest in duality, pointing to the lead director's consultative rather than authoritative role, lack of power to set the board agenda, and lack of authority to act as the spokesperson for the company.<sup>53</sup> There has not been much empirical research on the effect of having a lead director in the corporate governance structure, but one study appears to support the view that the presence of a lead director does not enhance board performance or company profitability.<sup>54</sup>

There is disagreement regarding the causes and consequences of a company's top-leadership structure. Why do firms choose duality for their system of governance, and what effect does that structure have on company performance? Supporters explain duality's persistent prevalence as evidence of its superiority as a governance structure in the competitive marketplace.<sup>55</sup> As this argument goes, duality is the dominant leadership structure because corporate boards have determined that their CEOs have the knowledge and skills to lead both the board and the management group,<sup>56</sup> or because the boards have given the title of board Chair as an award to the CEO who has led the company to successful performance.<sup>57</sup> Advocates of a combined CEO-Chair also contend that duality remains

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This finding is consistent with firms appointing lead directors for symbolic rather than substantive purposes."); MILLSTEIN REPORT, *supra* note 32, at 9 ("[T]he lead director is not perceived by . . . fellow board members as the board leader when in the shadow of the combined CEO and chairman.").

<sup>53</sup> See Balsam & Upadhyay, *supra* note 25, at 8 ("The difference between having a separate chair and having a lead director is that the former is nominally the head of the board which has supervisory authority over the CEO, whereas the latter's role is normally more limited."); Lorsch & Lipton, *supra* note 45, at 79 (recommending the appointment of a lead director for consultative and coordinative purposes, and specifying that the lead director will "not set the agenda nor preside at meetings" nor "act as a spokesperson for the company"); MILLSTEIN REPORT, *supra* note 32, at 8 ("The lead director does not run the meeting. He who sits at the head of the table runs the meeting.").

<sup>54</sup> See *infra* Part IV.B.2.

<sup>55</sup> Baliga et al., *supra* note 2, at 43; Brickley et al., *supra* note 25, at 199-200.

<sup>56</sup> Baliga et al., *supra* note 2, at 43.

<sup>57</sup> See Brickley et al., *supra* note 25, at 192, 207 (explaining that most companies that have separate CEOs and Chairs are in a transitional succession process of testing new CEOs who would eventually be granted the Chair title); Harrison et al., *supra* note 1, at 226-27, 230 (suggesting that successful corporate financial performance is likely to enhance the power of the CEO and may result in the CEO being able to acquire the role of board Chair). Some candidates for the CEO position in fact demand that they get the Chair seat along with the top executive spot. Joann S. Lublin, *Splitting Posts of Chairman, CEO Catches On*, WALL ST. J., Nov. 11, 2002, at B1.

dominant because it is effective in generating shareholder wealth.<sup>58</sup>

Advocates of separate CEO and Chair positions, by contrast, attribute the pervasiveness of duality not to competitiveness or effectiveness, but instead to the shift toward a governance structure of “CEO primacy” or “dictatorship of the CEO,”<sup>59</sup> and to the undue influence of executive management in the board selection process.<sup>60</sup> Supporters of separate CEO and Chair roles also regard duality as the cause of corporate boards’ failure to exercise their management and monitoring responsibilities to protect shareholder interests.<sup>61</sup>

### III. THEORETICAL ARGUMENTS ABOUT DUALITY

Some commentators have suggested that the prevalence of duality implies that a combined CEO and Chair position is the optimal leadership structure for large public companies.<sup>62</sup> Supporters of duality maintain that if duality were not an effective and efficient governance structure, most public companies could not maintain duality and still survive in the competitive marketplace.<sup>63</sup> Despite the prevalence of duality in corporate governance, however, not all of corporate America believes that duality is the optimal leadership structure. There

<sup>58</sup> See Brickley et al., *supra* note 25, at 200 (suggesting that duality not be denounced without “a cogent explanation for how such an important corporate control practice can be wealth-decreasing and still survive in the competitive marketplace for so long across so many companies”).

<sup>59</sup> Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 DEL. J. CORP. L. 345, 345 (2007).

<sup>60</sup> Baliga et al., *supra* note 2, at 41, 43. See Sydney Finkelstein & Richard A. D’Aveni, *CEO Duality as a Double-Edged Sword: How Boards of Directors Balance Entrenchment Avoidance and Unity of Command*, 37 ACAD. MGMT. J. 1079, 1102 (1994) (pointing out that the business press often expresses the view that “CEO duality formally institutionalizes the dominance of CEOs over boards”); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996) (“Although institutions that have survived cannot be too inefficient, evolution-toward-efficiency constrains but does not fully determine the institutions we observe.”).

<sup>61</sup> Baliga et al., *supra* note 2, at 41, 43; MILLSTEIN REPORT, *supra* note 32, at 13.

<sup>62</sup> See Brickley et al., *supra* note 25, at 199-200 (suggesting that the dominance of duality implies that having an independent chairperson is not likely to be the optimal leadership structure for most public companies); Lex Donaldson & James H. Davis, *Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns*, 16 AUSTL. J. MGMT. 49, 61 (1991) (explaining that based on the stewardship theory of corporate governance, a majority of large U.S. companies have already adopted the optimal corporate governance structure where the CEO also serves as the board Chair).

<sup>63</sup> Brickley et al., *supra* note 25, at 199-200; see also Donaldson & Davis, *supra* note 62, at 61 (“[S]hould corporations bow to pressures to appoint independent board chairs[,] the performance of the corporations and the returns to their shareholders would suffer.”).

is a view among many shareholders, business leaders, industry groups, corporate governance advisers, and regulators that corporate governance is more effective and efficient when the CEO and Chair positions are separated than when they are combined.<sup>64</sup>

Various theories have been advanced for and against duality. The following analysis focuses on the advantages of the CEO-Chair and nonexecutive Chair models. In most cases, the arguments in favor of one leadership structure are essentially arguments against the other leadership structure.

#### A. *Arguments Supporting Combined Positions*

A unifying theme of the various arguments in support of duality is that combining the CEO and Chair positions enhances the board's management performance. The board's management responsibilities require that it make key decisions affecting the company.<sup>65</sup> Proponents of duality contend that combining the CEO and Chair positions enhances the board's management role. A combined CEO-Chair, they argue, provides the board with more complete and timely information about the company, provides the company with a unified command structure and a consistent leadership direction, and creates a collaborative and collegial environment for board decision making.<sup>66</sup>

Taking these arguments separately, the first posits that the board of directors will benefit from having a Chair who has deep, first-hand knowledge of the company.<sup>67</sup> Proponents contend that a board Chair who also serves as the CEO is likely to spend more time at the company, to have more detailed information about the strengths and weaknesses of the company, and to have a deeper understanding of the operational and financial health of the company.<sup>68</sup> Presumably, the CEO would use the knowledge and experience that she gains from serving as the company's top executive to contribute

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<sup>64</sup> See Brickley et al., *supra* note 25, at 189-91 (giving examples of business leaders, shareholders, regulators, and researchers who oppose duality).

<sup>65</sup> See *supra* Part I.A.

<sup>66</sup> See *infra* Part III.A.

<sup>67</sup> See Brickley et al., *supra* note 25, at 194 ("Presumably, CEOs have unparalleled specialized knowledge regarding the strategic challenges and opportunities facing the firm."); Boyd, *supra* note 31, at 301 (stating that "the CEO-Chair would be expected to have a greater knowledge of the firm and its industry").

<sup>68</sup> Clark, *supra* note 5, at 300; *cf.* Brickley et al., *supra* note 25, at 194.

to her role as Chair of the board, leading and guiding the board to understand, deliberate, and make fundamental business decisions for the company.<sup>69</sup> In that sense, the CEO-Chair's "specific knowledge may trump [the] general wisdom and outside perspective" of a non-CEO Chair in the decision-making process.<sup>70</sup>

A related theory is that combining the CEO and Chair positions reduces the cost of information transfer between company leaders.<sup>71</sup> A combined CEO-Chair position avoids the need for the transfer of information that must take place if different individuals hold the CEO and Chair positions.<sup>72</sup> Because information transfer may be costly, untimely, or incomplete, having critical information reside in one combined CEO-Chair may improve the ability of that individual to perform management responsibilities.<sup>73</sup>

There is some evidence, however, that questions the degree of information costs that arise from separating the CEO and Chair positions.<sup>74</sup> For one thing, researchers have observed that a company can mitigate the information costs of separating top leadership positions by appointing nonexecutive Chairs with significant experience and in-depth knowledge based on their long-time membership on the company's board.<sup>75</sup> Moreover, combining the CEO and Chair positions may create information costs, in that many CEOs impose an unwritten policy that all communication of information from inside the company to the board must first be approved by the CEO.<sup>76</sup> A board with a dual CEO-Chair may lack the healthy skepticism necessary to examine information that has been screened and filtered by the CEO prior to being provided to the board.<sup>77</sup>

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<sup>69</sup> See Balsam & Upadhyay, *supra* note 25, at 7 ("CEOs have specialized knowledge regarding the strategic challenges and opportunities facing the firm that is valuable to the chairman's job.")

<sup>70</sup> Clark, *supra* note 5, at 300.

<sup>71</sup> Dawn Harris & Constance E. Helfat, *CEO Duality, Succession, Capabilities and Agency Theory: Commentary and Research Agenda*, 19 STRATEGIC MGMT. J. 901, 903 (1998). See generally Brickley et al., *supra* note 25.

<sup>72</sup> Brickley et al., *supra* note 25, at 194-95.

<sup>73</sup> Harris & Helfat, *supra* note 71, at 903.

<sup>74</sup> See Brickley et al., *supra* note 25, at 199-200 (reporting the average tenure of independent board chairs in a representative sample).

<sup>75</sup> See *id.*

<sup>76</sup> See Ide, *supra* note 5, at 838-39 (criticizing the practice of the CEO in screening information to the board and suggesting that others in senior management provide information directly to the board).

<sup>77</sup> See Vo, *supra* note 24, at 25 (suggesting that directors maintain a healthy skepticism for information that management provides to the board).



The second broad argument supporting duality is that a combined position provides a unified command structure and reduces the company's cost of decision making.<sup>78</sup> A CEO-Chair can exert greater authority and speed in making and implementing strategic decisions for the company.<sup>79</sup> Thus, decisions made by a CEO-Chair may be clearer, timelier, and more consistent than decisions made by a CEO who has to negotiate and consult with a board that is led by a separate Chair.<sup>80</sup> In addition, having one individual occupy both the CEO and Chair positions reduces public confusion about who is in charge of the company, and clarifies who is responsible for the company's performance.<sup>81</sup>

There are countervailing considerations to the advantages of duality's unified command structure. The concentration of corporate leadership authority in one person, the CEO-Chair, may constrain board oversight and restrict board adoption of appropriate strategies that adapt to changing business environments.<sup>82</sup> What appear to be clear and consistent decisions on the part of the CEO-Chair may turn out to be manifestations of the executive's fixation on a set course of action or unwillingness to adopt new business strategies to meet pressing competitive conditions.<sup>83</sup>

The third line of argument in favor of duality is that a combined CEO-Chair may enhance the board's performance of

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<sup>78</sup> Baliga et al., *supra* note 2, at 42; Lucian A. Bebchuk, Martijn Cremers & Urs Peyer, *CEO Centrality* 10 n.9 (Harvard L. Sch. John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 601, 2008), available at <http://ssrn.com/abstract=1030107>; Finkelstein & D'Aveni, *supra* note 60, at 1083; Roberta S. Karmel, *Splitting the CEO and Chairman*, 231 N.Y. L.J. 3, 3 (2004).

<sup>79</sup> Baliga et al., *supra* note 2, at 42; Balsam & Upadhyay, *supra* note 25, at 7; Boyd, *supra* note 31, at 301; Brickley et al., *supra* note 25, at 195; Harris & Helfat, *supra* note 71, at 902; cf. Karmel, *supra* note 78, at 3.

<sup>80</sup> Baliga et al., *supra* note 2, at 42; Boyd, *supra* note 31, at 301, 304; Brickley et al., *supra* note 25, at 195; Finkelstein & D'Aveni, *supra* note 60, at 1080, 1083; Sanders & Carpenter, *supra* note 31, at 164.

<sup>81</sup> Baliga et al., *supra* note 2, at 42; Boyd, *supra* note 31, at 301, 304; Brickley et al., *supra* note 25, at 195; Finkelstein & D'Aveni, *supra* note 60, at 1079-80, 1083-84; Sanders & Carpenter, *supra* note 31, at 164; Makoto Toda & William McCarty, *Corporate Governance Changes in the Two Largest Economies: What's Happening in the U.S. and Japan?*, 32 SYRACUSE J. INT'L L. & COM. 189, 213 (2005).

<sup>82</sup> See Baliga et al., *supra* note 2, at 42-43 (comparing IBM's failure to adopt strategies to prevent loss of market share with Compaq Computer's successful adoption of a lower-priced product model); Ramirez, *supra* note 59, at 370 ("Corporate governance should operate to limit CEO autonomy and to protect investors; this will lead to superior outcomes.").

<sup>83</sup> See Boyd, *supra* note 31, at 301 (explaining that "duality has been blamed for poor performance and slow response to change in firms such as General Motors, Digital Equipment Corporation, and Goodyear Tire and Rubber").

its management responsibilities by facilitating cooperation between board directors and company executives.<sup>84</sup> Some scholars have suggested that a board may perform its managerial role better when there is a collegial and supportive relationship among directors and officers.<sup>85</sup> The CEO is the leader of the company's executive group, and several members of that executive group are also likely to serve as directors on the board.<sup>86</sup> Where the CEO is also the leader of the board of directors, the joint leadership may prompt more cooperation between the two groups.<sup>87</sup> By enhancing collegiality and collaboration between board directors and company executives, a CEO-Chair may thus facilitate consensus that leads to smooth and efficient decision making.<sup>88</sup>

Observers of boardroom dynamics indicate that many corporate boards indeed develop a close-knit culture that values internal harmony over vigorous debate and dissension.<sup>89</sup> However, it is not entirely clear whether and to what extent the board's managerial function depends on a collegial relationship among directors and managers.<sup>90</sup> Taking a neutral

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<sup>84</sup> See Clark, *supra* note 5, at 278 (asserting that "boards of directors perform the managerial role better when there is a 'collegial and collaborative' mode of interaction among directors and officers").

<sup>85</sup> See generally Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 35-45 (2002) (arguing that an increased emphasis on the board's monitoring role may exacerbate tension and distrust between the outside directors and management, which may adversely affect the board's performance of its management role).

<sup>86</sup> CHIAPPINELLI, *supra* note 3, at 400; see also Gordon, *supra* note 6, at 1472-76 (describing a shift in board composition away from a majority of inside directors toward a majority of independent directors during the period from 1950 to 2005, but noting that most corporations maintain one or two inside directors on their boards).

<sup>87</sup> Cf. Baliga et al., *supra* note 2, at 42 (explaining that proponents of duality contend that separating the top leadership positions may create rivalry between the CEO and the Chair).

<sup>88</sup> See Balsam & Upadhyay, *supra* note 25, at 7 ("Having one leader can also minimize the potential for rivalry."); Millstein & MacAvoy, *supra* note 30, at 1284 ("Board service was largely viewed as honorific and responsive to management concerns; the arm's-length relationship implied in the board's monitoring role over management was replaced by a collegial relationship between the two . . .").

<sup>89</sup> Walsh & Seward, *supra* note 21, at 431; see also Brudney, *supra* note 18, at 610-17 (explaining that the obstacles to directors' taking an arm's-length stance toward management include unclear legal standards and weak sanctions, limited monetary incentives, psychological effects of small group dynamics, and social relationships with management).

<sup>90</sup> See ALI PRINCIPLES, *supra* note 3, § 3.02 cmt. d ("The board's obligation to oversee the performance of the principal senior executives does not imply an antagonistic relationship between the board and the executives. Rather, it contemplates a collegial relationship that is supportive as well as watchful[,] . . . challenging yet positive, arm's length but not adversary."); Brown, *supra* note 30, at 1107-08 (explaining that board failure often results from a lack of constructive criticism

or critical position toward certain information provided and actions taken by senior management does not necessarily impede a board's deliberative and decision-making processes.<sup>91</sup> Rather, directors who take an objective and probing stance toward senior executives while deliberating and making decisions for the company may be more likely to fulfill the directors' managerial responsibilities.<sup>92</sup> Conversely, interaction between board directors and corporate executives that is markedly supportive and accommodating may signal the board's improper deference to, and mere rubber-stamping of, executive decisions and conduct.<sup>93</sup>

Arguments in support of duality focus primarily on the potential improvement in the board's management role, without much consideration of the board's other major role—namely, monitoring executive behavior. While some commentators suggest that the CEO-Chair has the in-depth knowledge about the company necessary to effectively monitor management misconduct,<sup>94</sup> the CEO-Chair with a keen understanding of the company's strengths and weaknesses may be the very executive who is engaging in managerial misconduct.<sup>95</sup> Notwithstanding the knowledge and understanding of the CEO-Chair, the effectiveness of the board Chair's monitoring role is obviated when the board Chair position is occupied by the very same misbehaving CEO.

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from the board to management and from information asymmetries between the board and management).

<sup>91</sup> See BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 7 (2005), available at <http://www.businessroundtable.org/sites/default/files/CorporateGovPrinciples.pdf> ("Effective directors maintain an attitude of constructive skepticism; they ask incisive, probing questions and require accurate, honest answers . . ."); *Developments*, *supra* note 16, at 2200 (explaining that "increased independence and activism need not result in a crippled board").

<sup>92</sup> See Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, HARV. BUS. REV., Sept. 2002, at 106, 111 ("Perhaps the most important link in the virtuous cycle is the capacity to challenge one another's assumptions and beliefs. Respect and trust do not imply endless affability or absence of disagreement.").

<sup>93</sup> Walsh & Seward, *supra* note 21, at 431 (explaining that corporate boards that prize collegiality over objectivity may fail to scrutinize and discipline executives).

<sup>94</sup> Cf. Clark, *supra* note 5, at 300 (discussing the board's monitoring role).

<sup>95</sup> See *id.* ("One could even argue that independent directors will not know enough about the company to act as good monitors of potential misconduct and self-dealing, even though it's hard to then argue that inside directors, with their conflicted interests, would do better in this role."); Walsh & Seward, *supra* note 21, at 424 (affirming that directors in public companies have the ultimate responsibility to scrutinize the conduct of their company's top executives).

### B. Arguments Supporting Separate Positions

Supporters of splitting the CEO and Chair positions argue that separation enhances the board's performance of its management responsibilities by improving both the quality and the timeliness of board decision making.<sup>96</sup> Having a board Chair who is not an executive of the company may bring fresh knowledge and insight to the board's decision-making process.<sup>97</sup> With learning and experiences outside of the company whose board she leads, a nonexecutive Chair may provide unique perspectives that enhance the board's performance of its management duties to deliberate and make strategic and fundamental business decisions.<sup>98</sup>

A nonexecutive Chair may also facilitate the board's management function by enabling the board to quickly make decisions and adopt new strategies to meet changing business environments.<sup>99</sup> Supporters of separating the top leadership positions often point to Compaq Computer as an example of a company where having a separate Chair enabled the business—over the strong objection of the company's CEO—to adopt a lower-priced product line to remain competitive in the industry.<sup>100</sup> Compaq's nonexecutive Chair confirmed that “Compaq's board was able to act quickly because of the corporate governance structure in place at Compaq where the CEO and Chairman roles are distinct.”<sup>101</sup> Similarly, the separation of the CEO and Chair roles at Cypress Semiconductor Corporation has been regarded as the reason that the board was able to make a strategic financial decision to stop the CEO from investing the company's cash account in the stock market shortly before the dot-com crash.<sup>102</sup> Although T.J. Rodgers, then-CEO of Cypress Semiconductor, was not pleased with the board's decision at the time, he later acknowledged that he was glad the board stopped him because

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<sup>96</sup> Baliga et al., *supra* note 2, at 42.

<sup>97</sup> Clark, *supra* note 5, at 300.

<sup>98</sup> *Id.*; Sanders & Carpenter, *supra* note 31, at 164.

<sup>99</sup> See Baliga et al., *supra* note 2, at 42 (referring to the contention that “Roger Smith, in his dual capacities of Chairman and CEO [of General Motors], restricted board oversight and the adoption of strategies appropriate to the changing environment”).

<sup>100</sup> See, e.g., *id.* at 43.

<sup>101</sup> *Id.*

<sup>102</sup> Caggiano, *supra* note 51, at 5.

the board's decision "ended up saving [the company] a lot of money."<sup>103</sup>

Supporters of separating the CEO and Chair positions contend that the board also performs its monitoring role better when there is a nonexecutive Chair.<sup>104</sup> The monitoring role requires directors to exert oversight over corporate managers in order to detect and discipline managerial inefficiencies and misconduct.<sup>105</sup> Thus, duality may cause failure by the board to effectively monitor and control executive management.<sup>106</sup>

In public companies, boards of directors delegate day-to-day management responsibilities instead of personally performing these tasks themselves.<sup>107</sup> With management tasks delegated, it is crucial that corporate boards effectively monitor executive managers' performance.<sup>108</sup> The board's ability to monitor the CEO and other executives, in turn, depends on the board's power to exert control over the CEO and other executives.<sup>109</sup> However, a CEO who also serves as board Chair has de facto authority over the board, notwithstanding the board's legal authority and responsibility to monitor and control the CEO.<sup>110</sup> Where the CEO, by serving simultaneously as board Chair, has practical authority and influence over other board members, the board's power to control the CEO and other executives is curtailed or ineffective.<sup>111</sup> Consequently,

<sup>103</sup> *Id.*

<sup>104</sup> Baliga et al., *supra* note 2, at 42; Brown, *supra* note 30, at 1113; Finkelstein & D'Aveni, *supra* note 60, at 1079, 1082; Harris & Helfat, *supra* note 71, at 902.

<sup>105</sup> Gordon, *supra* note 6, at 1468; Kesner et al., *supra* note 6, at 790; Millstein & MacAvoy, *supra* note 30, at 1293.

<sup>106</sup> Baliga et al., *supra* note 2, at 42; Brickley et al., *supra* note 25, at 189-90; Kesner et al., *supra* note 6, at 790; *see also* Brown, *supra* note 30, at 1113 ("[T]he board relationship has shifted from one of 'CEO domination' to one of 'CEO accountability,' as companies move to separate CEO and board chairperson positions."); Ramirez, *supra* note 59, at 392 ("[P]ermitting unbridled CEO power to reign in corporate America, as it does today, is inconsistent with any principled economic view of how corporate governance should function.").

<sup>107</sup> Brown, *supra* note 30, at 1107; Millstein & MacAvoy, *supra* note 30, at 1283-84; Mark S. Mizruchi, *Who Controls Whom? An Examination of the Relation Between Management and Boards of Directors in Large American Corporations*, 8 ACAD. MGMT. REV. 426, 430 (1983); Walsh & Seward, *supra* note 21, at 424.

<sup>108</sup> Millstein & MacAvoy, *supra* note 30, at 1292; Sundaramurthy et al., *supra* note 20, at 232.

<sup>109</sup> Millstein & MacAvoy, *supra* note 30, at 1292; Sanders & Carpenter, *supra* note 31, at 164.

<sup>110</sup> Boyd, *supra* note 31, at 303; Brown, *supra* note 30, at 1113; Del Jones & James Kim, *Stockholders Want Boards of Independents*, USA TODAY, May 14, 1993, at 1B.

<sup>111</sup> Boyd, *supra* note 31, at 303; Finkelstein & D'Aveni, *supra* note 60, at 1079, 1082; Sundaramurthy et al., *supra* note 20, at 233; *see also* Millstein & MacAvoy, *supra* note 30, at 1292 ("Directors who are members of management or are otherwise closely

the board is likely to perform its monitoring function more effectively when the board Chair does not also serve as the leader of the executive group that is the very focus of the board's monitoring.<sup>112</sup>

Proponents of duality challenge the theory that a CEO-Chair effectively controls the modern corporate board. They contend that board functions are not concentrated in the hands of the Chair, but are delegated and dispersed to board committees, such as the compensation and auditing committees.<sup>113</sup> This contention has merit, in that the CEO-Chair has total and absolute control of the board only when it is a single-member board.<sup>114</sup> However, the modern corporation has a multi-member board that often contains a number of inside directors,<sup>115</sup> a fact that precipitated the director and board independence requirements discussed in Part I.B. The CEO-Chair, as the top-ranking executive, exerts influence and control over the inside directors who are lower-ranking executives of the company.<sup>116</sup> Outside directors may also feel a sense of loyalty and gratitude to the CEO because the CEO often plays an influential, if not decisive, role over the election of the outside directors.<sup>117</sup> In addition, the CEO has immense power and control over the entire board when that CEO has

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linked to management have the same conflict as management in evaluating corporate performance.”).

<sup>112</sup> Boyd, *supra* note 31, at 303; Finkelstein & D’Aveni, *supra* note 60, at 1079, 1082; Millstein & MacAvoy, *supra* note 30, at 1292-93; Sundaramurthy et al., *supra* note 20, at 233.

<sup>113</sup> Brickley et al., *supra* note 25, at 196; *see also* Boyd, *supra* note 31, at 301 (explaining the view that the board Chair position is largely ceremonial and symbolic).

<sup>114</sup> Brickley et al., *supra* note 25, at 196.

<sup>115</sup> CHIAPPINELLI, *supra* note 3, at 400; *see also* Dalton & Kesner, *supra* note 32, at 35, 39 (finding that more than 30% of board members in a sample of 50 large companies in the United States are “insiders,” defined as directors who are also full-time officers of the company); Kesner et al., *supra* note 6, at 793-94 (citing various studies’ findings that the proportion of outside directors ranges from 12% to 100%, with a mean of 70%, for a sample of 384 of the Fortune 500 companies).

<sup>116</sup> *See* Dalton & Kesner, *supra* note 32, at 35 (expressing doubt that an inside director can objectively evaluate the CEO); Finkelstein & D’Aveni, *supra* note 60, at 1082 n.4 (stating that inside directors are likely to have more information about the company’s operations, but the inside directors’ monitoring ability is likely curtailed because they are unlikely to contradict the CEO who is their work boss); Kesner et al., *supra* note 6, at 790 (noting the inside directors’ awkward task of evaluating the CEO who is their day-to-day boss); Walsh & Seward, *supra* note 21, at 425 (recognizing the difficulties with getting an unbiased inside director’s assessment of the CEO’s performance).

<sup>117</sup> Brown, *supra* note 30, at 1113; Gordon, *supra* note 6, at 1496; Millstein & MacAvoy, *supra* note 30, at 1284; Mizruchi, *supra* note 107, at 431; Ramirez, *supra* note 59, at 363.

the ability, as board Chair, to make committee assignments and, consequently, to hand-pick the directors to assign to functionally important committees, such as the compensation, nomination, and audit committees.<sup>118</sup>

Underlying the theory that a nonexecutive Chair facilitates both the board's management and monitoring roles is the concept of agency costs.<sup>119</sup> Those who prefer to see two separate individuals serve in the CEO and Chair positions contend that having a separate Chair reduces the agency costs inherent in the corporate structure that separates control and ownership.<sup>120</sup> As one scholar explains, agency costs arise because corporate decisions are made by "agents whose decisions are influenced by private interests"; thus, their choices might not be made in an optimal fashion to further shareholder interests.<sup>121</sup> When company management acts more for personal interests than for general shareholder interests, the board of directors has failed in its duty to monitor and discipline management.<sup>122</sup> Not surprisingly, supporters of duality argue that having a separate Chair simply shifts the agency costs

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<sup>118</sup> See Finkelstein & D'Aveni, *supra* note 60, at 1079, 1082 (commenting that the chairperson of the board often controls the director nominating process, which gives the chairperson the power to favor directors who are loyal to the chairperson); Sundaramurthy et al., *supra* note 20, at 233 (concluding that a CEO who also occupies the position of board chair compromises the board functions of setting agenda, governing, and monitoring board committees and management executives).

<sup>119</sup> See Donaldson & Davis, *supra* note 62, at 51 ("Agency and organisational economics theories predict that when the CEO also holds the dual rôle [sic] of chair, then the interests of the owners will be sacrificed to a degree in favour of management, that is, there will be managerial opportunism and agency loss."); Ramirez, *supra* note 59, at 377 ("[T]here is powerful evidence that the separation of CEO and chairman of the board into two positions reduces agency costs and enhances firm value.").

<sup>120</sup> See Boyd, *supra* note 31, at 304 (citing Eugene Fama and Michael Jensen's observation that duality signals that the corporation does not separate its decision management from its decision control, and that the corporation will suffer in the competition for survival as a result of such lack of separation); Brickley et al., *supra* note 25, at 192-93 (citing Michael Jensen and William Meckling's definition of agency costs as the sum of the costs to establish incentive and control mechanisms for directors and officers and the costs resulting from not providing appropriate or complete incentives and controls over directors and officers).

<sup>121</sup> Bebchuk et al., *supra* note 78, at 11; see also Walsh & Seward, *supra* note 21, at 421-22 (citing Adolf Berle and Gardiner Means's observation that managers may be tempted to pursue prestige, power, and other personal interests instead of shareholder interests).

<sup>122</sup> Dalton & Kesner, *supra* note 32, at 34; see also CHIAPPINELLI, *supra* note 3, at 500 (citing *In re Enron Corp. Final Report of Neal Batson*, court-appointed examiner for Enron, as stating that the Enron board could have prevented or minimized the Enron officers' misconduct by terminating the officers' employment, refusing to approve the company's financial statements, and notifying the SEC of the officers' wrongdoing); Gordon, *supra* note 6, at 1469 ("Independent directors . . . enhance the fidelity of managers to shareholder objectives, as opposed to managerial interests or stakeholder interests.").

from controlling the combined CEO-Chair's behavior to controlling the separate Chair's behavior.<sup>123</sup> However, for the reasons discussed below, the agency costs of controlling the nonexecutive Chair's behavior are likely to be lower than the agency costs of controlling a board Chair who also serves as CEO.

A nonexecutive Chair may reduce agency costs through her control of information flow to the board and control over the board agenda.<sup>124</sup> Having a separate Chair provides the board with an additional source of information besides the CEO.<sup>125</sup> This independent source of information is vital to both the board's decision-making and oversight functions, because empirical studies<sup>126</sup> and anecdotal evidence<sup>127</sup> suggest that company executives attempt to circumvent the corporate system of checks and balances by controlling the flow of information to the board. In addition, the board Chair has the power to set the agenda for board meetings.<sup>128</sup> A board Chair

<sup>123</sup> Brickley et al., *supra* note 25, at 193-94.

<sup>124</sup> Finkelstein & D'Aveni, *supra* note 60, at 1082; *see also* Baliga et al., *supra* note 2, at 41-42 (citing research on management's domination of the board through managerial control of information flow); Walsh & Seward, *supra* note 21, at 431 (explaining that executives may attempt to cover up their negative qualities or low performance by controlling the board's meeting agenda and withholding relevant information from the board).

<sup>125</sup> Sanders & Carpenter, *supra* note 31, at 164; *see also* CHIAPPINELLI, *supra* note 3, at 501-03 (citing *In re Enron Corp. Final Report of Neal Batson*, that the company's management "failed to present clearly Enron's SPE transactions and the total amount and maturities of its off-balance sheet debt to the Finance Committee, . . . used misleading terms and confusing jargon, and . . . presented information to the Enron Board and its committees in a manner that obfuscated the substance of the SPE transactions"); Douglas G. Baird & Robert K. Rasmussen, *The Prime Directive*, 75 U. CIN. L. REV. 921, 935 (2007) (noting that CEOs tend to provide the board with ample information relating to successful or promising projects while giving scant information about projects that go awry).

<sup>126</sup> *See, e.g.*, Baliga et al., *supra* note 2, at 41-42 (listing empirical studies conducted throughout the 1970s and 1980s); Walsh & Seward, *supra* note 21, at 431 (listing empirical studies).

<sup>127</sup> *See* CHIAPPINELLI, *supra* note 3, at 504 (citing *In re Enron Corp. Final Report of Neal Batson*, that "the Enron board did not function as an effective check and balance. This failure may have resulted from . . . a carefully orchestrated strategy of Enron's senior officers . . ."); Judith H. Dobrzynski, *Chairman and CEO: One Hat Too Many*, BUS. WK., Nov. 18, 1991, at 124 (reporting that at Salomon Inc., "the board was kept in the dark long after [then] Chairman and CEO John H. Gutfreund learned of Salomon's transgressions" of illegal bidding in Treasury security auctions); Stevenson, *supra* note 32 (explaining that Fisons P.L.C.'s decision to split its CEO and Chair positions was implemented "primarily to assuage the concerns of shareholders about too much power resting with a single executive who did not seem inclined to keep shareholders fully briefed on the company's difficulties").

<sup>128</sup> Finkelstein & D'Aveni, *supra* note 60, at 1082; Sundaramurthy et al., *supra* note 20, at 233; *see also* CHIAPPINELLI, *supra* note 3, at 498-99 (stating that Ken Lay was the Chairman and CEO of Enron and that Enron management provided board members with agendas for board meetings (citation omitted)).



who does not also serve as the company's CEO may be more likely to focus the board agenda on, and provide board members with information about, issues that question management judgment or challenge management decisions.<sup>129</sup>

Having separate individuals serve in the CEO and Chair positions may also reduce agency costs because a board that is led by a nonexecutive Chair is more likely to evaluate objectively whether management's performance, including that of the CEO, enhances shareholder interests.<sup>130</sup> When the roles of CEO and board Chair are combined in the same person, directors are put in the awkward position of evaluating a CEO who is, at the same time, their leader on the board and the person on whom they depend for board nominations and committee assignments.<sup>131</sup> The situation is even worse for directors who are also executives of the company; for these inside directors, there is the added tension of evaluating the individual who is their top executive boss and who plays a large role in their position advancement, compensation, and job security.<sup>132</sup> Thus, although the board is often regarded as the

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<sup>129</sup> See Baliga et al., *supra* note 2, at 41-42 (referring to research that shows company executives circumvent the corporate system of checks and balances by controlling board agendas); Sanford V. Berg & Stanley K. Smith, *CEO and Board Chairman: A Quantitative Study of Dual vs. Unitary Board Leadership*, 3 DIRECTORS & BOARDS 34, 34-35 (1978) (“[S]elective presentation of information to the Board of Directors can permit the CEO to continue in unprofitable activity—in the hopes that some unforeseen event will reverse the downward trend.”); Finkelstein & D’Aveni, *supra* note 60, at 1082 (commenting that the chairperson of the board can “dominate both the agenda and content of board meetings”).

<sup>130</sup> Boyd, *supra* note 31, at 302; Wallace N. Davidson III, Carol Nemeč & Dan L. Worrell, *Succession Planning vs. Agency Theory: A Test of Harris and Helfat’s Interpretation of Plurality Announcement Market Returns*, 22 STRATEGIC MGMT. J. 179, 179 (2001); Sundaramurthy et al., *supra* note 20, at 232. See Baliga et al., *supra* note 2, at 42-43 (explaining the contention that IBM’s duality governance structure is to blame for “the board’s difficulty in critically evaluating management performance and exercising independent judgment”).

<sup>131</sup> See Baliga et al., *supra* note 2, at 42 (explaining that combining the CEO and Chair roles may make it difficult for directors to be candid when evaluating company performance); Finkelstein & D’Aveni, *supra* note 60, at 1079, 1082 (commenting that the chairperson of the board often controls the director nominating process, which gives the chairperson the power to favor directors who are loyal to the chairperson); Mizruchi, *supra* note 107, at 431 (stating the widely held view that “board members are handpicked by management”); Walsh & Seward, *supra* note 21, at 431 (citing a study’s finding that directors who “challenge[d] the president’s powers of control were advised . . . that such conduct was inappropriate or were asked to resign”).

<sup>132</sup> See Dalton & Kesner, *supra* note 32, at 35 (expressing doubt that an inside director can objectively evaluate the CEO); Finkelstein & D’Aveni, *supra* note 60, at 1082 n.4 (stating that inside directors are likely to have more information about the company’s operations, but the inside directors’ monitoring ability is likely curtailed because they are unlikely to contradict the CEO who is their work boss); Kesner et al., *supra* note 6, at 790 (noting the inside directors’ awkward task of evaluating the CEO

shareholders' "first line of defense" against mismanagement,<sup>133</sup> a board that is led by a person holding both the Chair and CEO positions is not likely to intervene when management's behavior is inconsistent with shareholder interests.<sup>134</sup>

Furthermore, the CEO-Chair, in the role of board Chair, would essentially be evaluating his own performance as CEO.<sup>135</sup> It seems unlikely that the CEO-Chair—a successful business executive who has been elevated to serve concurrently in the top two leadership positions of a company—would rate his own performance as lackluster.<sup>136</sup> Supporters of a separate Chair thus believe that the CEO whose performance is being evaluated should not be put in charge of the team conducting the evaluation.<sup>137</sup> As one governance expert observed, "One of the major functions of the board is to supervise management. If the chairman of the board is also in management, then he is in effect marking his own exam papers."<sup>138</sup>

Another argument in support of separating the top leadership positions is that it minimizes the risk of entrenchment.<sup>139</sup> A board operating under the leadership of a

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who is their day-to-day boss); Walsh & Seward, *supra* note 21, at 425 (recognizing the difficulties with getting an unbiased assessment from an inside director's assessment of the CEO's performance).

<sup>133</sup> Finkelstein & D'Aveni, *supra* note 60, at 1081.

<sup>134</sup> Dalton & Kesner, *supra* note 32, at 35.

<sup>135</sup> Davidson et al., *supra* note 130, at 180; Finkelstein & D'Aveni, *supra* note 60, at 1082.

<sup>136</sup> See Baird & Rasmussen, *supra* note 125, at 935 ("The CEO, like most of us, wants to appear in a good light. She has the incentive to put the best spin on her accomplishments."); Albert A. Cannella, Jr. & Michael Lubatkin, *Succession as a Sociopolitical Process: Internal Impediments to Outsider Selection*, 36 ACAD. MGMT. J. 763, 765 (1993) (citing evidence that "powerful CEOs, when confronted with poor performance, may try to deflect the blame onto weaker subordinates, who are then dismissed while the CEO remains"); Dobrzynski, *supra* note 127, at 124 ("You can hardly blame a CEO for refusing to recognize the need for new talent at the top."); Walsh & Seward, *supra* note 21, at 431 (suggesting that executives value their job security and "strive to make sure that the board sees them as high-effort/high-ability people").

<sup>137</sup> See Dalton & Kesner, *supra* note 32, at 35 (asking whether it is "appropriate that the very person to be evaluated is the head of the evaluation team"); Kesner et al., *supra* note 6, at 790 (explaining that "chairmen/CEOs cannot represent the shareholders in the first role and at the same time impartially sit in judgment on their own performance in the second role").

<sup>138</sup> Stevenson, *supra* note 32 (quoting Blenyth Jenkins, the director of corporate affairs for the Institute of Directors, a London trade group).

<sup>139</sup> See Cannella & Lubatkin, *supra* note 136, at 770 (suggesting that incumbent CEOs who also hold the board Chair title have more institutional power than those who do not also serve as board Chair and, therefore, "may be able to forestall their own removal"); Harrison et al., *supra* note 1, at 216 (commenting that a person holding both the CEO and Chair positions is "more powerful and less easily dislodged"); Ramirez, *supra* note 59, at 385 ("[T]he powerful will seek to entrench their

CEO-Chair lacks the motivation and incentive to objectively evaluate and discipline the dual executive,<sup>140</sup> which increases the risk of entrenching the CEO-Chair in both positions.<sup>141</sup> CEO-Chair entrenchment, in turn, increases the potential for this powerful executive to use the corporation to further his own personal interests instead of furthering general shareholder welfare.<sup>142</sup> Supporters of separating the positions buttress their position by pointing to well-recognized strategies of managerial entrenchment in a duality system, including the wrangling of a generous base salary for the executive and the engineering of a bonus compensation system that is not tied to company performance in the stock market.<sup>143</sup>

In addition, an executive who can secure the role as the integrating mechanism between the management group and the board of directors—namely, the role of a combined CEO and Chair—may have succeeded in raising his value in the managerial labor market and enhancing his image as irreplaceable in the eyes of shareholders and directors.<sup>144</sup> Famed governance scholars Eugene Fama and Michael Jensen warn that allowing the CEO to also occupy the role of board Chair signals that the corporation has failed to separate its decision management from its decision control, which increases the likelihood that the CEO-Chair will take inefficient and opportunistic actions that deviate from shareholder interests and reduce shareholder wealth.<sup>145</sup>

Supporters of duality respond to the entrenchment argument by pointing out that even where one individual occupies both the CEO and Chair positions, the board as a

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control and position, rather than expose themselves to a truly competitive environment . . . . There are few incumbents more powerful than the incumbent CEOs of public corporations.”).

<sup>140</sup> Baliga et al., *supra* note 2, at 41, 43.

<sup>141</sup> Finkelstein & D’Aveni, *supra* note 60, at 1079, 1082, 1102; *see also* Walsh & Seward, *supra* note 21, at 432 (explaining that a key “entrenchment strategy is to neutralize the control mechanisms themselves”).

<sup>142</sup> Finkelstein & D’Aveni, *supra* note 60, at 1082; *see also* Mallette & Fowler, *supra* note 3, at 1028 (commenting that the “power and influence of a CEO-chairperson provide an opportunity to increase job security and personal well-being at the expense of shareholders”); Ramirez, *supra* note 59, at 348 (asserting that the United States corporate governance system is “devolving towards CEO primacy and the end of shareholder primacy”).

<sup>143</sup> Walsh & Seward, *supra* note 21, at 432; *see also* Ramirez, *supra* note 59, at 376 (explaining that study results show that enhanced CEO power is correlated to higher CEO compensation but not to CEO performance).

<sup>144</sup> *See* Walsh & Seward, *supra* note 21, at 432 (describing various managerial entrenchment practices).

<sup>145</sup> Finkelstein & D’Aveni, *supra* note 60, at 1082.

whole retains the power to hire and fire senior management, including the CEO.<sup>146</sup> While they concede that it may be easier for a board to remove a CEO who is not also the Chair than to remove a CEO-Chair, proponents of duality assert that the board can and does exert its removal power.<sup>147</sup> Examples include the board's removal of CEO-Chair Kay Whitmore from Eastman Kodak, CEO-Chair Robert Stempel from General Motors, CEO-Chair John Akers from IBM, CEO-Chair James Robinson from American Express, and CEO-Chair Paul Lego from Westinghouse.<sup>148</sup> Proponents of separating the top leadership positions, however, contend that these removals would have occurred earlier if the ousted CEOs were not also board Chairs.<sup>149</sup>

Another agency argument favoring the separation of the CEO and Chair positions is that nonexecutive Chairs have more incentives than CEO-Chairs to carry out their management and monitoring functions in ways that further shareholder interests.<sup>150</sup> This is because a nonexecutive Chair does not receive a salary from the corporation, and the fees for serving on the board are often modest compared to the Chair's other sources of income.<sup>151</sup> Furthermore, intangible incentives, such as avoiding social criticism and protecting reputation,

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<sup>146</sup> Brickley et al., *supra* note 25, at 196; *see also* Mizruchi, *supra* note 107, at 433 (explaining that the board has the ultimate control in the corporation because of its power to hire and fire the CEO).

<sup>147</sup> Brickley et al., *supra* note 25, at 196.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; *see also* Baliga et al., *supra* note 2, at 41-42 (referring to research that shows company executives circumventing the corporate system of checks and balances by resisting management changes despite evidence of poor performance); Finkelstein & D'Aveni, *supra* note 60, at 1081 (stating that independent directors are more likely than insider directors to remove a CEO who has performed poorly).

<sup>150</sup> *See* Clark, *supra* note 5, at 300 (explaining that independent directors have less incentives to act contrary to shareholder interests); Gordon, *supra* note 6, at 1471 (noting that independent directors are "less dependent on the CEO and more sensitive to external assessments of their performance as directors"); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529-30 (2005) (commenting that outside directors may be more effective than inside directors in monitoring management conduct because their financial dependence on the corporation, in most cases, is limited to a fixed director fee instead of a variable management compensation package, which is subject to fluctuation depending on the financial performance of the corporation); *see also* *infra* note 191 and accompanying text for the counterargument that independent directors are not truly independent because they are selected by management and lack personal incentives to act independently of management.

<sup>151</sup> Brown, *supra* note 30, at 1114-15; Clark, *supra* note 5, at 300; *see also* Romano, *supra* note 150, at 1529-30 (noting that independent directors have no incentive to contribute to audit failures by misstating earnings "because their financial dependence on the corporation is limited to directors' fees").

may encourage a nonexecutive Chair to act in the interests of shareholders instead of merely following management's dictates.<sup>152</sup> Thus, a board led by an independent Chair may be more open to considering and accepting a takeover bid,<sup>153</sup> an action that has been demonstrated to result in an increase in shareholder value.<sup>154</sup> On the other hand, a board led by a CEO-Chair is more likely to adopt poison pills and to resist takeover bids,<sup>155</sup> defensive actions that generally result in a decrease in shareholder value.<sup>156</sup>

A response to the argument that a nonexecutive Chair has more incentive to protect shareholder interests is that any danger to shareholder interests from combining the CEO and Chair positions may be mitigated by external monitoring and by internal alignment of CEO interests with shareholder interests through compensating the CEO with large amounts of company stock and stock options.<sup>157</sup> This response is weakened, however, by the apparent failure of external monitors, such as

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<sup>152</sup> Brown, *supra* note 30, at 1116; Finkelstein & D'Aveni, *supra* note 60, at 1081-82; *see also* Bainbridge, *supra* note 5, at 391 (explaining that "if the company fails on their watch . . . the independent directors' reputation . . . is likely to suffer").

<sup>153</sup> *See* Clark, *supra* note 5, at 300 (stating that independent directors are more accepting of, and less resistant to, takeover bids).

<sup>154</sup> Empirical studies show that shareholders of the acquired company experience large stock gains following announcement of a takeover bid, while shareholders of the acquiring company do not suffer an offsetting loss of stock value. Walsh & Seward, *supra* note 21, at 435. Results from such studies suggest that takeovers result in no net shareholder loss; thus, takeover activities, overall, are beneficial to the economy. *Id.*

<sup>155</sup> *See* Boyd, *supra* note 31, at 302 (noting that signs of CEO-Chairs' ineffective governance include resistance to hostile takeovers and adoption of poison pills); Finkelstein & D'Aveni, *supra* note 60, at 1082 (citing study results that show a positive correlation between duality and adoption of poison pills).

<sup>156</sup> *See* Ramirez, *supra* note 59, at 375-76 (finding that anti-takeover mechanisms generally correlate with higher executive compensation, lower productivity, and lower profitability). Empirical studies show that a company's stock price drops significantly "upon the announcement of a poison pill adoption, while share prices increased significantly if the firms abandoned plans to adopt a poison pill." Walsh & Seward, *supra* note 21, at 439; *see also* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?* 2-4 (Harvard L. Sch., John M. Olin Ctr. for L., Econ. & Bus., Discussion Paper No. 491, 2004), available at <http://ssrn.com/abstract=593423> (arguing that golden parachutes and poison pills correlate to a reduction in shareholder value). *See generally* John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301 (2001) (describing takeover defenses and the types of companies that adopt them); Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871 (2002) (describing the takeover movement, antitakeover techniques, and the market's adaptive response to antitakeover devices).

<sup>157</sup> Baliga et al., *supra* note 2, at 43; Brickley et al., *supra* note 25, at 196; Donaldson & Davis, *supra* note 62, at 52.

outside lawyers, independent accountants, credit rating agencies, securities analysts, and governmental agencies, to monitor executive misconduct in connection with the well-publicized scandals involving major corporations and investment funds in the past decade.<sup>158</sup> In addition, the recent revelation of the common practice of backdating executive stock options<sup>159</sup> suggests that endowing CEOs with stocks and stock options does not necessarily align executive and shareholder interests; instead, it may exacerbate executive greed and prompt executive mismanagement.<sup>160</sup>

### C. *Weighing the Theoretical Arguments About Duality*

Weighing the theoretical arguments for and against duality is not an easy task. Some would argue that the weighing analysis should be left to each corporation because the costs and benefits of different governance structures may vary among companies, resulting in different optimal governance structures for each company.<sup>161</sup> For example, some scholars believe that companies often use the Chair title as an

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<sup>158</sup> See CHIAPPINELLI, *supra* note 3, at 510-27 (discussing the roles of external monitors in the Enron and WorldCom corporate scandals); Kara Scannell, *The Madoff Fraud: SEC Botched Inquiries into Madoff Scheme*, WALL ST. J., Sept. 3, 2009, at C3 (summarizing an SEC inspector general report's finding that the SEC "botched numerous opportunities to uncover Bernard Madoff's Ponzi scheme, in part because of an inexperienced staff and delays in examinations"). See generally ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (collecting works by various scholars and experts in the field of corporate governance regarding the failures of internal and external gatekeepers and the background events surrounding the collapse of Enron).

<sup>159</sup> See Richard Hill, *Cox: SEC Probing over 100 Cases Involving Reporting; New Rules Halt Slide*, 38 SEC. REG. & L. REP. (BNA) 1567, 1567 (Sept. 18, 2006) (backdating stock options "involves misrepresenting the date that an option is granted so that it appears to be awarded at a time when the underlying stock price is at a low point, thereby maximizing the potential profit to be gained when the stock option is exercised at a later date"); *SEC Is Probing More than 100 Cases Involving Possible Fraud in Option Reporting*, 75 U.S. L.W. 2135, 2136 (Sept. 12, 2006) (recognizing that although SOX requires real-time reporting of stock option grants, backdating has continued where options are filed late and not in compliance with statutory requirements).

<sup>160</sup> See Ramirez, *supra* note 59, at 366-67 (opining that the practice of backdating stock options seems "more about the crass enrichment of executives than creating any incentive for performance"); Walsh & Seward, *supra* note 21, at 434 (discussing the lack of consensus on whether increasing managerial ownership of company stock increases the alignment of management's interests with those of outside shareholders).

<sup>161</sup> Brickley et al., *supra* note 25, at 197; Boyd, *supra* note 31, at 309; see also Karmel, *supra* note 78, at 3 (advocating against "[a] one size fits all command and control corporate governance regulation" because it "would stifle the experimentation that leads to good governance practices").

internal incentive mechanism for a new CEO.<sup>162</sup> According to this view, most of the companies that have separate CEOs and Chairs are in a transitional succession process of testing new CEOs who will eventually be awarded the Chair title.<sup>163</sup> These scholars caution against requiring companies to separate the CEO and Chair positions because doing so would compel companies to change their internal succession processes and CEO incentive systems.<sup>164</sup>

Viewed in a different light, however, duality may not be the result of a deliberate succession planning process, but instead may be a signal that the company lacks a process for succession planning and for developing future leaders to run the company beyond the tenure of the current CEO-Chair.<sup>165</sup> Governance observers who take this view explain duality as the result of agency problems that arise when the board, beholden to the powerful individual holding both the CEO and Chair positions, fails to plan for leadership succession.<sup>166</sup>

Another argument in support of letting each company decide for itself is that the decision to combine or separate the CEO and Chair positions is a strategic decision in response to external pressures<sup>167</sup> and competitive uncertainty, such as the availability of resources in the industry, the level of instability or volatility in the industry, and the amount of competition in the industry.<sup>168</sup> According to this argument, a company that operates in a highly competitive environment would prefer the consolidation of leadership power and the faster decision-making process that a duality governance structure provides.<sup>169</sup> When leadership is concentrated in a combined CEO-Chair, the corporation may respond to changing business conditions more quickly and cohesively, and the benefits of a fast and unified response outweigh the potential agency costs of duality.<sup>170</sup> Conversely, a corporation that operates in a stable environment has less need for a powerful CEO and more time

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<sup>162</sup> Brickley et al., *supra* note 25, at 192, 207, 209.

<sup>163</sup> *Id.*

<sup>164</sup> Brickley et al., *supra* note 25, at 192.

<sup>165</sup> See Harris & Helfat, *supra* note 71, at 901 (suggesting that combining the titles of president, chief executive, and board chair indicates a lack of succession planning).

<sup>166</sup> See *id.* at 903 (discussing investor concerns about lack of succession planning when companies consolidate leadership titles).

<sup>167</sup> Harrison et al., *supra* note 1, at 225.

<sup>168</sup> Boyd, *supra* note 31, at 305-06.

<sup>169</sup> *Id.* at 305.

<sup>170</sup> *Id.*

for consensus decision making.<sup>171</sup> Thus, without the need for decision speed, the company would want to install an independent Chair to minimize the potential agency costs of managerial abuse.<sup>172</sup>

There are weaknesses in the contention that each company should be permitted to adopt its choice of governance structure in order to respond appropriately to the level of external pressures that the company faces. In the same way that the levels of external pressure are not the same for all companies, the level of external pressure for any one company is not likely to remain the same for an extended period of time or for the entire life of that company.<sup>173</sup> Accordingly, it would be expected that companies change their top leadership structure over time as they go through periods of high external uncertainty (where the companies would opt for a unified duality structure) or low external pressures (where the companies would adopt an independent leadership structure). But empirical studies do not indicate that companies consciously choose their leadership structure as a strategic response to different levels of external pressure. For example, in a study of 181 companies for the five-year period from 1986 to 1991, researchers found that less than one-third of these companies changed their leadership structure by combining or separating the CEO and Chair positions during the sample period.<sup>174</sup> These data suggest that more than two-thirds of the companies either experienced the same level of external pressures during the five-year sample period or, despite experiencing changing levels of competitive demands during those years, did not consider adopting or abandoning duality as a strategic response.

Furthermore, if companies facing competitive pressure strategically choose duality for its fast and unified decision-making process, we should see a general increase in the

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See BARACK OBAMA, THE AUDACITY OF HOPE 145-59 (2006) (describing the spurts and stops in the growth of the economy and business enterprises in the United States).

<sup>174</sup> Baliga et al., *supra* note 2, at 45. Of the sample, 12 of the companies (6.6%) had separate CEO and Chair positions over the entire sample period, 111 of the companies (61.3%) had combined roles over the entire sample period, and 58 of the companies (32%) changed their leadership structure to or away from duality during the sample period. *Id.* Another study of 671 companies finds that 94 of these companies (14%) changed their leadership structure by combining or separating the CEO and Chair positions during the two-year period from 1978 to 1980. Harrison et al., *supra* note 1, at 226.



number of companies choosing to consolidate their CEO and Chair positions—due to the need to respond to the generally increasing complexity and competitive nature of business both in the United States and globally.<sup>175</sup> However, as discussed in Part II, it appears from various surveys that the trend in leadership structure has been a decrease in duality and an increase in separating the CEO and Chair positions. Although duality remains the dominant leadership governance structure in the United States, this dominance has decreased from a level of approximately 80% of the companies in the early 1990s to a level of approximately 60% of the companies in more recent years.<sup>176</sup> In light of the increasingly complex and competitive nature of domestic and global business activities, the data showing decreasing duality refute the argument that duality is a corporate strategy to respond to heightened business complexity and competitiveness.

The discussion in this section thus far has focused on the countervailing considerations to letting each company make its own decision about duality. The article now evaluates the theoretical arguments about duality to determine which leadership structure better supports the directors' fundamental responsibilities to oversee business operations and monitor management conduct. Viewed from this analytical framework, the theoretical arguments suggest that companies should separate the CEO and Chair positions.

Separating the CEO and Chair positions provides a governance framework better suited to the fulfillment of the directors' management and monitoring responsibilities. Duality may enhance the board's performance of its management responsibilities because a CEO-Chair brings to the board a deep knowledge about the company, and duality permits clear-cut authority in one combined CEO-Chair that enables consistent and timely decision making by the company.<sup>177</sup> The knowledge and information advantage of duality, however, diminishes when the company can put in place a nonexecutive

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<sup>175</sup> See Jacket Cover of THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005) (“And with this ‘flattening’ of the globe, which requires us to run faster in order to stay in place, has the world gotten too small and too fast for human beings and their political systems to adjust in a stable manner?”); Berg & Smith, *supra* note 129, at 34 (“The complexities of managing the modern corporation have been noted by many observers.”).

<sup>176</sup> See *supra* Part II.

<sup>177</sup> See *supra* Part III.A.

Chair that has long served on the board.<sup>178</sup> Any confusion about the line of authority and accountability may also be mitigated by clearly delineating and communicating the division of responsibilities between the CEO and the Chair.<sup>179</sup> Furthermore, the consistency of decisions resulting from duality's unified command structure may be detrimental if it renders the company resistant or slow to change strategies in order to meet evolving business conditions.<sup>180</sup>

While a combined CEO-Chair may facilitate collegiality and consensus between the executive and director groups—thereby enhancing the board's deliberation and decision-making process—any potential benefit that a collegial environment might bring to the board's management function may come at the expense of the board's monitoring function.<sup>181</sup> The cordial and deferential attitude that often prevails in the corporate boardroom may inhibit the objectivity and healthy vigilance that directors need to maintain while making conflict-of-interest decisions involving senior management or other strategic decisions affecting the company.<sup>182</sup> For example, the supportive and accommodating relationship that existed on the Enron board of directors was regarded as a contributing factor in the board's failure to detect and prevent the financial fraud perpetrated by Enron's top executives.<sup>183</sup> As an investigation committee of the United States Senate reported:

Enron board members uniformly described internal Board relations as harmonious . . . . The Directors also described a good working relationship with Enron management. Several had close personal relationships with Board Chairman and Chief Executive Officer (CEO) Kenneth L. Lay. All indicated they had possessed great respect for senior Enron officers, trusting the integrity and competence of Mr. Lay; President and Chief Operating Officer (and

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<sup>178</sup> Brickley et al., *supra* note 25, at 199-200.

<sup>179</sup> MILLSTEIN REPORT, *supra* note 32, at 19.

<sup>180</sup> See Boyd, *supra* note 31, at 301 (pointing to examples where duality may have resulted in the company's inability or unwillingness to adopt strategic changes).

<sup>181</sup> See MILLSTEIN REPORT, *supra* note 32, at 19 (“[C]ombining the roles fosters a more friendly board environment, just as it encourages more complacent boards.”); Walsh & Seward, *supra* note 21, at 431 (explaining that corporate boards that prize collegiality over objectivity may fail to scrutinize and discipline executives).

<sup>182</sup> See MILLSTEIN REPORT, *supra* note 32, at 19 (“While mindless animosities and ego contests in the boardroom can be counterproductive, directors who applaud and rubberstamp all actions of the CEO without asking difficult questions are not fulfilling their duties.”).

<sup>183</sup> See CHIAPPINELLI, *supra* note 3, at 491-510 (describing the Enron scandal).

later CEO) Jeffrey K. Skilling; Chief Financial Officer Andrew S. Fastow . . . .<sup>184</sup>

The Enron failure exemplifies the risk that a board committed to being friendly and harmonious to inside directors and other inside executives will ignore or downplay the red flags of management misconduct.

Whereas duality may enhance the board's management function, but hinder its oversight responsibilities, separating the CEO and Chair positions may enable the board to fulfill both its management and monitoring roles. Having a nonexecutive Chair may facilitate the board's management and decision-making process by assuring appropriate information and topics are put forth to the board for consideration.<sup>185</sup> In addition, a nonexecutive Chair may bring an outside perspective and fresh insights to assist the board in its deliberation and decision making.<sup>186</sup>

Separating the top executive and board roles may also provide directors with an environment more conducive to carrying out their oversight responsibilities. A nonexecutive Chair may be more likely to provide the board with information about—and to include in the board agenda—matters that raise questions about management judgment or questions that management may be reluctant to address.<sup>187</sup> In addition, a nonexecutive Chair is more likely to provide—and also more likely to encourage other directors to provide—an objective evaluation of executive performance.<sup>188</sup> Such objectivity is necessary for the board to carry out its tasks of disciplining

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<sup>184</sup> See *id.* at 498 (citation omitted).

<sup>185</sup> See Finkelstein & D'Aveni, *supra* note 60, at 1082 (commenting that the chairperson of the board has control over both the agenda and content of board meetings); Walsh & Seward, *supra* note 21, at 431 (explaining that executives may attempt to cover up their negative qualities or low performance by withholding relevant information from the board).

<sup>186</sup> Clark, *supra* note 5, at 300; Sanders & Carpenter, *supra* note 31, at 164.

<sup>187</sup> See Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Misperceive Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 139-46 (1997) (explaining that senior executives may be motivated to avoid reporting their suboptimal decisions, mistakes, and failures due to the concern that such reports may reflect poorly on them); Walsh & Seward, *supra* note 21, at 431 (explaining that executives may attempt to cover up their negative qualities or low performance by controlling the board's meeting agenda and withholding relevant information from the board).

<sup>188</sup> See Baliga et al., *supra* note 2, at 43 (explaining that duality may result in "the board's difficulty in critically evaluating management performance and exercising independent judgment").

managerial inefficiencies and misconduct that destroy shareholder value.<sup>189</sup>

A separate Chair thus gives the board a stronger chance of reining in agency problems inherent in the separation of corporate control and ownership—problems that are likely to be exacerbated when ultimate directorial and executive power reside in one individual. A useful analogy is that, in corporate governance, as in political government, a system of checks and balances is the best protection against abuse of power.<sup>190</sup> The theoretical arguments on duality suggest that separating the CEO and Chair positions allows the board to better exert its management and oversight authority in furtherance of shareholder interests.

Some may contest the notion that separating the CEO and Chair roles would facilitate performance of the board's management and monitoring roles and would thus better serve shareholder interests. These skeptics may point to the fact that, although technically elected by shareholders, all directors are actually selected by management and are therefore not truly independent from management when exercising the directors' decision-making and oversight responsibilities.<sup>191</sup> However, it is difficult to argue that just because some directors' independence may be compromised, we might as well give up on objectivity altogether and just let the CEO also chair the board. Moreover, questioning whether any director is truly independent from management does not advance the case for duality because supporters of duality often argue that "the danger of shareholder harm from combined titles can be counter-balanced by effective independent outside directors . . . ."<sup>192</sup>

In sum, duality may bring some benefits to the board's management role, but duality also carries substantial risks to the board's monitoring function. Having a nonexecutive Chair, on the other hand, appears to bring considerable benefits to the

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<sup>189</sup> Kesner et al., *supra* note 6, at 790.

<sup>190</sup> Paula L. Rechner & Dan R. Dalton, *The Impact of CEO as Board Chairperson on Corporate Performance: Evidence vs. Rhetoric*, 3 ACAD. MGMT. EXECUTIVES 141, 141 (1989) [hereinafter Rechner & Dalton 1989 Study].

<sup>191</sup> See Brown, *supra* note 30, at 1113 ("Directors who displeased a CEO often found it difficult to keep their seats on the board, which made it hard for the directors to maintain independence from the CEO."); Gordon, *supra* note 6, at 1496 (noting that directors may feel a sense of loyalty and gratitude to the CEO who helped to put them on the board); Worrell et al., *supra* note 18, at 501 ("[O]utside directors are often chosen by the CEO and may be aligned to management interests.").

<sup>192</sup> Brickley et al., *supra* note 25, at 196.

board in both its management and monitoring responsibilities. The risks that a nonexecutive Chair may have less knowledge about the inner working of the company than a CEO-Chair, or that a nonexecutive Chair may be less adept at creating a collegial atmosphere between management and the board, can be alleviated without much difficulty. A board with a separate Chair can still benefit from the CEO's knowledge and expertise about the company, and from the CEO's ability to facilitate a collaborative relationship between management and the board, by having the CEO serve as a director on the board—just not in the Chair position.

Efforts to alleviate the potential loss of executive expertise and board collegiality that may arise from having a nonexecutive Chair appear to be more manageable than attempting to mitigate the agency costs of duality. The board's objective monitoring of management performance is essential for the protection of shareholder interests. The potential managerial inefficiencies and misconduct that may result from weak oversight and ineffective monitoring by a CEO-Chair far outweigh any potential loss of knowledge and collegiality on the board that is led by a nonexecutive Chair.

#### IV. EMPIRICAL EVIDENCE ON DUALITY

A number of studies provide statistical evidence about the impact of CEO duality on corporate performance, as measured by financial and nonfinancial metrics. The following discussion focuses on the research findings that have been offered to advance or reject the notion that duality, being the dominant corporate governance structure in the United States, is the optimal governance structure to further shareholder interests. Much of the empirical evidence suggests that separating the CEO and Chair positions has a positive effect on the financial and nonfinancial performance of the company.

##### A. *Evidence Supporting a Combined Position*

###### 1. Nonfinancial Measures of Corporate Performance

*Kesner, Victor, and Lamont (1985)*. This study examines the relationship between duality and the company's

involvement in illegal activities.<sup>193</sup> The study's sample includes 274 companies that were continuously listed on the Fortune 500 and that consistently maintained a governance structure that either separated or combined the roles of the CEO and board Chair during the period from 1980 through 1984.<sup>194</sup> Of the sample, 245 (89%) of the companies had one individual serving both as CEO and board Chair, and 29 (11%) of the companies had two individuals serving in the separate positions.<sup>195</sup> The study focuses on the sample companies' involvement in price discrimination, tying arrangements, price fixing, monopoly, conspiracy, and other violations of antitrust laws and the Federal Trade Commission Act.<sup>196</sup> The study tallies the number of times in which the sample companies were found guilty in litigated cases, were subject to consent decrees in nonlitigated cases, or were charged in cases where the court found substantial merits to the charges.<sup>197</sup>

The number of illegal acts over the test period ranges from zero to seventeen occurrences for each company in the sample, with a mean of less than one occurrence for all companies in the sample, and a mean of three occurrences for those companies that were involved in some types of illegal activities.<sup>198</sup> Without giving specific data, the researchers conclude that "firms where one individual serves as both CEO and chairman are no more likely to be associated with illegal acts than those firms in which separate individuals hold these positions."<sup>199</sup>

## 2. Financial Measures of Corporate Performance

*Chaganti, Mahajan, and Sharma (1985)*. This study focuses on the relationship between duality and financial health of twenty-one pairs of companies in the retail industry.<sup>200</sup> In each pair, one company failed during the period from 1970 to

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<sup>193</sup> See Kesner et al., *supra* note 6, at 792-93 (hypothesizing that companies that combine the CEO and Chair positions are more likely to commit illegal acts than companies that separate the positions).

<sup>194</sup> *Id.* at 793-94.

<sup>195</sup> *Id.* at 795.

<sup>196</sup> *Id.* at 793.

<sup>197</sup> *Id.* at 794.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 796.

<sup>200</sup> Rajeswararao S. Chaganti, Vijay Mahajan & Subhash Sharma, *Corporate Board Size, Composition and Corporate Failures in Retailing Industry*, 22 J. MGMT. STUD. 400, 408 (1985).

1976, and the other company of comparable type and size in the pair did not fail during that period.<sup>201</sup> The study defines a “failed” company as one that has filed for bankruptcy under Chapter XI of the Bankruptcy Act.<sup>202</sup> The study controls for general economic and industry-specific conditions to isolate their effects on firm failures.<sup>203</sup> Recognizing that conditions leading to corporate failure take shape over time, the study collects data on whether the companies in each pair combine or separate their CEO and Chair positions during the five-year period prior to the failure of the failed company in the pair.<sup>204</sup>

The study finds that when comparing the two sample groups—companies that failed and companies that did not fail—there are not statistically significant differences in whether these companies separated or combined their CEO and Chair positions.<sup>205</sup> Data collected for the sample period show that in each of the five years, between ten and twelve of the twenty-one companies that eventually failed had separated their CEO and Chair positions.<sup>206</sup> Similarly, for the twenty-one comparable companies that did not fail, between nine and twelve companies had separated their CEO and Chair positions.<sup>207</sup> Acknowledging the limited focus of the study on a small number of companies in the retailing industry, the researchers conclude that duality is “not likely to make a difference to the chances of corporate failure.”<sup>208</sup>

*Donaldson and Davis (1991)*. This study analyzes the financial performance of 321 companies, including large Fortune 500 companies and smaller corporations in seven different industries.<sup>209</sup> Of the sample group, 76% of the companies had a combined CEO-Chair structure, and 24% of the companies had different individuals serve in the CEO and Chair roles.<sup>210</sup> The study compares the companies’ return on

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 405.

<sup>203</sup> *Id.* at 408.

<sup>204</sup> *Id.* at 409-10.

<sup>205</sup> *Id.* at 413.

<sup>206</sup> *Id.* at 412.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 414.

<sup>209</sup> Donaldson & Davis, *supra* note 62, at 54.

<sup>210</sup> *Id.* at 54-55.

equity and gain in shareholder wealth for the three years from 1985 to 1987.<sup>211</sup>

The study finds that the average return on equity was 14.75% for companies with a dual CEO-Chair and 11.49% for companies with a separate Chair.<sup>212</sup> The study considers this difference in return on equity as statistically significant.<sup>213</sup> Controlling for industry effects, the study also finds that the dual CEO-Chair structure was associated with higher levels of average return on equity than the separate Chair structure, although the difference was reduced to 2.38%.<sup>214</sup> Data from the study show no statistically significant difference, with and without controlling for industry effects, between the gain in shareholder wealth of corporations that combined the CEO-Chair positions and corporations that separated these roles.<sup>215</sup>

*Baliga, Moyer, and Rao (1996)*. Several researchers, using a sample of 181 Fortune 500 companies and a five-year sample period from 1986 to 1991, focus their study on the financial performance of companies that changed their governance structure to or from duality, as well as the long-term financial performance of companies that consistently maintained either of the governance structures.<sup>216</sup> The researchers categorize the sample companies in three groups: 111 companies (61.3%) had combined roles over the entire sample period, 12 companies (6.6%) had separate CEO and Chair positions over the entire sample period, and 58 companies (32%) changed their leadership structure to or away from duality during the sample period.<sup>217</sup> The researchers compare the effects on stock price following an announcement of change in governance structure, changes in return on common equity (“ROE”) and return on total assets (“ROA”) following a change in governance structure, and the industry-

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<sup>211</sup> *Id.* at 55. Return on equity is “profit generated on shareholder funds,” and gains in shareholder wealth include “the capital gains from share price appreciation plus dividends, for holding the share for three years from 1985 . . . expressed relative to the initial price . . . paid to acquire the stock in 1985.” *Id.*

<sup>212</sup> *Id.* at 56.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 58.

<sup>216</sup> Baliga et al., *supra* note 2, at 44-45.

<sup>217</sup> *Id.* at 45. Another study of 671 companies finds that ninety-four of that study’s sample group (14%) changed their leadership structure by combining or separating the CEO and Chair positions during the two-year period from 1978 to 1980. Harrison et al., *supra* note 1, at 211, 216, 226.



adjusted market value added ratios (“MVA”) during the five-year sample period for all three groups of companies.<sup>218</sup>

Results from this study reveal no significant effect on stock price upon announcement of a change in leadership structure, whether from duality to nonduality or from nonduality to duality.<sup>219</sup> The study also finds no measurable effect on ROE or ROA in the two-year period following a change in governance structure, whether from duality to nonduality or from nonduality to duality.<sup>220</sup> Similarly, when comparing the long-term performance of companies that maintained duality or nonduality over the entire test period, the study finds no significant evidence that duality affects financial performance, as measured by MVA.<sup>221</sup> Pointing to the lack of any significant difference in financial performance due to a status change toward or away from duality, and no significant difference in long-term financial performance between companies that had CEO-Chairs and companies that had nonexecutive Chairs, the researchers conclude that the call to abolish duality is more of a “symbolic way of ‘signaling’ that the board is effectively exercising its governance role . . . than an effective way of motivating fundamental changes in firm performance.”<sup>222</sup>

*Brickley, Coles, and Jarell (1997)*. This study focuses on the impact of duality on the stock returns and return on capital of 628 large U.S. companies contained in the 1988 Forbes survey of corporate executives.<sup>223</sup> Of this group, 535 companies

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<sup>218</sup> Baliga et al., *supra* note 2, at 44. Market value added ratio is “an approximation of Tobin’s Q ratio” and is calculated as “the market value of debt, preferred equity and common equity capitalization less the book value of a firm’s entire capitalization, adjusted for past write-offs of capital.” *Id.* at 48. For comparative purposes, a higher MVA reflects better operating performance. *Id.*

<sup>219</sup> *Id.* at 46-47.

<sup>220</sup> *Id.* at 47.

<sup>221</sup> *Id.* at 49-50. Although the study’s results indicate that companies that change their leadership structure have higher changes in market value added ratios, the researchers note that the changes typically involve changing from nonduality to duality and thus the resulting changes in market value added ratios for these companies may not reflect the impact of duality on firm performance but instead may reflect a “passing the baton” process whereby CEOs who have demonstrated their ability are awarded the additional title of board chair. *Id.* at 50. *Accord* Brinkley et al., *supra* note 25.

<sup>222</sup> Baliga et al., *supra* note 2, at 51.

<sup>223</sup> Brickley et al., *supra* note 25, at 197-98, 202 tbl.4 (the survey contains data on 661 firms, but in calculating statistics pertinent to this article, thirty-three firms are eliminated from the original sample due to a lack of a board chairperson). Return on capital is “income before extraordinary items and discontinued operations plus interest and minority interest (income account) all divided by invested capital (total) at end of prior fiscal year.” *Id.* at 210 tbl.9.

(85%) had CEO-Chairs, and 93 companies (15%) had CEOs who did not serve as board Chairs.<sup>224</sup>

Results from the study show that for the year 1988, companies that combined their leadership positions had a 6.5% higher median stock return<sup>225</sup> and a 3.5% higher median industry-adjusted stock return.<sup>226</sup> Although companies that combined their CEO and Chair positions also had a 1.4% higher median return on capital in the year 1988,<sup>227</sup> companies that separated their CEO and Chair positions had a 1.2% higher median industry-adjusted return on capital.<sup>228</sup>

For the period from 1989 to 1991, while companies with a CEO-Chair had a 4.4% higher annualized median stock return,<sup>229</sup> companies with a separate Chair had a 1.6% higher annualized median industry-adjusted stock return.<sup>230</sup> The study finds similar results for return on capital during this period, whereby companies with a combined CEO-Chair had a 0.2% higher annualized median return on capital,<sup>231</sup> but companies with a separate Chair had a 2.4% higher annualized median industry-adjusted return on capital.<sup>232</sup>

Based on these mixed findings, the study concludes that companies that have one individual serving as both CEO and board Chair “do not necessarily have lower accounting returns” than companies that have two individuals occupy the separate CEO and Chair positions.<sup>233</sup> Moreover, because the researchers

<sup>224</sup> *Id.* at 198 tbl.1 (statistics that appear in table 1 were altered to reflect a sample size of 628 firms rather than the 661 firms used to calculate the statistics therein).

<sup>225</sup> *See id.* at 210 (comparing 1988 median stock return of 10.6% for companies with separate leaders and 17.1% for companies with combined leaders).

<sup>226</sup> *See id.* (comparing 1988 median industry-adjusted stock return of -2.5% for companies with separate leaders and 1.0% for companies with combined leaders). Industry benchmarks come from companies with the same four-digit SIC code. *Id.*

<sup>227</sup> *See id.* (comparing 1988 median return on capital of 13.8% for companies with separate leaders and 15.2% for companies with combined leaders).

<sup>228</sup> *See id.* (comparing 1988 median industry-adjusted return on capital of 2.4% for companies with separate leaders and 1.2% for companies with combined leaders).

<sup>229</sup> *See id.* (comparing 1989-1991 annualized median stock return of 9.1% for companies with separate leaders and 13.5% for companies with combined leaders).

<sup>230</sup> *See id.* (comparing 1989-1991 annualized median industry-adjusted stock return of 4.0% for companies with separate leaders and 2.4% for companies with combined leaders).

<sup>231</sup> *See id.* (comparing 1989-1991 annualized median return on capital of 12.4% for companies with separate leaders and 12.6% for companies with combined leaders).

<sup>232</sup> *See id.* (comparing 1989-1991 annualized median industry-adjusted return on capital of 2.7% for companies with separate leaders and 0.3% for companies with combined leaders).

<sup>233</sup> *Id.* at 211.

recognize that the results reflect conflicting and mostly insignificant differences in stock return and return on capital, they urge caution in using the study's findings to draw conclusions about the effect of duality on corporate financial profitability.<sup>234</sup>

*B. Evidence Supporting Separate Positions*

1. Nonfinancial Measures of Corporate Performance

*Harrison, Torres, and Kukalis (1988)*. This study analyzes the turnover rates for the CEO and Chair positions of 671 large public manufacturing companies.<sup>235</sup> Of this sample, 72% of the companies consolidated the top leadership positions so that one individual held both the CEO and Chair positions.<sup>236</sup> The study determines turnover by examining whether the person who held the position in 1978 remained in the same position in 1980.<sup>237</sup> Results from this study show that the turnover rate for CEOs who held only one position was 15%, whereas the turnover rate for CEOs who also held the position of board Chair was only 10%.<sup>238</sup>

Other empirical studies that focus on CEO turnover in poorly performing companies also find that it is difficult to remove an underperforming CEO if that CEO also holds the position of board Chair.<sup>239</sup> The consistent finding from studies on CEO turnover is that when the same individual holds both the CEO and Chair positions, the likelihood of the board dismissing the CEO decreases.<sup>240</sup>

*Mallette and Fowler (1992)*. This study compares the adoption of poison pills by companies that have a dual CEO-Chair leadership structure and companies that have a separate

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<sup>234</sup> *Id.* at 210-11.

<sup>235</sup> Harrison et al., *supra* note 1, at 216.

<sup>236</sup> *Id.* at 215-16. Names of individuals holding the CEO and Chair positions come from the Standard and Poor's *Register of Corporations, Directors, and Executives* for 1979 and 1981. *Id.* at 217.

<sup>237</sup> *Id.* at 217.

<sup>238</sup> *Id.* at 222. The 10% represents the data for CEO-Chairs who retain neither position during the test period. *Id.*

<sup>239</sup> See Balsam & Upadhyay, *supra* note 25, at 2, 7 (citing Weisbach's study in 1988 and Goyal and Park's study in 2002).

<sup>240</sup> See Cannella & Lubatkin, *supra* note 136, at 782 (explaining the study's finding that the "likelihood of dismissal is also higher for incumbent CEOs who do not hold the chairperson title").

Chair.<sup>241</sup> The sample population includes 673 industrial manufacturing companies, and the study period covers the peak poison pill adoption years of 1985 to 1988.<sup>242</sup> Of the sample group, 477 companies (71%) had a combined CEO-Chair and 196 companies (29%) had a separate Chair.<sup>243</sup>

The study finds that 226 companies (34%) of the sample population had adopted poison pills by the end of 1988, and 447 companies (66%) of the sample population did not have poison pills in place at the end of 1988.<sup>244</sup> Results of the study show that a company with a nonexecutive Chair was much less likely to adopt a poison pill than a company with a dual CEO-Chair.<sup>245</sup> Of the 226 companies that adopted poison pills during the peak years of poison pill adoption, 200 companies (88%) were led by a CEO-Chair, and only 26 companies (12%) were led by a nonexecutive Chair.<sup>246</sup> Although this study focuses only on the empirical association between duality and adoption of poison pills, the study cites other research that shows poison pills to have a negative effect on stock price.<sup>247</sup> Thus, the study concludes that a company with a combined CEO-Chair is much more likely to adopt a poison pill, a defensive measure that has been shown by other studies to have the effect of discouraging or deterring takeover bids and resulting in a decrease in shareholder value.<sup>248</sup>

*Brickley, Coles, and Jarell (1997)*. This study compares the amount of compensation and the length of tenure of CEO-Chairs and of CEOs who do not serve as Chairs.<sup>249</sup> The study's sample population includes 628 companies contained in the

<sup>241</sup> Mallette & Fowler, *supra* note 3, at 1010.

<sup>242</sup> *Id.* at 1020-21.

<sup>243</sup> *Id.* at 1022.

<sup>244</sup> *Id.* at 1021.

<sup>245</sup> *Id.* at 1023. *Accord* Finkelstein & D'Aveni, *supra* note 60, at 1082 (citing, with approval, the Mallette & Fowler study's finding of a positive correlation between duality and adoption of poison pills). Other research also shows that a board led by a CEO-Chair is more likely to adopt poison pills and to resist takeover bids. *See, e.g.*, Boyd, *supra* note 31, at 302 (noting that signs of CEO-Chairs' ineffective governance include resistance to hostile takeovers and adoption of poison pills).

<sup>246</sup> Mallette & Fowler, *supra* note 3, at 1023.

<sup>247</sup> *Id.* at 1011. *See* Walsh & Seward, *supra* note 21, at 439 (explaining that empirical studies show that a company's stock price drops significantly upon the board's announcement of the adoption of a poison pill, while the stock price rises upon the board's announcement that the company has abandoned its plan to adopt a poison pill).

<sup>248</sup> Mallette & Fowler, *supra* note 3, at 1028. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 612-14 (2002) (discussing the evidence that hostile takeovers result in increased shareholder wealth).

<sup>249</sup> *See* Brickley et al., *supra* note 25, at 202 tbl.4 (presenting data on tenure and compensation classified by whether the CEO and Chair positions are combined).

1988 Forbes survey of corporate executives.<sup>250</sup> Of this group, 535 companies (85%) had CEO-Chairs, and 93 companies (15%) had CEOs who did not serve as board Chairs.<sup>251</sup>

The study finds that both the compensation and tenure of the 535 CEO-Chairs were markedly higher than the compensation and tenure of the 93 CEOs who did not serve as board Chairs.<sup>252</sup> Data from the study show that the median total compensation for CEOs who also served as board Chairs was approximately 46% higher than the median total compensation for CEOs who did not serve as board Chair.<sup>253</sup> Similarly, whereas the median tenure for CEOs who also served as board Chairs was 6.92 years, the median tenure for CEOs who did not serve as board Chairs was only 2.92 years.<sup>254</sup>

The study's findings of higher compensation and longer tenure for the CEO-Chairs may be indicators of managerial entrenchment in the duality governance structure.<sup>255</sup> By combining the top two leadership positions in one person, executive accountability is reduced, discharge for poor management performance is doubtful, and the combined leader is more likely to be able to extract additional compensation and stay in power longer than a CEO who has to answer to a separate board Chair.<sup>256</sup>

A recent study by professors and researchers Bebchuk, Cremers, and Peyer provides further empirical evidence that combining the CEO and Chair positions may facilitate managerial entrenchment.<sup>257</sup> Their study, in addition to providing evidence of entrenchment, also provides data on the

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<sup>250</sup> *Id.* at 197, 198 tbl.1 (the survey contained data on 661 firms, but in calculating the statistics pertinent to this article, thirty-three firms were eliminated from the original sample due to a lack of a board chairperson).

<sup>251</sup> *Id.* at 198 tbl.1 (statistics that appear in table 1 were altered to reflect a sample size of 628 firms rather than the 661 firms used to calculate the statistics therein).

<sup>252</sup> *Id.* at 202 tbl.4.

<sup>253</sup> *See id.* (comparing a median of \$675,000 in total compensation for CEOs and a median of \$985,000 in total compensation for CEO-Chairs). Total compensation includes "salary, bonus, value of restricted stock, savings and thrift plans, and other benefits." *Id.* at tbl.4. A potential cost of separating the CEO and Chair positions is the compensation for the independent chairperson. *Id.* at 195. *See* Brown, *supra* note 30, at 1105 (explaining that directors who are also employees of the corporation generally do not receive additional compensation for their service on the board).

<sup>254</sup> Brickley et al., *supra* note 25, at 202 tbl.4.

<sup>255</sup> *Id.* at 202.

<sup>256</sup> *See id.* (acknowledging that tenure and compensation data for CEO-Chairs indicate that "combined titles might imply that the CEO is not accountable to shareholders and is seldom fired for poor performance").

<sup>257</sup> *See infra* Part IV.B.2.

financial performance of companies that are led by dominant chief executives such as CEOs who also serve as board Chairs.<sup>258</sup>

*Sanders and Carpenter (1998)*. This study analyzes the correlation between a company's degree of internationalization and the likelihood that the company would combine its CEO and Chair positions.<sup>259</sup> The study presents information that shows directors and officers of international firms operate in highly complex information processing and decision-making environments due to diverse cultural and competitive conditions.<sup>260</sup> In addition, internationalization presents greater information processing requirements and monitoring problems because of the geographic dispersion of assets, operations, personnel, and management.<sup>261</sup> International companies strive to control and cope with this informational and decision-making complexity by creating a governance structure that efficiently processes information and effectively monitors executive actions.<sup>262</sup>

The study hypothesizes that as a company's degree of internationalization increases, the likelihood decreases that the company would have a dual CEO-Chair governance structure.<sup>263</sup> The sample population includes 258 companies in the 1992 Standard & Poor's 500.<sup>264</sup> A company's degree of internationalization was measured by its foreign sales, foreign production, and geographic dispersion.<sup>265</sup>

The study's findings indicate that the degree of a company's internationalization is a significant predictor of whether the company has the same person or two individuals serve in the CEO and Chair positions.<sup>266</sup> Results from the study

<sup>258</sup> This article discusses Bebchuk, Cremers, and Peyer's empirical study in more detail in Part IV.B.2, which analyzes the empirical evidence of financial benefits arising from separating the CEO and Chair positions.

<sup>259</sup> Sanders & Carpenter, *supra* note 31, at 158.

<sup>260</sup> *See id.* at 158-60 (citing various studies).

<sup>261</sup> *Id.* at 171-72.

<sup>262</sup> *See id.* at 158-60 (citing various studies).

<sup>263</sup> *Id.* at 164.

<sup>264</sup> *Id.* at 165.

<sup>265</sup> *Id.* at 166. Foreign sales are represented by "the ratio of foreign sales to total sales and reflect a firm's dependence on sales to foreign markets." *Id.* Foreign production is represented by "foreign assets expressed as a percentage of total assets," and geographic dispersion identifies the "number of countries in which a firm had subsidiaries, expressed as a percentage of the highest number of countries with subsidiaries represented in our sample." *Id.*

<sup>266</sup> *Id.* at 170.

suggest that companies with high degrees of internationalization are likely to implement a governance structure that amplifies communication channels and disperses responsibility among company leaders; the highly internationalized companies are not likely to consolidate power and responsibility into one combined CEO-Chair.<sup>267</sup> Instead, these companies separate the CEO and Chair positions in order to improve the information available to the board and to enhance the board's ability to control and monitor management.<sup>268</sup> The study concludes that separation of the CEO and Chair positions may allow companies to cope with the high information processing and agency costs that result from a high level of internationalization.<sup>269</sup>

## 2. Financial Measures of Corporate Performance

Duality is often cited as a culprit of the decline in financial performance of large corporations,<sup>270</sup> while the existence of a nonexecutive Chair is regarded as a reason for the competitive financial performance of other large corporations.<sup>271</sup> For example, opponents of duality point to General Motors's loss of \$23.5 billion in 1992, together with its sizeable losses of market share and market value, as resulting from then-CEO-Chairman Roger Smith's constraint on board oversight and restriction on board adoption of appropriate strategies to adapt to the competitive environment.<sup>272</sup>

Another often cited anecdote about duality's destruction of shareholder value involves General Motors's payment of "greenmail"<sup>273</sup> to Ross Perot, an outside director on General

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<sup>267</sup> *Id.* at 164, 169-73. See Berg & Smith, *supra* note 129, at 34 ("Unless some divisionalization occurs to improve information flows, the costs of monitoring and rewarding inputs (and activities) rise.").

<sup>268</sup> Sanders & Carpenter, *supra* note 31, at 164, 169-73.

<sup>269</sup> *Id.* at 172.

<sup>270</sup> Baliga et al., *supra* note 2, at 42; see also Boyd, *supra* note 31, at 301 ("[D]uality has been blamed for poor performance and slow response to change" in large corporations.).

<sup>271</sup> See, e.g., Baliga et al., *supra* note 2, at 43 (citing nonduality as the reason Compaq was able to "make appropriate strategic responses to a changing competitive environment").

<sup>272</sup> *Id.* at 42.

<sup>273</sup> The corporate practice of paying a premium price to repurchase shares in order to be rid of a hostile shareholder is known as paying "greenmail" to the hostile shareholder. CHIAPPINELLI, *supra* note 3, at 244. Several empirical studies have documented the association between greenmail payments and negative stock returns

Motors's board who was also a major shareholder of the company and a vocal critic of General Motors's management.<sup>274</sup> Many criticized CEO-Chair Roger Smith for "muzzling" Ross Perot's criticism of management when the CEO-Chair directed the company to buy out Perot's shares at a premium price of \$700 million.<sup>275</sup> Similarly, supporters of separating the top leadership positions regard IBM's loss of \$5 billion in 1992, together with its substantial losses of market share and market value, as resulting from then-CEO-Chairman John Akers's restraint on the board's exercise of its own judgment to objectively evaluate management performance.<sup>276</sup>

To contrast with the poor financial performance of General Motors and IBM under the duality leadership structure, supporters of a separate Chair point to Compaq Computer's ability to perform competitively under the leadership of Ben Rosen, a nonexecutive Chair.<sup>277</sup> Compaq's board of directors, under the leadership of a separate Chair and over the strong objection of the company's CEO, adopted a successful lower-priced product line to maintain its market share and remain competitive in the industry.<sup>278</sup> In addition to these anecdotal cases linking duality with negative financial performance, several studies present empirical evidence that separating the CEO and Chair positions results in better corporate financial performance.

*Berg and Smith (1978)*. These researchers conducted one of the first empirical studies that tested the impact of duality on corporate financial performance.<sup>279</sup> The sample population includes the entire group of Fortune 200 companies in twenty-three industries.<sup>280</sup> Of the 200 companies in the sample group, about 59% had one individual serving in both the CEO and Chair roles, while approximately 41% had two separate leaders in these positions.<sup>281</sup> The performance measures include stock price appreciation, return on equity,

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for nonparticipating shareholders of the companies making the payments. Walsh & Seward, *supra* note 21, at 439.

<sup>274</sup> Baliga et al., *supra* note 2, at 42-43.

<sup>275</sup> *Id.* at 42-43.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 43.

<sup>278</sup> *Id.*

<sup>279</sup> Berg & Smith, *supra* note 129, at 34.

<sup>280</sup> *Id.* at 35.

<sup>281</sup> *Id.* at 38 tbl.II (Table II contains information for only 199 of the Fortune 200 companies; percentages are based on these 199 companies).



and return on investment during the test period of 1974 to 1976.<sup>282</sup>

Results from this study show that companies that combine their CEO and Chair positions experience significantly lower stock price appreciation and return on equity, and a modestly lower return on investment, than companies that separate the CEO and Chair positions.<sup>283</sup> These findings suggest that companies that combine the CEO and Chair positions perform worse financially than companies that have an independent Chair.<sup>284</sup>

*Rechner and Dalton (1989 and 1991).* This study examines the risk-adjusted stockholder return of 141 Fortune 500 companies that kept their governance structures constant, either combining or separating the CEO and Chair positions, over the six-year period from 1978 to 1983.<sup>285</sup> Of the 141 companies in the sample group, 79% had one leader who served in both the CEO and Chair roles, and 21% had two leaders in these positions.<sup>286</sup>

The first analysis of data in 1989 finds no statistically significant difference in risk-adjusted stockholder returns between companies with a combined CEO-Chair and companies with a separate Chair.<sup>287</sup> The data show no significant difference in risk-adjusted stockholder return for any one single year of the sample period, and no significant difference in stock return for the entire six-year period,

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<sup>282</sup> *Id.* at 35. Stock price appreciation is “the change in the value of common stock,” return on equity is “(net income)/(stockholder equity),” and return on investment is “(price appreciation and stock dividend)/(book value of equity).” *Id.* at 38 statistical appendix.

<sup>283</sup> *Id.* at 39. The results as presented in Table A.1 on page 39 of the study, and reported here in this article, differ from the researchers’ summary of the results as discussed in the text on page 35 of the study. *See id.* at 35 (“For total return to investors, the impact on performance was significant and negative . . .”).

<sup>284</sup> *Cf. id.* at 35 (“It would be premature to conclude that unitary leadership reduces benefits to stockholders—although across all industries this was true for the return on book value in equity. These mixed results suggest that no general conclusion can be made, and further tests are called for.”).

<sup>285</sup> Rechner & Dalton 1989 Study, *supra* note 190, at 142. The study specifies, “Stockholder return . . . comprises risk-adjusted, abnormal returns on common stocks. This approach takes into account the effects of both general market factors and differential risk levels on security returns. Thus, the measure reflects only those returns due to firm-specific factors.” *Id.*

<sup>286</sup> Paula L. Rechner & Dan R. Dalton, *CEO Duality and Organizational Performance: A Longitudinal Analysis*, 12 STRATEGIC MGMT. J. 155, 156 (1991) [hereinafter Rechner & Dalton 1991 Study].

<sup>287</sup> Rechner & Dalton 1989 Study, *supra* note 190, at 142.

between companies that had a combined CEO-Chair and companies that had a separate Chair.<sup>288</sup>

When the researchers conducted a subsequent analysis of the same 141 companies over the same six-year period from 1978 to 1983, focusing their research on the companies' return on equity, return on investment, and profit margin, the results showed a negative relationship between duality and these performance measures.<sup>289</sup> In these three financial measures of corporate performance, the companies that had two individuals serving in the CEO and Chair positions consistently and significantly outperformed companies that had one individual occupying both roles.<sup>290</sup>

*Pi and Timme (1993)*. This study investigates the variation in return on assets and production cost efficiency between companies that had one dual CEO-Chair and companies that had two individuals serve in these roles.<sup>291</sup> The study focuses on a sample of 112 publicly traded bank-holding companies for the period from 1987 to 1990.<sup>292</sup> Of the sample population, 93 banks (83%) had a combined CEO-Chair, and 19 banks (17%) had a separate Chair.<sup>293</sup>

Controlling for company size and other variables, the study's results show that companies that had a separate Chair consistently and significantly outperformed companies that had a combined CEO-Chair in both measures of return on assets and production cost efficiency.<sup>294</sup> From these results, the researchers suggest that the board's monitoring function is not effective in a duality governance structure, with the consequence that the CEO-Chair may be less constrained from engaging in behavior that destroys shareholder value.<sup>295</sup>

*Boyd (1995)*. This study gathers data on leadership structure and financial performance of 192 public companies in twelve industries.<sup>296</sup> The number of sample companies in each

<sup>288</sup> *Id.*

<sup>289</sup> Rechner & Dalton 1991 Study, *supra* note 286, at 156-59.

<sup>290</sup> *Id.* at 157.

<sup>291</sup> Lynn Pi & Stephen G. Timme, *Corporate Control and Bank Efficiency*, 17 J. BANKING & FIN. 515, 518 (1993). Return on assets is "after-tax net income divided by total assets," and production cost efficiency is "derived [using] a stochastic frontier cost model" that examines each company's costs, outputs, and prices. *Id.*

<sup>292</sup> *Id.* at 517, 521.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 525-26.

<sup>295</sup> *Id.*

<sup>296</sup> Boyd, *supra* note 31, at 306.

industry ranges from twelve to twenty-two, and the percentage of sample companies with duality in each industry ranges from 33% to 73%.<sup>297</sup> Financial performance is measured as the average return on investment over the five-year period from 1980 through 1984.<sup>298</sup> The study results show that the effect of duality on financial performance varies across industry groups, but that combining the CEO and Chair positions is correlated with slightly lower corporate financial performance as measured by return on investment.<sup>299</sup>

This study also includes a meta-analysis of the findings of seven other empirical studies published during the period from 1978 to 1993.<sup>300</sup> In these seven studies, the sample population ranges from 42 to 800 companies.<sup>301</sup> The seven studies focus on measures of financial performance, such as return on equity, return on investment, stock return, and profit margin.<sup>302</sup> When aggregating the result statistics across these seven studies, the meta-analysis shows that separation of the CEO and Chair positions is associated with slightly higher financial performance across the aggregated financial performance measures.<sup>303</sup>

*Sundaramurthy, Mahoney, and Mahoney (1997)*. This study examines the relationship between board structure and stock market reaction to the company's adoption of antitakeover provisions.<sup>304</sup> The sample population includes 261 companies in the Standard & Poor's 500 that adopted 486 antitakeover measures from 1984 to 1988, the crest of the takeover wave.<sup>305</sup> The results show that "the market reacts less negatively to antitakeover provisions adopted by boards with a chairperson who is not the CEO than to antitakeover

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<sup>297</sup> *Id.* at 308. The smaller percentages of duality for some industries reflect the study's inclusion of smaller companies, where duality is not as common as in larger companies. *Id.* at 307.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 308-09.

<sup>300</sup> *Id.* at 302. The seven studies were conducted by Berg and Smith (1978); Chaganti, Mahajan, and Sharma (1985); Rechner and Dalton (1989 and 1991); Donaldson and Davis (1991); Mallette and Fowler (1992); and Cannella and Lubatkin (1993). *Id.*

<sup>301</sup> *Id.* at 303.

<sup>302</sup> *Id.* at 302-03.

<sup>303</sup> *Id.* at 302.

<sup>304</sup> Sundaramurthy et al., *supra* note 20, at 231.

<sup>305</sup> *Id.* at 234. The antitakeover provisions include supermajority voting for mergers, classified board, fair price provisions, reduction of cumulative voting, anti-greenmail provisions, and poison pills. *Id.* at 244-45.

provisions adopted by boards chaired by the CEO.”<sup>306</sup> The researchers conclude that market reaction appears to be influenced by the leadership structure of the board and that investors regard a nonexecutive Chair as more capable of monitoring management actions and protecting shareholder interests than a combined CEO-Chair.<sup>307</sup>

The study also finds that “the market reacts more negatively to antitakeover provisions adopted by outsider-dominated boards than to antitakeover provisions adopted by boards” that are dominated by insiders.<sup>308</sup> Thus, while the market views an outsider Chair as enhancing the ability of the board to monitor and protect shareholder interests, investors do not perceive the same value in other outside directors.<sup>309</sup>

*Bebchuk, Cremers, and Peyer (2007)*. This study focuses on the relationship between CEO centrality and the value and behavior of public firms.<sup>310</sup> Data for the study cover 12,011 companies in twelve industries for the years 1993 through 2004.<sup>311</sup> The study refers to CEO centrality as the relative importance of the CEO to other top executives within the company in terms of ability, contribution, or power.<sup>312</sup> CEO centrality is measured by the “CEO’s pay slice (CPS),” which is the CEO’s compensation as a percentage of the aggregate top-five compensations in the company.<sup>313</sup> CPS is deemed to be the product of several variables relating to corporate governance, including whether the CEO also has the dual role as board Chair.<sup>314</sup>

Results from the study show that greater CEO centrality, or higher CPS, relates to firm performance in several ways, including lower firm value as measured by

<sup>306</sup> *Id.* at 239.

<sup>307</sup> *Id.* at 239-40. The study’s suggestion—that investor trust in the board’s monitoring role is enhanced when companies separate the CEO and Chair positions—is consistent with research findings that corporate boards that are led by a nonexecutive Chair tend to be sued less often. *Id.* at 240.

<sup>308</sup> *Id.*

<sup>309</sup> *See id.* (“[T]he market not only does not take into account the monitoring role of outsiders but actually discounts their presence.”).

<sup>310</sup> *See generally* Bebchuk et al., *supra* note 78, at 1-5 (concluding that CEO centrality is an aspect of corporate governance that merits attention from researchers).

<sup>311</sup> *Id.* at 8.

<sup>312</sup> *Id.* at 1, 6.

<sup>313</sup> *Id.* Executive compensation includes “the total compensation to each executive, including salary, bonus, other annual pay, the total value of restricted stock granted that year, the Black-Scholes value of stock options granted that year, long-term incentive payouts, and all other total compensation.” *Id.* at 7.

<sup>314</sup> *Id.* at 1.

industry-adjusted Tobin's Q,<sup>315</sup> lower industry-adjusted return on assets,<sup>316</sup> lower stock returns accompanying acquisition announcements,<sup>317</sup> and lower CEO turnover controlling for length of service and performance.<sup>318</sup> The study finds that the high CPS level may be the result of a CEO who uses his power to dominate the board and the company's decision making and to raise his CPS above an optimal level.<sup>319</sup> Results from the study also rule out the hypothesis that the correlation between high CPS and low firm value is explained by the tendency of low value companies to adopt high levels of CPS.<sup>320</sup> Thus, the researchers explain, "having a high excess CPS might reflect agency and governance problems that in turn bring about a reduction in firm value."<sup>321</sup>

From this study, one may expect that, because high CEO centrality is associated with low firm value, a CEO who gets high CPS but achieves low financial value for the company is likely to be removed, as the board is likely to be dissatisfied with a highly compensated CEO who fails to create high value for the company.<sup>322</sup> Contrary to expectation, however, the study finds that the association between high CPS and low firm value is most prominent in companies with high entrenchment—companies where the CEO is "relatively insulated from market discipline and the threat of removal."<sup>323</sup> The study's results indicate that the more dominant a CEO is within a company's governance structure, the less impact market performance has

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<sup>315</sup> *Id.* at 1, 3, 11. Tobin's Q is "the market value of equity plus the book value of assets minus the book value of equity, all divided by the book value of assets." *Id.* at 8, 40, 41, 46, 49.

<sup>316</sup> *Id.* at 1, 3. Industry-adjusted return on assets is "the return on assets computed as net income divided by book value of assets adjusted by the median ROA of the firms in Compustat in a given four-digit SIC industry and year." *Id.* at 8-9, 40.

<sup>317</sup> *Id.* at 1, 3. The study finds that "high-CPS firms tend to make worse acquisition decisions as judged by the market's reaction to acquisition announcements. If the acquiring firm has higher CPS, the stock return accompanying the acquisition announcement is lower and more likely to be negative." *Id.* at 3. The researchers concluded that "one potential reason for the lower valuation of firms with high CPS is that high-CPS firms make acquisitions viewed less favorably by the market and, in particular, are more likely to make acquisitions viewed as value-destroying by the market." *Id.* at 26.

<sup>318</sup> *Id.* at 4.

<sup>319</sup> *Id.* at 2, 10, 13.

<sup>320</sup> *Id.* at 2.

<sup>321</sup> *Id.*

<sup>322</sup> *See id.* at 20 (discussing whether CEO turnover is related to CPS).

<sup>323</sup> *Id.* at 21.

on that CEO's tenure.<sup>324</sup> Based on these findings, the researchers suggest that the CEO's dominance, of which duality may be a contributing factor,<sup>325</sup> exaggerates agency problems that may lower the financial performance of the company and may make the removal and replacement of the CEO more difficult or unlikely.<sup>326</sup>

*Balsam and Upadhyay (2009)*. This recent study examines the impact that duality—and the announcement that the company is moving toward or away from duality—has on corporate financial performance.<sup>327</sup> The study's sample population includes the 1,500 companies in the ExecuComp database of companies during the ten-year period from 1996 to 2005.<sup>328</sup> The percentage of companies in the sample population that had a separate Chair ranged from 24% in 1996 to almost 40% in 2005.<sup>329</sup>

Results from the study show that separating the CEO and board Chair positions correlates with significantly improved financial performance, as measured by Tobin's Q, return on assets, and ratio of sales to assets.<sup>330</sup> The study also finds that, at times, appointment of a lead director has no effect and, at other times, has a negative effect on these three measures of corporate financial performance.<sup>331</sup> Thus, the researchers conclude "that having a lead director is not a substitute for having a separate chair."<sup>332</sup>

The study also examines the stock market reaction to the 408 announcements of a change in leadership structure made by the companies during the ten-year sample period.<sup>333</sup> Of the group of announcements, 236 (58%) announced a move away from duality in that the combined CEO and Chair

<sup>324</sup> See *id.* at 30 (concluding that "CEO turnover is less sensitive to firm specific returns for CEOs with a high industry-adjusted CPS").

<sup>325</sup> *Id.* at 6.

<sup>326</sup> *Id.* at 29.

<sup>327</sup> Balsam & Upadhyay, *supra* note 25, at 3, 6.

<sup>328</sup> *Id.* at 12, 38 tbl.1. The study includes one analysis that excludes utilities and financial services firms, and another analysis that includes utilities and financial services firms; both analyses yield similar results. *Id.* at 12 n.11.

<sup>329</sup> *Id.* at 15-16.

<sup>330</sup> *Id.* at 4-6, 18-19, 21. Tobin's Q is measured as "(Market value of equity + Book value of debt)/(Book value of assets)." *Id.* at 13.

<sup>331</sup> *Id.* at 4-6, 18, 21.

<sup>332</sup> *Id.* at 32.

<sup>333</sup> *Id.* at 29. The study excludes announcements that were accompanied by other material events such as "mergers, dividend declaration, splits, tender offers, new product announcements, charter amendments or substantial changes in capital structure." *Id.*

positions were being separated, and 172 (42%) announced a move toward duality in that the separated positions were being combined.<sup>334</sup> The study's results show positive stock market returns are more likely to follow the announcement of a decision to separate the CEO and Chair positions than the announcement of a decision to combine the positions.<sup>335</sup>

### C. *Weighing the Empirical Evidence*

Much of the empirical evidence on both the financial and nonfinancial effects of duality weighs in favor of separating the positions of CEO and Chair. Although the studies use different measures of corporate performance—some studies focusing only on large companies or specific industries, and some studies employing no control for other governance variables—when viewed together, they provide a convincing case that separating the CEO and Chair positions has a positive impact on corporate performance from both financial and nonfinancial perspectives.

Although grouped under Part IV.A as “Evidence Supporting Combined Positions,” the studies discussed in that section do not provide much empirical evidence that duality results in improved financial or nonfinancial performance—only that duality does not result in worse performance. With the exception of the Donaldson study in 1991, the studies in Part IV.A find that there is no difference in performance between companies that have a combined CEO-Chair and those that have a separate Chair. The Donaldson study finds that only return on equity is higher in dual CEO-Chair companies than in companies with a separate Chair, and that there is no difference between the two groups of companies with respect to gain in shareholder wealth.<sup>336</sup> All other studies in that section find no difference between companies that have a combined CEO-Chair and those that have a separate Chair with respect to involvement in illegal activities, bankruptcy filings, stock returns, return on equity, return on assets, return on capital, and market value added. Lacking the positive evidence to

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<sup>334</sup> *Id.* It should be noted the original sample size was comprised of 512 announcements, 104 of which were lost “due to incomplete returns on data.” *Id.*

<sup>335</sup> *Id.* at 6, 29-30. Stock market returns include abnormal return, which is “computed after subtracting predicted from realized stock returns,” and excess return, which is “computed after subtracting the return on the value-weighted market index from the firm’s realized return.” *Id.* at 30.

<sup>336</sup> Donaldson & Davis, *supra* note 62, at 56-58.

advocate affirmatively for the combined CEO-Chair structure, the studies only defensively protect duality in concluding that companies with a combined CEO-Chair are “no more likely” to underperform on nonfinancial measures<sup>337</sup> and “do not necessarily” have lower financial returns than companies with a separate Chair.<sup>338</sup>

The studies identified in Part IV.B as “Evidence Supporting Separate Positions” provide strong data that companies with nonduality perform better in both financial and nonfinancial metrics than companies with one individual occupying both roles. Several studies focus on the effect of duality on entrenchment indicators such as the adoption of antitakeover provisions, rates of CEO turnover, lengths of CEO tenure, and amounts of CEO compensation; data from these studies suggest that combining the CEO and Chair positions may increase the likelihood of entrenchment. For example, companies with a combined CEO-Chair are much more likely to adopt poison pills<sup>339</sup> and less likely to oust a nonperforming CEO.<sup>340</sup> Study results also indicate that the CEO-Chairs receive markedly higher compensation and longer tenure than the CEOs who do not also serve as the Chair.<sup>341</sup> In addition, the studies—covering over 12,000 companies in more than twenty industries—provide compelling evidence that companies with a separate board Chair perform significantly better on financial measures such as stock returns, return on equity, return on assets, return on investment, and profit margin.

The stock market also appears to favor the separation of the CEO and Chair positions. Results from several studies suggest that investors perceive companies that separate the positions to be better monitors of management and better advocates of shareholders than companies that combine the two positions. Thus, companies that announce they are separating the CEO-Chair structure experience significantly more positive stock returns than companies that announce they are combining the CEO and Chair positions.<sup>342</sup> In addition, the market reacts less negatively to antitakeover provisions

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<sup>337</sup> Kesner et al., *supra* note 6, at 796; *see also* Chaganti et al., *supra* note 200, at 414.

<sup>338</sup> Brickley et al., *supra* note 25, at 211; *see also* Baliga et al., *supra* note 2, at 46-51.

<sup>339</sup> Mallette & Fowler, *supra* note 3, at 1023.

<sup>340</sup> Cannella & Lubatkin, *supra* note 136, at 782; Harrison et al., *supra* note 1, at 222.

<sup>341</sup> Brickley et al., *supra* note 25, at 202.

<sup>342</sup> Balsam & Upadhyay, *supra* note 25, at 6, 30.



adopted by a board with a separate Chair than to those measures adopted by a board with a combined CEO-Chair.<sup>343</sup>

The empirical evidence indicates not only that duality correlates with lower corporate performance and shareholder value, but also that the negative effects of duality cannot be eliminated simply by putting more outside directors on the board or by installing a lead director.<sup>344</sup> It appears that the board Chair occupies a powerful and influential position in the corporate governance structure and that this individual's independence from management is pivotal to the company's performance.<sup>345</sup> Thus, having a nonexecutive Chair appears to be more crucial than having a lead director or an outsider-dominated board in reducing agency costs and enhancing shareholder value.<sup>346</sup>

## V. STAKEHOLDERS' VIEWS ON DUALITY

The board is charged with management and monitoring responsibilities in order to serve the best interests of the corporation and its shareholders, but directors may also consider the interests of other stakeholders when making corporate decisions.<sup>347</sup> The term "stakeholders" includes, in addition to shareholders, the corporation's employees,

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<sup>343</sup> Sundaramurthy et al., *supra* note 20, at 237-40.

<sup>344</sup> See Balsam & Upadhyay, *supra* note 25, at 4-6, 18-19, 21 (finding that although separation of the CEO and Chair positions correlates with higher financial performance, appointment of a lead director does not correlate with better financial results); Sundaramurthy et al., *supra* note 20, at 237-40 (finding that although the market reacts less negatively to antitakeover provisions adopted by boards with a separate Chair than to provisions adopted by boards with a CEO-Chair, the "market reacts more negatively to anti-takeover provisions adopted by outsider-dominated boards than to antitakeover provisions adopted by boards with fewer outsiders.").

<sup>345</sup> See Clark, *supra* note 5, at 271 (explaining that some corporate governance experts urge companies to have a substantial minority of insiders on the board but insist that the board chair be an outside director); MILLSTEIN REPORT, *supra* note 32, at 9 ("[T]he 'chairman of the board' title is not meaningless; it remains a strong hierarchical signal of board leadership to fellow board members, management and shareowners alike."); Ramirez, *supra* note 59, at 377 ("[T]here is powerful evidence that the separation of CEO and chairman of the board into two positions reduces agency costs and enhances firm value.").

<sup>346</sup> See Balsam & Upadhyay, *supra* note 25, at 32 ("[H]aving a lead director is not a substitute for having a separate chair."); MILLSTEIN REPORT, *supra* note 32, at 8 ("The lead director is better than nothing. But on a scale of 1 to 10, having a [non-executive] chairman is 10, and having a lead director is about a 4."); Sundaramurthy et al., *supra* note 20, at 240 ("[T]he market not only does not take into account the monitoring role of outsiders but actually discounts their presence.").

<sup>347</sup> Cf. Allen, *supra* note 28, at 279-81 (discussing the entity conception of corporations).

customers, and creditors; “stakeholders” may also include the community and environment in which the corporation operates.<sup>348</sup> The term has been defined even more broadly to include “any group or individual who can affect or is affected by the achievement of the organization’s objectives.”<sup>349</sup> Based on that broad definition, the list of stakeholders may be expanded to include “governments, competitors, consumer advocates, environmentalists, special interest groups, and the media.”<sup>350</sup>

Executives and boards of directors of companies that have a dual CEO-Chair governance structure naturally oppose splitting the leadership positions.<sup>351</sup> Some candidates for the CEO position in fact demand that they get the chairman’s seat along with the top executive spot.<sup>352</sup> Reasons for opposing separation of the roles focus on the desire to have only one person in charge of the company. These reasons include preventing dilution of the CEO’s power to effectively lead the company, avoiding potential rivalry between the CEO and the Chair, and eliminating potential confusion about who is responsible for the company’s performance.<sup>353</sup> As explained by an executive who supports combining the CEO and Chair positions, “They should be the same person. If they are not, the Chairman would be a figure-head or would usurp the role of the CEO.”<sup>354</sup>

Directors of companies that have a nonexecutive Chair, on the other hand, have expressed strong support for splitting the position.<sup>355</sup> The 2008 Public Company Governance Survey

<sup>348</sup> Licht, *supra* note 28, at 651.

<sup>349</sup> See *id.* at 722 (quoting R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984)).

<sup>350</sup> *Id.* at 722.

<sup>351</sup> Caggiano, *supra* note 51, at 5; Catherine M. Daily & Dan R. Dalton, *CEO and Board Chair Roles Held Jointly or Separately: Much Ado About Nothing?*, 11 ACAD. MGMT. EXECUTIVES 11, 11 (1997); MILLSTEIN REPORT, *supra* note 32, at 20; Worrell et al., *supra* note 18, at 499. See Balsam & Upadhyay, *supra* note 25, at 54 (referencing the Exxon Mobil board’s recommendation that shareholders vote against a shareholder proposal to separate the CEO and Chair positions); Millstein & MacAvoy, *supra* note 30, at 1287 n.18 (noting that opposition to separation of the roles originates from management groups, including The Business Roundtable, a group of chief executives from large public companies).

<sup>352</sup> Caggiano, *supra* note 51, at 5. See Lublin, *supra* note 57 (recounting Edward Breen’s desire for both the CEO and Chairman jobs at Tyco International).

<sup>353</sup> Lorsch & Lipton, *supra* note 45, at 79; see also Caggiano, *supra* note 51, at 5 (separation may create rivalry between the roles); Daily & Dalton, *supra* note 351, at 11 (“[J]oint leadership . . . provides a unified focus and communicates strong leadership to the external community.”).

<sup>354</sup> Toda & McCarty, *supra* note 81, at 213.

<sup>355</sup> MILLSTEIN REPORT, *supra* note 32, at 15.

conducted by the National Association of Corporate Directors shows that 72.8% of the directors serving on boards with a separate Chair believe that there is great benefit from splitting the CEO and Chair positions, while only 6.7% of the directors do not perceive a benefit from separating the roles.<sup>356</sup>

Business leaders have also expressed concern about duality and have voiced their support for the nonexecutive Chair role. Harold Geneen, former chairman of International Telephone & Telegraph, believes that the board's role is to judge the performance of the company's management, especially the CEO.<sup>357</sup> Mr. Geneen opposes duality on the basis that the CEO, as the chief professional manager for the company, should not also assume the leadership position on the board because the CEO "cannot represent the shareholders and impartially sit in judgment on himself."<sup>358</sup> Similarly, Carl Icahn, a prominent financier, views the weakness in board oversight as a contributing factor to the recent economic crisis, and one of his suggestions for board reform is to separate the roles of the CEO and the board Chair.<sup>359</sup> Compaq Computer's former chairman, Benjamin Rosen, opines that when the CEO also serves as the board Chair, "[c]hecks and balances have been thrown to the wind."<sup>360</sup> Robert Monks, a venture capitalist and a director of numerous public companies, states it even more harshly: "You're really talking about, when you have a combined chairman and C.E.O., a dictatorship."<sup>361</sup>

Many shareholders have voiced their preference for splitting the top leadership positions. Mutual funds, pension funds, other institutional shareholders, and shareholder activists have frequently lobbied for companies to adopt and implement governance policies that separate the positions of CEO and board Chair.<sup>362</sup> For example, the United Shareholders' Association, the New York City Employees Retirement System, Ram Trust Services, and the California Public Employees' Retirement System have submitted shareholder proposals to

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<sup>356</sup> *Id.*

<sup>357</sup> Kesner et al., *supra* note 6, at 790.

<sup>358</sup> Rechner & Dalton 1991 Study, *supra* note 286, at 155.

<sup>359</sup> Cheffins, *supra* note 30, at 54-55.

<sup>360</sup> Jones & Kim, *supra* note 110.

<sup>361</sup> Dashka Slater, *Resolved: Public Corporations Shall Take Us Seriously*, N.Y. TIMES, Aug. 12, 2007 (Magazine), at 22.

<sup>362</sup> Balsam & Upadhyay, *supra* note 25, at 2, 54; Brickley et al., *supra* note 25, at 190; MILLSTEIN REPORT, *supra* note 32, at 15; Stevenson, *supra* note 32; Sundaramurthy et al., *supra* note 20, at 233; Worrell et al., *supra* note 18, at 500.

urge the boards of directors of large public companies, such as General Motors, Sears, and Exxon-Mobil, to require that an outside director serve as the chairperson of the board.<sup>363</sup> These shareholders view the separation of the CEO and Chair positions as a good governance practice that signals the board's ability and willingness to control management and protect shareholder interests.<sup>364</sup>

Shareholder proposals to split the CEO and Chair positions have received increasing support from shareholders in recent years, and although nonbinding on the board of directors, these shareholder resolutions have been successful in pressuring some companies to split the positions.<sup>365</sup> At Washington Mutual, for example, the board of directors decided in 2008 to replace CEO Kerry Killinger as chairman of the board in response to a majority vote by shareholders to separate the positions.<sup>366</sup> Similarly, at Bank of America, CEO Kenneth Lewis relinquished his role as board Chair in mid-2009 after a majority of the company's shareholders voted in favor of splitting the positions.<sup>367</sup> Later that year, CEO John Mackey stepped down as Chair of Whole Foods Market after

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<sup>363</sup> See Balsam & Upadhyay, *supra* note 25, at 54 (referencing a 2008 shareholder proposal by clients of Ram Trust Services to separate the CEO and Chair positions at Exxon-Mobil); James Kim, *Sears Pushed to Split CEO's Job*, USA TODAY, Apr. 22, 1993, at 2B (reporting on the efforts of the United Shareholders' Association and the New York City Employees Retirement System to separate the jobs of CEO and Chairman at Sears); Pi & Timme, *supra* note 291, at 516 (commenting on the efforts of institutional shareholders to split the combined role of CEO-Chair at General Motors); Worrell et al., *supra* note 18, at 505 (discussing the California Public Employees' Retirement System's support for corporations to have a separate Chair).

<sup>364</sup> Sundaramurthy et al., *supra* note 20, at 233. See Balsam & Upadhyay, *supra* note 25, at 54 (explaining that the inherent dangers of duality include "lack of responsiveness and arbitrariness"); Kim, *supra* note 363 ("[S]plitting the two jobs would allow the board to scrutinize the CEOs with more rigor."); Rechner & Dalton 1991 Study, *supra* note 286, at 159 ("Many funds managers want to see outside directors installed as chairmen of the board because they do not trust CEOs to serve the shareholders first and themselves second."); Worrell et al., *supra* note 18, at 505 (quoting Dale Hanson, former CEO of the California Public Employees' Retirement System as commenting that "our whole thrust has been the empowerment of boards to do what we were always led to believe boards were supposed to do: provide oversight to management—the hiring, and if necessary, the firing").

<sup>365</sup> See Claudia H. Deutsch, *Revolt of the Shareholders*, N.Y. TIMES, Feb. 23, 2003, at 31 ("When Dow Chemical recently said it would split the job of chairman and chief executive, the A.F.L.-C.I.O. quietly scrapped a resolution demanding that Dow do so."); MILLSTEIN REPORT, *supra* note 32, at 15 (stating that shareholder proposals to split the positions received a record average of 31.3% of the votes cast, including more than 40% of the votes at Pfizer, Weyerhaeuser, and Time Warner).

<sup>366</sup> Cheffins, *supra* note 30, at 47.

<sup>367</sup> *Independent Board Chair*, COUNCIL OF INSTITUTIONAL INVESTORS (Mar. 2009), <http://www.cii.org/independentboardchair> [hereinafter CII Statement].

years of pressure from shareholders to separate the roles of the chief executive and the board chair.<sup>368</sup>

Various industry groups are supportive of splitting the top corporate leadership positions. The National Association of Corporate Directors (“NACD”), for example, identifies that one of the membership’s Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies is that corporate governance should be structured to provide leadership for the management group that is distinct from leadership for the board.<sup>369</sup> The NACD’s guidelines for the composition of its own board of directors also specify that the “positions of Chairman of the Board and CEO are separate,” the “CEO may not serve as Chairman,” and the “Chairman of the Board shall be an independent Director.”<sup>370</sup> Other organizations that have voiced their support for separating the top leadership roles include the Organization for Economic Co-operation and Development,<sup>371</sup> the Council of Institutional Investors,<sup>372</sup> and the Millstein Center for Corporate Governance and Performance.<sup>373</sup>

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<sup>368</sup> *Id.*

<sup>369</sup> NAT’L ASS’N OF CORP. DIRS., KEY AGREED PRINCIPLES TO STRENGTHEN CORPORATE GOVERNANCE FOR U.S. PUBLICLY TRADED COMPANIES 5 (2009), <https://secure.nacdonline.org/StaticContent/StaticPages/DM/NACDKeyAgreedPrinciples.pdf>. The NACD, with membership of nearly 10,000 directors and executives from public, private, and nonprofit companies, provides research and resources to assist corporate directors in fulfilling their responsibilities. *About NACD*, NAT’L ASS’N OF CORP. DIRS., <http://www.nacdonline.org/nacd/default.asp> (last visited Jan. 28, 2010).

<sup>370</sup> NAT’L ASS’N OF CORP. DIRS., GOVERNANCE GUIDELINES 6 (2009), <http://www.nacdonline.org/images/GovernanceGuidelines%20050617.pdf>.

<sup>371</sup> *See* ORG. FOR ECON. CO-OPERATION AND DEV., PRINCIPLES OF CORPORATE GOVERNANCE 63-64 (2004), <http://www.oecd.org/dataoecd/32/18/31557724.pdf> (“Separation of the two posts may be regarded as good practice, as it can help to achieve an appropriate balance of power, increase accountability and improve the board’s capacity for decision making independent of management.”). The OECD is an organization consisting of thirty member countries, including the United States, that works to promote policies to enhance economic development and maintain financial stability. *Id.* at 2.

<sup>372</sup> *See* CII Statement, *supra* note 367 (affirming that “the Council has long advocated that boards should be chaired by an independent director”). The Council of Institutional Investors is an “association of public, union and corporate pension funds with combined assets that exceed \$3 trillion” that “strives to educate its members, policymakers and the public about good corporate governance.” *About the Council*, COUNCIL OF INSTITUTIONAL INVESTORS, <http://www.cii.org/about> (last visited Jan. 28, 2010).

<sup>373</sup> *See, e.g.*, MILLSTEIN REPORT, *supra* note 32, at 3 (“Having an independent chairman is a means to ensure that the CEO is accountable for managing the company in close alignment with the interests of shareowners, while recognizing that managing the board is a separate and time intensive responsibility.”). The Millstein Center, part of the Yale School of Management, “sponsors research . . . and publishes policy briefings on emerging corporate governance issues.” *Id.* at 4.

Corporate governance advisers and rating services regard the nonexecutive Chair structure as a better governance structure than the CEO-Chair structure.<sup>374</sup> These advisers and services provide corporate governance ratings to various customers, including “investors, insurance companies, financial and securities analysts . . . , financial institutions, and the rated companies themselves.”<sup>375</sup> Customers use the ratings “to make investment decisions . . . , determine premiums, prepare financial and stock reports . . . , determine credit risks, and benchmark governance practices.”<sup>376</sup> Citing the enhanced ability of a nonexecutive Chair to monitor management’s performance, the governance raters assign strong grades to companies that separate their CEO and Chair positions.<sup>377</sup>

Regulators have expressed support for board reforms that restrict the company’s CEO from serving as board Chair.<sup>378</sup> Current and former commissioners of the U.S. Securities and Exchange Commission have spoken in favor of separating the positions as a means of reducing the power of the chief executive over the board.<sup>379</sup> Regulators believe that the separation of the roles would strengthen the governance of U.S. corporations because the CEO’s role is to lead the management group and serve as its spokesperson, whereas the Chair’s role is to lead, and be the spokesperson for, the director group that oversees the management group.<sup>380</sup>

Legislators have also promoted legislation to separate the CEO and Chair positions.<sup>381</sup> In Congress, Senators Charles Schumer and Maria Cantwell introduced the Shareholder Bill of Rights Act of 2009, and Representative Gary Peters introduced the Shareholder Empowerment Act of 2009; both bills contain a provision requiring public companies to have an independent board chair.<sup>382</sup> On the state front, the North

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<sup>374</sup> See Vo, *supra* note 24, at 13 (discussing the governance rating criteria).

<sup>375</sup> *Id.* at 2.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 13.

<sup>378</sup> Brickley et al., *supra* note 25, at 190.

<sup>379</sup> See *id.* (citing then-SEC commissioner—now SEC chairperson—Mary Schapiro’s support of separating the roles); Dobrzynski, *supra* note 127, at 124 (quoting former SEC chairman Harold Williams’s view that the CEO should not also serve as the board Chair because “[c]ontrol of the agenda and pace of the meeting is a powerful control”).

<sup>380</sup> See Kesner et al., *supra* note 6, at 790 (citing the view of former SEC chairman Harold Williams).

<sup>381</sup> Brickley et al., *supra* note 25, at 190.

<sup>382</sup> Cheffins, *supra* note 30, at 55 & n.235.

Dakota legislature in 2007 successfully added a corporate governance chapter to the state's business corporation statute; one of the governance provisions prohibits the board chair from serving as an executive officer of the corporation.<sup>383</sup> The North Dakota corporate governance chapter was adopted "to strengthen corporate democracy and improve the performance of publicly traded corporations," and the chapter provides an "opt-in" mechanism in which corporations may elect to be subject to the governance rules of the chapter.<sup>384</sup>

In sum, various stakeholder groups have long advocated for separation of the CEO and Chair positions. In the past decade, revelation of accounting and financial manipulation by chief executives at prominent companies, stock option backdating by senior management at hundreds of major corporations, and excessive risk taking by top executives at financial and investment institutions may have fueled the strong support among shareholders, business leaders, industry groups, corporate governance advisers, regulators, and legislators for more vigorous oversight of the company's CEO by a separate and independent board Chair.

## VI. CONCLUSION

Theoretical arguments and empirical evidence, as reflected in financial and nonfinancial metrics, weigh strongly in favor of a leadership structure that separates the CEO and Chair positions. Having a nonexecutive Chair, instead of a dual CEO-Chair, provides a governance framework that is better suited to the fulfillment of the board's fundamental responsibilities to oversee business operations and monitor management conduct for the purpose of enhancing shareholder value. Furthermore, empirical evidence indicates not only that duality correlates with lower board performance and shareholder value, but also that the negative effects of duality cannot be eliminated simply by putting more outside directors on the board or by installing a lead director.

The recognition that board performance and corporate success do not depend solely on whether the positions of CEO and Chair are held by one or two individuals does not preclude

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<sup>383</sup> N.D. CORP. GOVERNANCE COUNCIL, EXPLANATION OF THE NORTH DAKOTA PUBLICLY TRADED CORPORATIONS ACT 3 (2007), *available at* <http://ndcgc.org/Reference/Explain405.pdf>.

<sup>384</sup> *Id.* at 1.

the conclusion that the nonexecutive Chair structure is better than the duality CEO-Chair structure for fulfilling directorial responsibility and enhancing shareholder value. Not every company that combines the CEO and Chair positions is a governance failure, and not every company that separates the CEO and Chair positions is a model of good governance. It should be noted, however, that a substantial majority of the companies that were at the heart of the recent economic meltdown had a combined CEO-Chair structure before the crisis erupted.<sup>385</sup> As these financial institutions struggled over the past couple of years, many have voluntarily changed their leadership structure by electing a nonexecutive Chair.<sup>386</sup> Thus, although many variables affect the board's ability to perform its management and monitoring functions and the corporation's ability to generate shareholder value, both conceptual reasons and empirical evidence point to duality as a governance variable that is correlated with lower board performance and poorer corporate financial health. So, while there is no guarantee that separating the leadership positions alone will result in an effective board or strong financial results, splitting the roles will give the company a better chance of achieving vigilant board oversight and corporate financial success.

The lack of guarantee that separating the roles will bring governance and financial benefit to all companies suggests that perhaps this split leadership structure should not be imposed on all companies. In smaller, private companies where the CEO and Chair is the majority shareholder, or where there are controlling shareholders, there is effectively no separation of control and ownership, and the potential agency cost is minimal. Separation of the executive and board leadership roles in such companies is unlikely to enhance board performance or advance shareholder interests. Thus, the conclusion that companies should separate their CEO and Chair positions is reserved for larger, public companies.

A thorough analysis of which, if any, regulatory bodies or other institutions should be charged with implementing and enforcing the nonexecutive Chair structure is beyond the scope of this article. Only a few thoughts about this question are presented here for potential further discussion elsewhere. If we

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<sup>385</sup> MILLSTEIN REPORT, *supra* note 32, at 18.

<sup>386</sup> *Id.* at 15.



are to move beyond the current system where companies are permitted to choose the leadership structure that they want, there are various potential approaches to enforcing a separation of the CEO and Chair positions. State legislatures are generally regarded as the primary source of rules on corporate governance,<sup>387</sup> and they may establish the nonexecutive Chair requirement in the states' corporate statutes. Implementing the desired leadership structure through state statutes, though, is unlikely to be achieved easily or quickly, and the task may be more quickly accomplished and uniformly applied through federal laws or stock market listing standards.<sup>388</sup> As discussed elsewhere in this article, many countries around the world have rules that prohibit corporations from having one individual hold both jobs of CEO and board Chair. Slightly different from the strict requirement of independent board leadership is the "comply or explain" system that exists in the United Kingdom and Canada.<sup>389</sup> The nonexecutive Chair structure is not a novel or untested model of corporate leadership, and the evidence and analysis presented in this article suggest that we make independent board leadership the default corporate governance structure in the United States.

There are limits to what the proposed structural change in corporate leadership can accomplish.<sup>390</sup> Understanding the limitation, however, does not diminish the significance of the benefits that this change may bring. Concentrating executive and board leadership in one person magnifies the opportunity for abuse; dispersing these powers reduces the potential for such behavior. Separating the CEO and Chair positions also signals the board's recognition and willingness to exercise its monitoring responsibilities. Even if such a signal is more symbolic than real, adopting the nonexecutive Chair structure

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<sup>387</sup> Ramirez, *supra* note 59, at 351.

<sup>388</sup> See *id.* at 354 ("Some commentators have suggested that federal standards should be expanded or that federal incorporation should displace the operation of state corporate governance standards for publicly held companies . . .").

<sup>389</sup> MILLSTEIN REPORT, *supra* note 32, at 14.

<sup>390</sup> See Cheffins, *supra* note 30, at 55 ("Despite [British] banks having the benefit of a separate chairman and CEO, the U.K. banking sector failed as profoundly as its U.S. counterpart in 2008 . . ."); Sonnenfeld, *supra* note 92, at 113 ("Without a doubt, these good-governance guidelines have helped companies avoid problems, big and small. But they're not the whole story or even the longest chapter in the story."); Tuy-Nga T. Vo, *Lifting the Curse of the SOX Through Employee Assessments of the Internal Control Environment*, 56 U. KAN. L. REV. 1, 24 (2007) ("Structural reforms do not constitute a comprehensive and effective cure for corporate ailments.").

may be a highly effective way for the company to recognize the stakeholders' voices. In light of the ample evidence that duality correlates with lower financial performance, acceding to the stakeholders' call to separate the roles may soothe the anger being voiced against corporate leaders—even if it will not restore the financial loss that the investing public has suffered. Thus, although splitting the CEO and Chair positions is no panacea for the corporate ailments with which we have become familiar, it would not be a meaningless exercise. It would increase the odds of getting the best from the board and the management, both of which are entrusted with creating real economic value and achieving optimal business performance.