

The Daily Deal

SERVING THE DEAL COMMUNITY

TUESDAY FEBRUARY 13, 2007
VOLUME 18 ISSUE 30

UPDATE



Pressure from Breeden pushes Applebee's to explore possible sale

BY DONNA BLOCK

Restaurant chain Applebee's International said Tuesday it is exploring strategic alternatives, including the sale of the company, amid pressure from a shareholder to make changes.

The move comes after a hedge fund run by former Securities and Exchange Commission chairman Richard Breeden criticized the company's performance in a 13D filing with the SEC last month.

Breeden Capital Management has said it wants the company, whose shares have substantially underperformed compared with others in its peer group, to reduce capital expenditures, boost cash returned to shareholders and sell more restaurants to franchisees.

The hedge fund said that many of the company's problems stemmed from, among other things: a fundamentally flawed growth strategy; ineffective leadership during several years before Dave Goebel became chief executive officer; serious internal marketing and finance weaknesses; and poor governance practices.

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GATES CHECKS IN TO FOUR SEASONS

Microsoft founder, Saudi prince take over hotel operator in \$3.8B deal. By David Carey

BLACKSTONE BEGINS CARVING UP EOP

Buyout firm has already agreed to sell several properties. By David Elman

HOME DEPOT TO REVIEW HD SUPPLY UNIT

Retailer hires Lehman to explore possible sale of wholesale business. By Carolyn Murphy

WHAT WE'RE SAYING

The best of our *blogs*

DEALWATCH: HOTELS

Four Seasons Hotels has accepted a \$3.8 billion offer to go private, three months after it was proposed, becoming the latest hotel property group to draw big names and big money. Bill Gates, Saudi Arabian Prince Alwaleed Bin Talal Bin Abdulaziz Alsaud and the company's controlling shareholder Isadore Sharp offered \$82 a share for the luxury hotelier, which counts 71 properties in 31 countries. The buyout offer for Ontario-based Four Seasons is about a 28% premium to the stock's close before the proposal was unveiled. It's a lofty figure, but these three aren't the only rich guys shopping in the sector. The overall market for hotels in the U.S. is about \$100 billion per year, one venture capitalist told us a few months ago, and wealthy bidders are looking far and wide to stake claims. ■ —Carolyn Murphy (Dealscape)



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TOP STORY

Applebee's to review strategy

Shareholders demand changes, citing executive perks

BY DONNA BLOCK

Restaurant chain **Applebee's International Inc.** said Tuesday it is exploring strategic alternatives, including the sale of the company, amid pressure from a shareholder to make changes.

Overland Park, Kan.-based Applebee's said there is no assurance of any transaction. It added, however, that certain strategic alternatives could affect its previously issued guidance. As a result, the company, which has a market capitalization of \$1.8 billion, withdrew its fiscal year 2007 forecast.

Applebee's said it does not expect to reveal anything more until after the committee has completed its review and evaluated its options.

Applebee's has formed a committee of independent directors, which will receive financial advice from **Citigroup Global Markets Inc.** The company itself has hired **Banc of America Securities LLC** as financial adviser. Legal advisers are **Cravath, Swaine & Moore LLP** of New York, and **Blackwell Sanders Peper Martin LLP** of Kansas City, Mo.

The move comes after a hedge fund run by former Securities and Exchange Commission chairman Richard Breeden criticized the company's performance in a 13D filing with the SEC last month.

Breeden Capital Management LLC has said it wants the company, whose shares



FORMER SEC CHAIRMAN RICHARD BREEDEN

have substantially underperformed compared with others in its peer group, to reduce capital expenditures, boost cash

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TOP STORY

Mills declares Simon-Farallon bid superior

BY PETER MOREIRA

Mall developer **Mills Corp.** on Tuesday gave Canada's **Brookfield Asset Management** three days to improve its offer for the company or lose out to a "superior" bid from **Simon Property Group Inc.** and **Farallon Capital Management LLC.**

In a statement, Chevy Chase, Md.-based Mills said its board has concluded that the \$1.6 billion offer from Indianapolis-based Simon and Farallon, a \$26 billion hedge fund based in San Francisco, is better for shareholders and more likely to be completed quickly than the original offer from Brookfield.

The Mills on Jan. 17 had agreed to sell out to Toronto-based Brookfield for \$21 a share, or a total price of the company's equity of \$1.35 billion. Mills also has about \$6 billion of debt, which the eventual buyer will have to take on. Earlier this month Simon and the hedge fund Farallon topped the original offer with a \$24-a-share bid.

"In making its determination, the board considered the advice of its outside legal counsel and independent financial advisors, and considered a number of factors, including the higher per-share consideration that Simon and Farallon have offered and the likelihood that the Simon-Farallon transaction could be completed more quickly than the Brookfield merger," Mills said in its statement.



Goldman, Sachs & Co. and **J.P. Morgan Securities Inc.** are providing Mills with financial advice, while **Wachtell, Lipton, Rosen & Katz** and **Hogan & Hartson LLP** are providing legal counsel.

The Mills board has given Toronto-based Brookfield three business days to renegotiate its offer. If it does not do so to the board's satisfaction, the Mills board plans to rescind the original agreement and open talks with Simon and Farallon.

Mills owns 38 malls in the U.S. covering 47 million square feet, and analysts have valued its holdings at anywhere from \$25 to \$55 a share. The company has been trying to emerge from its heavy debt burden and

spent much of last year shedding assets.

Merrill Lynch & Co. is providing financial advice to Simon, while Peter Golden is leading a **Fried, Frank, Harris, Shriver & Jacobson LLP** team providing the company legal counsel.

Robert B. Schumer, Jeffrey D. Marell, Valerie Radwaner, David R. Sicular and Mitchell L. Berg of **Paul, Weiss, Rifkind, Wharton & Garrison LLP** and William Orbe of **Richards Kibbe & Orbe LLP** are leading legal teams representing Farallon.

Credit Suisse Group and **Brookfield Financial Real Estate Group** are financial advisers to Brookfield Asset Management, which is receiving legal advice from a **Sidley Austin LLP** team. ■

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returned to shareholders and sell more restaurants to franchisees.

Breeden Capital Management's parent, **Breeden Partners**, owns 3.9 million shares of Applebee's or slightly more than 5% of the company's outstanding shares.

The hedge fund said many of the company's problems stemmed from among other things: a fundamentally flawed growth strategy; ineffective leadership during several

years before Dave Goebel became CEO; serious internal marketing and finance weaknesses and poor governance practices.

To that end, in a Jan. 25 letter addressed to Douglas Conant, chairman of Applebee's compensation committee, and filed with the SEC, the hedge fund said even while the company has lost millions in value over the past few years, executives still received more than \$30 million in bonuses. They also uncovered some other executive perks they considered

highly questionable, including personal use of corporate aircraft and even the use of shareholder funds to pay executives' personal income taxes.

The hedge fund said: "We do not believe that shareholder interests are served by turning corporate aircraft into flying limousines for senior executives' personal vacations. Just as importantly, this practice is inconsistent with the wholesome 'neighborhood values' that Applebee's claims to embody as a company." ■

PRIVATE EQUITY

Gates checks into Four Seasons hotel chain

BY DAVID CAREY

Canadian luxury hotels operator **Four Seasons Hotels Inc.** said Monday it had accepted a three-month-old takeover offer of \$82 a share, or \$3.8 billion including debt, from **Microsoft Corp.** founder Bill Gates and an affiliate of Saudi Arabia's Prince Alwaleed Bin Talal Bin Abdulaziz Al Saud.

Toronto-based Four Seasons, which according to its Web site manages 74 upscale hotels and resorts in 31 countries, said a special committee of its board approved the bid made Nov. 3 by Gates' **Cascade Investment LLC** and by Prince Alwaleed's **Kingdom Hotels International**.

The two together own just over 31% of Four Seasons' shares, according to Securities and Exchange Commission filings. Kingdom, which also has significant stakes in the Fairmont and Raffles hotel chains, acquired its Four Seasons stock in 1994; Cascade acquired most of its interest in 2003. Isadore Sharp, Four Seasons' chief executive, plans to co-invest in the deal and keep running operations.

The deal evidently surprised some investors, who had bid up Four Seasons' shares to as high as \$84.50. The shares closed at \$83.99 Friday in New York. On Monday the stock had plunged 3% to \$81.36 late in the session. When first lodged Nov. 3, the bid represented a 28.4% premium to the stock's closing price the prior day.



MICROSOFT FOUNDER BILL GATES

Four Seasons will sell for an eye-popping 43 times trailing 12-month Ebitda through Sept. 30, 2006. By contrast, **Blackstone Group's** \$39 billion purchase of **Equity Office Properties** last week came at roughly 20 times Ebitda.

Four Seasons and the investor group did not specify Monday how the buyout will be financed. But in view of the rich acquisition multiple, the buyers seem unlikely to deviate much from an equity-rich financing plan that Cascade disclosed last year.

That plan called for Cascade and the Bill and Melinda Gates Foundation, which together own 8.2% of Four Seasons, and Kingdom, a 23% owner, to reinvest their shares, which at \$82 a share have a value of \$970 million.

The two also said they would inject \$1.87 billion of new equity, putting total equity at \$2.84 billion, or 75% of the deal value.

A group of banks led by **Citigroup Global Markets Inc.**, **J.P. Morgan Securities Inc.** and **J.P. Morgan Chase Bank NA** are arranging debt financing for the deal, Four Seasons said.

It further disclosed that Isadore Sharp was entitled to receive about \$289 million in cash proceeds in satisfaction of a long-term incentive agreement that Four Season's shareholders had approved 18 years ago. ■

Nexity stock up on asset swap talk

BY PAUL WHITFIELD IN PARIS

Shares in France's largest residential property developer, **Nexity SA**, hit record highs Tuesday on speculation a planned shares-for-assets swap with French lender **La Caisse Nationale des Caisses d'Épargne et de Prévoyance** would lead to an offer.

Nexity stock traded as high as €71.60 a share before falling back to €69.05 in the late afternoon, up 2.6% on its previous close and equal to a market capitalization of €2.23 billion (\$2.92 billion), after the company said late Monday it had entered exclusive talks to swap a 51.5% shareholding for the property business of Caisses d'Épargne.

The two businesses have been in talks for several weeks over a possible deal that would see Nexity incorporate Caisses d'Épargne's home loans unit, **Crédit Foncier de France**, as well as its real estate units, **Locondus** and **Eurosic**, in exchange for 51.5% of Nexity's stock.

"In this scenario Nexity shareholders would see a substantial valuation uplift," wrote Mickael Van den Hauwe, a Brussels-based analyst with **Dexia NV/SA**, in a note.

Under French law Caisses d'Épargne's acquisition of a stake greater than 33.3% would normally require it to make an offer for the outstanding shares in Nex-

ity. The would-be partners have applied to French stock market regulator **Autorité des Marchés Financiers** for exemption from the regulation.

The AMF is not likely to grant the exemption, French daily **La Tribune** reported Tuesday, without citing sources.

While some analysts thought a negative ruling would lead to a public offer for Nexity by Caisses d'Épargne, others, including those at Paris-based **Kepler Equities**, speculated it could kill the deal.

Charles Milhaud, the chairman of Caisses d'Épargne, France's No. 4 bank, said he wants to create a real estate division within the group.

Talks between Caisses d'Épargne and Nexity will continue until April 30, the two companies said in a statement. ■

M&A

Ericsson moved to target Internet television

BY ANDREA ORR IN SAN FRANCISCO

Swedish telecommunications equipment giant **LM Ericsson** signaled its move into the fledgling Internet television business on Monday by announcing the purchase of **Entrisphere Inc.**, a startup maker of fiber-access technology used to deliver digital media to consumers.

Although Ericsson did not disclose terms of the deal, **Prudential Securities** analyst Inder Singh estimated that Santa Clara, Calif.-based Entrisphere, whose revenue he estimated at \$25 million to \$50 million, was sold for \$200 million to \$300 million.

The transaction “demonstrates Ericsson’s desire to be stronger as a wireline player,” said Simon Leopold, an analyst with **Morgan Keegan & Co.** in New York, adding that the deal underscores the ongo-

ing convergence of fixed-line and wireless technologies.

“People have been talking about this convergence for a long time, but it’s now much closer to becoming a reality and not just a buzzword,” he said.

Entrisphere has raised \$175 million in venture capital from investors including **VantagePoint Venture Partners, Duff Ackerman & Goodrich LLC, Capital Technologies CDPQ, Crosspoint Venture Partners, Ontario Teachers’ Pension Plan Board, Benchmark Capital and Accel Partners.**

Although the 7-year-old Entrisphere represents a relatively small acquisition for Ericsson, which has a market capitalization of more than \$57 billion, it could herald

important changes in the competitive landscape among telecom gear companies.

Naperville, Ill.-based **Tellabs Inc.**, for instance, makes fiber-access technology similar to Entrisphere’s and has long been viewed as a likely acquisition target by Ericsson. The purchase of Entrisphere not only diminishes Tellabs’ acquisition prospects, but also could hurt its ability to compete as a standalone player now that a key rival has teamed up with a major international equipment maker, analysts said.

Ittai Kidron, who follows Ericsson for **CIBC World Markets**, said Ericsson and Entrisphere were already working as partners to compete for contracts with phone service providers, although they recently lost a bid for a contract with **Verizon Communications Inc.** “We believe the loss was in part due to uncertainty regarding Ericsson’s commitment” to the fixed-line business, Kidron wrote in a research report. ■

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VENTURE CAPITAL

Benchmark backs LiveOps in \$28M round

Funding comes two months after startup hired former eBay COO as chief executive

BY PAUL BONANOS

Benchmark Capital has led a \$28 million third round of funding for distributed call center operator **LiveOps Inc.**, a profitable startup linking thousands of work-at-home call operators with customers in need of assistance.

Menlo Park, Calif.-based Benchmark joined existing investors **CMEA Ventures** and **Menlo Ventures**, both also of Menlo Park, in the round. The pair had previously led LiveOps' \$22 million second round, which followed an early angel investment. Of the \$22 million, \$10 million went into the company, while the remainder went to existing investors.

The funding comes about two months after LiveOps introduced as its chief executive Maynard Webb, the longtime chief operating officer at **eBay Inc.** Benchmark general partner Bill Gurley introduced LiveOps to Webb, whom he had known through the firm's early investment in eBay.

Boutique investment bank **Savvian Advisors LLC** of San Francisco was a financial adviser to LiveOps as the transaction was completed. Webb said the firm explored several strategic alternatives before LiveOps selected Benchmark's private investment offer.

Although neither Gurley nor Webb would supply precise information regarding LiveOps' revenue position or valuation, Gurley said both numbers are "well north of what you might expect for a public company," while Webb added that LiveOps' revenue is nearly doubling each year.

Rather than pursue an offering, however, LiveOps elected to take in new funding and hire a new chief executive with significant operational expertise, according to Gurley. In Webb, they found someone

highly familiar with the software-as-a-service model popularized by **Salesforce.com Inc.**, where Webb remains on the board of directors.

For Benchmark, the investment is one of few the firm makes beyond the earliest formative rounds. "About 70% of our investments are Series A, first-money-in," Gurley said. "The other 30% are opportunistic investments in either companies that we've missed in categories we'd like to get into, or in executives we know and trust. In LiveOps, we had the chance to invest in a company that fits both criteria."

LiveOps has created a software platform that enables call-center agents to work at home rather than in a centralized office, and communicate with each other

LiveOps has created a software platform that enables call-center agents to work at home rather than in a centralized office.

using various collaborative tools. LiveOps currently employs about 10,000 agents, and plans to add another 5,000 during the next year.

Many customers choose to deploy LiveOps' platform but use their own agents. Gurley said that some of those eventually convert to LiveOps' agent marketplace, but acknowledged that one day the startup could reap more revenue from customers who bring their own agents than those who use LiveOps' agent network.

Although decentralized networks of call center agents have existed for several years, the concept seems to be reaching a critical mass of users. Gurley compared the strategy to open-source coding, which

involves a decentralized network of programmers.

"Although the idea of having coders work together in a decentralized fashion was initially met with skepticism, eventually people found out that decentralized networks could actually be more reliable," he said, noting the increased productivity of employees with a proper work/life balance and a more comfortable work environment.

In addition, more competitive long-distance telephone rates and greater penetration of broadband Internet connections to private homes have reduced the cost of operating such networks, Gurley said.

"Our network is uniquely qualified to handle big spikes in traffic, as with **1-800-Flowers.com [Inc.]** on Valentine's Day, or pizza delivery during the Super Bowl," Webb added.

LiveOps expects to maintain continued profitability while investing in continued software development, additional agents, and an international presence. Webb also hinted that the company's technology would somehow be applied to other sectors outside of the customer-service realm, but declined more specifics.

Launched in 2004, LiveOps was created through the merger of an earlier company, also called LiveOps, with CallCast, an outsourced call services company. The relaunched LiveOps was guided by chief executive Bill Trenchard until Webb's arrival, when Trenchard became chairman.

Patrick A. Pohlen, the global co-chair of the Venture and Technology group in the Menlo Park office of **Latham & Watkins LLP**, advised Benchmark as the deal was completed. **Gunderson Dettmer Stough Villeneuve Franklin & Hachigian LLP** provided legal services to LiveOps. ■

REGULATION

Gains against poison pills spur activist tactics

BY RON OROL IN WASHINGTON

Activist institutional shareholders shifted their focus to pressing for investor rights to elect directors and influence executive compensation and spent less time on removing anti-takeover measures, according to SEC numbers. Shareholder rights activists say the change in focus indicates their movement is making a difference in corporate governance.

Martin Dunn, deputy director of the agency's Corporate Finance division, pointed out to securities lawyers at the Practising Law Institute's annual "SEC Speaks" conference that investors submitted 324 shareholder proposals in 2006, somewhat less than the 345 measures they submitted in 2005.

The vast majority of these nonbinding shareholder provisions focused on two areas: seeking a shareholder vote to approve executive compensation and corporate bylaw changes that require directors to receive an outright majority of voting shares to be elected to the board. Such a majority voting system would replace the plurality system that allows a director candidate to win, even if a majority of participating shareholders withhold their proxies or actually abstain from voting.

The number of shareholder proposals seeking removal or shareholder votes on anti-takeover proposals such as poison pills and staggered boards declined but was still substantial, Dunn said in an interview after his presentation.

Carol Bowie, vice president of proxy adviser **Institutional Shareholder Services Inc.**, said that the decline in proposals targeting anti-takeover provisions was actually a measure of validation for the shareholder rights movement. In the wake of past pressure from activist shareholders, many companies have already removed or altered these measures.

For example, only 45% of S&P 500 companies today have staggered boards, significantly less than a few years ago.

Staggered boards work as an anti-takeover measure by preventing shareholders from replacing a majority of company directors in a single annual election.

In the meantime, institutional investors also have become more determined to seek changes in director elections and executive compensation. "Executive pay is hot right now," she said.

Some 2006 shareholder proposals sought to have corporate proxy cards amended to give shareholders the right to advise the company on whether they think the executive's compensation is too high, too low or just right, otherwise known as the "Goldilocks measure."

Of the 324 shareholder proposals, the agency received 144 letters from corporations seeking to have them removed.

Dunn noted that in most cases, the agency agreed with shareholders and rejected the corporations' removal requests. For example, the SEC sided with shareholders on executive compensation proposals at both **Clear Channel Communications Inc.** and **Capital One Financial Corp.** In its petition to the agency, Clear Channel argued that shareholders would be confused by the term "advisory vote" on executive compensation. But, Dunn said, the agency took the position that investors are well aware that the measure isn't binding on the company.

With regard to majority vote proposals, Dunn noted that the agency received a few shareholder measures asking directors who disagree with the results of a non-binding proposal on their election, where that candidate received hefty opposition from investors, to be deemed not qualified to be directors in the future. Dunn said the issue is a matter for state law to determine and the agency does not have jurisdiction to decide on it. "It's an interesting state law question," Dunn said.

In addition to majority vote proposals, the agency is considering drafting

new rules aimed at clarifying rules for shareholder election of directors. Dunn acknowledged the agency will likely take its time in drafting these regulations. He expects them to be adopted in time for the 2008 proxy season, beginning that year in March. "This gives the commission time to be thoughtful and get it done in 2008," he said in an interview.

The expected draft rules are intended to respond to an appeals court ruling that found the SEC was wrong to let **American International Group Inc.** exclude an investor proposal seeking to change the company's bylaws in a way that permits shareholders to nominate a director candidate on the company's proxy ballot. The court ruling put the agency's interpretations of the rules at odds with the court's.

Shareholder groups submitted measures similar to the AIG provision at three other companies: **Hewlett-Packard Co.**, **UnitedHealth Group Inc.** and **Reliant Energy Inc.** After the SEC in January said it "will not express a view" on the HP shareholder proposal, the computer hardware company subsequently decided to include the measure on its proxy ballot for a vote.

Separately, Reliant Energy petitioned the agency to have its investor proposal removed. It also submitted a complaint in a Texas district court seeking the measure's removal. Dunn said the agency will not respond to the Reliant petition until after the court issues its order on the case.

"The commission has a long tradition of not getting ahead of courts on these measures," he said.

UnitedHealth also petitioned the agency to have a similar proposal removed. The healthcare company argues that the pension fund that submitted the proposal, **California Public Employees' Retirement System**, does not have a sufficiently large stake under Minnesota state law to legally submit a bylaw change proposal. ■

MOVERS & SHAKERS

COMPILED BY BAZ HIRALAL

In New York, **Jones Day** welcomed **Owen Nee** as of counsel to the firm. Nee was founder of the China practice at Coudert Brothers LLP, where he spent 32 years and was a partner when it dissolved. After that, Nee served as counsel at **Orrick, Herrington & Sutcliffe LLP**.



Morrison & Foerster LLP hired **Gary Lee** and **Karen Ostad** as partners in New York. Lee will co-chair the bankruptcy and restructuring group with Larren Nashelsky. Ostad advises on both the corporate and the litigation aspects of restructurings. Lee and Ostad join the firm from **Lovells**.

Debevoise & Plimpton LLP added **Samuel Tillett** to the firm as international counsel, resident in Moscow. He is a member of the corporate department, focusing on international securities, mergers, acquisitions and financing transactions. Tillett joins the firm from Polish media group **ITI Group**. From 1985-1997, he was a partner at Mayer, Brown & Platt.

New York-based **Tannenbaum Helpers Syracuse & Hirschtritt LLP** announced that **Brian Haskel** joined as a partner in the firm's

corporate practice. Haskel was most recently counsel at **Weil, Gotshal & Manges LLP**.

Teri Donaldson, former general counsel of Florida's Department of Environmental Protection, joined **Squire, Sanders & Dempsey LLP** as director of the firm's environmental health and safety practice. She is based in Tallahassee. Donaldson moves over from **Tew Cardenas LLP**, where she was chair of the environment, energy and resources practice.

Dani James joined **Kramer Levin Naftalis & Frankel LLP** as special counsel in New York, focusing on white-collar criminal defense and complex civil litigation. Earlier, she served as an assistant U.S. attorney in the Southern District of New York.

ML Strategies LLC, the consulting affiliate of **Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC**, will make **Jeremy Rabinovitz** vice president of government relations in Washington, effective March 5. Rabinovitz is a 20-year veteran of the House of Representatives. ■

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