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# H.P.'s Blundering Board

By **JOE NOCERA**

There they go again.

The Hewlett-Packard board is back to doing what it does best: shooting itself in the foot. By filing an embarrassing lawsuit against the company's former chief executive, Mark V. Hurd, this week — a suit that unwittingly highlights the mistakes it made in the way it let Mr. Hurd go — the H.P. board can now lay claim, officially, to the title of the Most Inept Board in America. It's going to take a yeoman effort to dethrone these guys.

Before moving on to today's installment, let's take a look at who a few of these directors are. The best-known director is the most recent addition to the board: Marc L. Andreessen, who more or less invented the browser while still in college, and has since become one of Silicon Valley's biggest stars. He joined in 2009, a few years after H.P. bought Mr. Andreessen's latest company for \$1.6 billion.

Rajiv L. Gupta, who serves on three boards, spent a decade as the chief executive of Rohm & Haas. John H. Hammergren is the chairman and C.E.O. of McKesson; he's also on three boards. Robert L. Ryan is the former chief financial officer of Medtronic. He sits on four boards. You'd think that these guys would

know [http://cms.em.nytimes.com/content/edit/article/article!bodyText?](http://cms.em.nytimes.com/content/edit/article/article!bodyText?contentId=1248069008519&inspectMode=false)

[contentId=1248069008519&inspectMode=false](http://cms.em.nytimes.com/content/edit/article/article!bodyText?contentId=1248069008519&inspectMode=false) how to negotiate an airtight exit deal with a departing C.E.O. Apparently not.

Anyway, when last we left The Most Inept Board in America, it had booted Mr. Hurd for supposedly fudging his expense reports to hide the fact that he was using a former soft-core porn actress turned reality-TV contestant as a greeter at big H.P. customer events. (At least that is what I infer; H.P.'s public statements about the Hurd firing — or was it a forced resignation? — are not exactly models of transparency.)

This happened on Aug. 6. Because the H.P. board didn't have the nerve to fire Mr. Hurd for cause, it wound up handing him a monster severance package. Much of it came in the form of stock options granted to Mr. Hurd in previous years. But \$12.2 million was cash — money

clearly meant as a kind of genteel, legal bribe to prevent Mr. Hurd from joining a direct competitor.

Mr. Hurd got his \$12.2 million 30 days after leaving H.P. On Sept. 6 — which is to say, the 31st day — Oracle announced that Mr. Hurd was joining Oracle as co-president, reporting to its founder and chief executive, Lawrence J. Ellison, well known in Silicon Valley as a corporate mischief-maker.

Mr. Ellison was already on record, in an e-mail to The New York Times, describing the Hurd firing as “the worst personnel decision since the idiots on the Apple board fired Steve Jobs many years ago.” You could practically see him chortling in the press release announcing Mr. Hurd’s new job. “Mark did a brilliant job at H.P. and I expect he’ll do even better at Oracle,” Mr. Ellison was quoted as saying.

Seventeen hours later, H.P. filed its lawsuit, claiming that Mr. Hurd’s decision to join Oracle “has put H.P.’s most valuable trade secrets and confidential information in peril.” In effect, the company argued that Mr. Hurd’s brain was so stuffed with inside information about H.P. that everything he did at Oracle would unfairly take advantage of that knowledge.

Which may even be true. Perhaps the directors should have thought of that when they were negotiating his departure.

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Let us acknowledge, before going any further, that Mr. Hurd does not appear to be a candidate for sainthood in this matter. This whole dustup began when Mr. Hurd was accused of sexual harassment by Jodie Fisher, the greeter in question. Although Mr. Hurd quickly paid to make the accusation go away — and although the two have denied having sex — it sure looks like something fishy was going on. You don’t keep someone off your expense account without a reason.

Indeed, three board experts I spoke to all felt strongly that the directors did the right thing in forcing Mr. Hurd to resign, even if they didn’t do it particularly well. Nell Minow, the co-founder of the Corporate Library, went so far as to say that, under the law, H.P. had no choice but to jettison Mr. Hurd.

Companies that do business with the government, she said, are legally required to apply their ethics policy even-handedly. If it’s a firing offense when a midlevel employee fudges an expense report, then it has to be a firing offense for the chief executive as well. “They had no other option,” she said.

Further, Mr. Hurd's decision to join Oracle is not exactly a case study in ethical corporate behavior. Although Oracle and H.P. have long been business partners, the two companies are also poised to increasingly compete in the hardware market. Early this year, Oracle completed its purchase of Sun Microsystems, which puts it in head-to-head competition with H.P. (and I.B.M.) in the high-end server market.

Thus, the central contention in the H.P. lawsuit — that Mr. Hurd will inevitably use his inside knowledge of H.P.'s hardware business to help his new employer — strikes me as quite plausible. How can he not? He's spent the last five years eating, drinking and sleeping H.P. (Well, except when he was eating and drinking with Ms. Fisher.) H.P. is in his bones.

Mr. Hurd has to have known that joining Oracle was bound to infuriate the H.P. board, especially after Mr. Ellison's stinging criticism. There are a million things Mr. Hurd could have done post-H.P. that would not have led to yet another fight between the two estranged parties. It is hard not to suspect that he took the job at least in part because he knew it would drive the H.P. board around the bend.

Yet whatever Mr. Hurd's motives, it really wasn't his responsibility to protect H.P.'s best interests, not once he was out the door. That duty falls to the board. And that is where the board failed dismally.

The central difficulty facing the H.P. board as it contemplated asking Mr. Hurd to leave is that California frowns on noncompete agreements. The board could ask him to sign a dozen trade secret agreements — as, indeed, it did — but it couldn't legally prevent him from joining a competitor.

Over the years, this has become settled law in California: lawsuits aimed at preventing, say, a brilliant software engineer from joining a competitor have invariably failed. The concept of "inevitable disclosure" of trade secrets by such an employee — which has been upheld elsewhere — is a nonstarter in California.

In its lawsuit, H.P. avoided the phrase "inevitable disclosure," relying instead on something it calls "threatened misappropriation." But it's the same thing, and it is likely to have the same result. Under California law, Mr. Hurd has every right to take his brain full of H.P.'s trade secrets and join Oracle. Pursuing the case is only going to embarrass H.P. (Then again, settling the case will probably be pretty embarrassing, too.)

Yet think about it: California has hundreds — nay, thousands — of companies. High-ranking executives, including C.E.O.'s, leave all the time. When is the last time you read about a case like this one — where a top executive walks across the street and joins a direct competitor a

month later? It almost never happens. Why? Because most boards in California know how to keep it from happening, despite their inability to lock up an executive with a noncompete agreement.

Maybe those boards don't hand the departing executive \$12.2 million 30 days after the executive leaves. Maybe they don't allow options to vest immediately. There are other ways as well to create a situation where an executive loses something of value if he goes to a competitor before a certain amount of time has passed. California employment lawyers tell me that such agreements are quite common.

And while it is true that \$12.2 million is a drop in the bucket for someone as wealthy as Mr. Hurd, who made over \$100 million in his five years at H.P., he also appears to be very motivated by money. The H.P. board could have at least tried to use money to keep him from jumping to a competitor. Or it could have tried to create a situation where Mr. Hurd would have something to lose by joining another big hardware company. Amazingly, the H.P. board did neither.

What I've been hearing this week is that the board felt it had no choice but to sue Mr. Hurd — both to put him on notice and to send a strong message to the rest of the company. But if this case gets laughed out of court, as I suspect it will, the message is going to be a bit different from what the board intends. The whole world will know Mr. Hurd walked away with \$40 million of H.P. shareholders' money, and joined a multibillion-dollar competitor with H.P. in its sights — and there wasn't a thing H.P. could do to stop him. Confidence-inspiring, this ain't.

When I spoke to Ms. Minow earlier this week, I was startled at the vehemence with which she condemned the H.P. board. "They have a worse record than a stopped clock," she said. She told me the Corporate Library had given the H.P. board a "D" ranking.

But when I asked her what could be done about a board like H.P.'s, she lit up. Under the new Dodd-Frank bill, she said, shareholders for the first time will be able to nominate their own candidate for the board. To do so, the nominating shareholders have to hold 3 percent of the stock — for three years.

That was a high bar, but not an impossible one, she believed. She said Calpers — the giant California public pension fund — "and a couple of its buddies could get together" and nominate a director or two.

She added: "It won't work unless you can leverage extreme shareholder unhappiness. You can't find a better example of that than at H.P."

You sure can't.

*This article has been revised to reflect the following correction:*

**Correction: September 14, 2010**

*The Talking Business column on Saturday, about the Hewlett-Packard board's handling of the ousting of Mark V. Hurd, the chief executive, misspelled the surname of one of the company's directors. He is Marc L. Andreessen, not Andreesen. The column also misstated the name of a company whose directors include Robert L. Ryan, another H.P. board member. It is Medtronic, not Medtronics..*