Win Lose or Draw—Director Choice in a Litigious World

THE HON. LEO E. STRINE, Jr.

Vice Chancellor, Delaware Court of Chancery

DAVID J. BERGER

Partner, Wilson Sonsini Goodrich & Rosati

Case A: Join the Board

- You have been approached by Steve, an old friend who is now a director of Alpha, an NYSE-listed company with a market cap of $7 billion, to join Alpha's board. You are the president of Beta, a company with a market cap of $750 million. You know that Alpha has recently been in the news as a result of a financial restatement, but Steve assures you that these problems are over. You believe that Alpha may eventually be a potential customer for Beta's new products.

Case B: Becoming a Director

- You recently decided to join Alpha's board of directors. In an effort to inform new board members about Alpha, the company sends you binders containing all of Alpha's public filings and press releases for the last two years, analyst reports for the last year, as well as the company's current strategic plan and the schedule for the next year's board meetings.   The Company's general counsel then sends you an email asking if there is any additional information you would like.

Case C: The First Board Meeting

- Alpha generally holds six board meetings per year. The schedule for these meetings provides for committee meetings beginning on the afternoon of the first day, followed by dinner for the entire board. The full board meets the following day, and concludes with an executive session, which typically begins with lunch and ends in the afternoon.

Case D: The Email

- You have now been a director of Alpha for a year. A few days before a regularly scheduled board meeting, an anonymous email is sent to all the directors stating that Kate, Alpha's chair and ceo, has been using company resources for her personal benefit. The email goes on to allege that Michael, the company's general counsel, is aware of Kate's actions, but did not disclose them because the two of them are having a personal relationship.

Case E: The Lawyers

- During the discussion at the board meeting about how to handle the tip, one of the directors proposes that Alpha's regular outside counsel be engaged to investigate the accusation. You recognize the name of the partner who is being proposed to conduct the investigation as widely perceived to be a leading attorney in this area, and also know that he and his firm have long served as Alpha's primary outside counsel.

Case F: Going Private

- At the board dinner celebrating your second anniversary on the Alpha board, Steve makes a toast in your honor. Kate then raises her glass and announces to the entire board that she is considering taking the company private. Kate goes on to say she has been working with the company's regular outside counsel and bankers, as well as a prominent private equity group, and believes she can offer a significant premium to the company's stock price. Kate plans to present the formal offer at tomorrow's board meeting.

Case G: The Special Committee

- Doug, the company's lead director, asks you to be part of the Special Committee to consider the ceo's offer. He informs you that the ceo has proposed an investment bank for the Special Committee to interview, and that Kate believes it is important that the Company have a signed deal within two weeks, although she is willing to allow any contract to contain an appropriate "fiduciary out."

Case H: The Litigation

- The effort to sell the company resulted in an auction between Kate’s group and Delta, the company’s largest competitor. After a lengthy bidding process, the Alpha special committee has unanimously approved Delta’s all-cash for all-shares offer at a price of $40 per share, a 33% premium from the Company’s market price. You have now been sued for breach of fiduciary duty, and your lawyer calls you to schedule your deposition.

Case I: The Closing Celebration

- After the deal is signed but well before it is scheduled to close, it is proposed that each member of the Special Committee receive a one-time $50,000 payment for the additional work they have provided as members of the Special Committee. At the same time, Alpha's ceo proposes that she and three of the company's senior officers enter into "Transition Agreements" with Alpha, which will guarantee each of them two years of salary if they stay with Alpha through the merger or are terminated as a result of the merger.