

Simulation 3: Centralized Management

From: Wendy I. Zeller [mailto:Ms.WIZ@work.com]
Sent: Friday, July 25, 2008 4:25 PM
To: WIZ Team Mailing List
Subject: CONFIDENTIAL – Acme, Inc.

I've just spoken with Carla, the Chair of the board of directors of Acme, Inc., a Delaware corporation. Two Acme shareholders are threatening to sue to invalidate a decision made by Acme's board. We are asked to give our legal opinion as to the merits of their claims.

I'm forwarding to you the e-mail I received from Carla, with details on the matter. In an earlier phone conversation with Carla, I learned that Acme's BoD consists of 5 directors: Alan, Barb, Carla, Debbie & Eric. I also learned that all five directors received academic degrees from the University of Chicago, but have had no other affiliation with the university. Frank, Acme's CEO, does not have any affiliation at all with the University of Chicago, and received both his B.Sc. and M.B.A. from Yale.

Please e-mail me back your analysis by tomorrow morning. Let me know if you need any additional information from the client (and why you need it). Thanks!

From: Galenson, Carla
Sent: Friday, July 25, 2008 2:06 PM
To: Zeller, Wendy I.
Subject: Collaboration with the University of Chicago

Wendy:

I appreciate your responsiveness. As I mentioned in our conversation, two shareholders are threatening to sue us regarding the board's approval of a collaboration with the University of Chicago.

The collaboration is, essentially, a glorified donation. Acme would donate \$5,000,000 to the university, and in return they would create an endowed position for a professor called "The Acme Professor of Corporate Responsibility".

Two weeks ago, Frank (our CEO) told me that he was negotiating with the university regarding some form of donation or sponsorship. Then, this Monday at 8 am Frank called me and said that he needed the board approve the deal quickly. Apparently, he hammered out all the details with the university administrators, and the administrators now required that Acme approve the deal before they brought it to their board of trustees for approval, that coming Wednesday at 9 am. The university officials told Frank that other firms are interested in funding the corporate responsibility professorship, so if we did not approve the deal by Wednesday morning, they would offer another company the deal. Frank e-mailed me a copy of the proposed agreement with the university.

I immediately asked Jerry, my assistant, to track down the other directors and see if they are available to meet that day or the following day (Tuesday). Around noon Jerry told

me that Alan is in town & can attend a meeting, Barb is vacationing in the Caribbean, but occasionally checks her e-mail, and Debbie & Eric are hiking in the Himalayas and cannot be reached.

Pressed for time, I first sent an e-mail to all four directors, explaining the deal in detail & attaching a copy of the proposed agreement. I asked each director to promptly reply as to his/her vote on the deal. Then I called Alan (who was the only director available by phone) and asked him to come over to her office the following day (Tuesday) at 5pm to discuss the deal. I hoped by that time to hear from Barb and maybe from Debbie and Eric.

On Tuesday morning I received a response from Barb. She was enthusiastically in favor of the deal, and explained her reasons for supporting it (mainly, she liked the idea of having a presence at the University of Chicago, because we frequently hire their graduates).

At 5pm, Alan came by my office. I showed him Barb's e-mail. Alan said he too favored the deal, because of the positive association Acme would get from sponsoring a chair in corporate responsibility. I agreed.

Alan and I then signed a document stating that we vote to approve the agreement. I attached Barb's e-mail to the document, and sent them to Frank with a memo that the board has approved the agreement (since 3 of the 5 directors approved it and two directors were unavailable).

On Wednesday morning the university approved the agreement as well, and we issued a press release about it. The same day I received an angry phone call from Alice, one of our shareholders. Alice is a Yale alum and demanded that half of the \$5,000,000 would go to Yale. She also claimed that the board did not, in fact, give valid approval to the agreement with the University of Chicago.

Then, yesterday (Thursday), Bob, another shareholder, e-mailed me that he intends to sue Acme in order to enjoin the donation and make Acme distribute the \$5,000,000 as dividends. He claimed that if the company had five million dollars it didn't need, it should give them to the shareholders, not to the directors' alma mater.

I flipped through the Delaware General Corporation Law, and noticed that §122(9) specifically authorized the corporation to make donations for educational purposes, and §141(a) states that the board of directors (not shareholders) manage the corporation, unless the certificate of incorporation provides otherwise. I checked our certificate of incorporation, and it is silent on this matter.

Can we make a motion for summary judgment on the basis of sections 122(9) and 141(a)? Also, please let me know how likely Alice and Bob are to win if this suit survives summary judgment.

Carla