JAMES G. WOLF

PRESENTED TO:

ORGANISMO ITALIANO DI VALUTAZIONE [OIV]

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FAIRNESS OPINIONS AND CONFLICTS OF INTERESTS

OPENING

Bankers/Advisors play an important role in assisting shareholders in obtaining the best price in a transaction

Relational conflicts are inevitable and all potential conflicts are not material

The larger the bank/organization the more prone to conflicts but also they offer a wider range of services, deeper informational base et al

In general the courts are not seeking to dictate the choice of advisers but rather are promoting transparency and supervision

DEFINITION: CONFLICT OF INTEREST

- A situation in which a person or organization is involved in multiple interests, financial interests, or otherwise, one of which could possibly corrupt the motivation of the individual or organization

- A situation in which the concerns, or aims, of two different parties are incompatible

- A situation in which a person or organization is in a position to derive a personal benefit from actions or decisions in their official capacity

WHAT ARE THE KEY POTENTIAL & PERCEIVED CONFLICTS

MATERIAL CURRENT RELATIONSHIPS AND/OR FUTURE EXPECTATIONS OF BUSINESS FROM SUCCESS OF THE TRANSACTION

- Understanding who the client is; the counter parties; the stakeholders
- What is the overall relationship and fee history with the client and how shall this be disclosed? Typically two years is the standard in the US.
- Other: regulatory, *i.e. Audit, personal relationships and or investments or ownership interests*

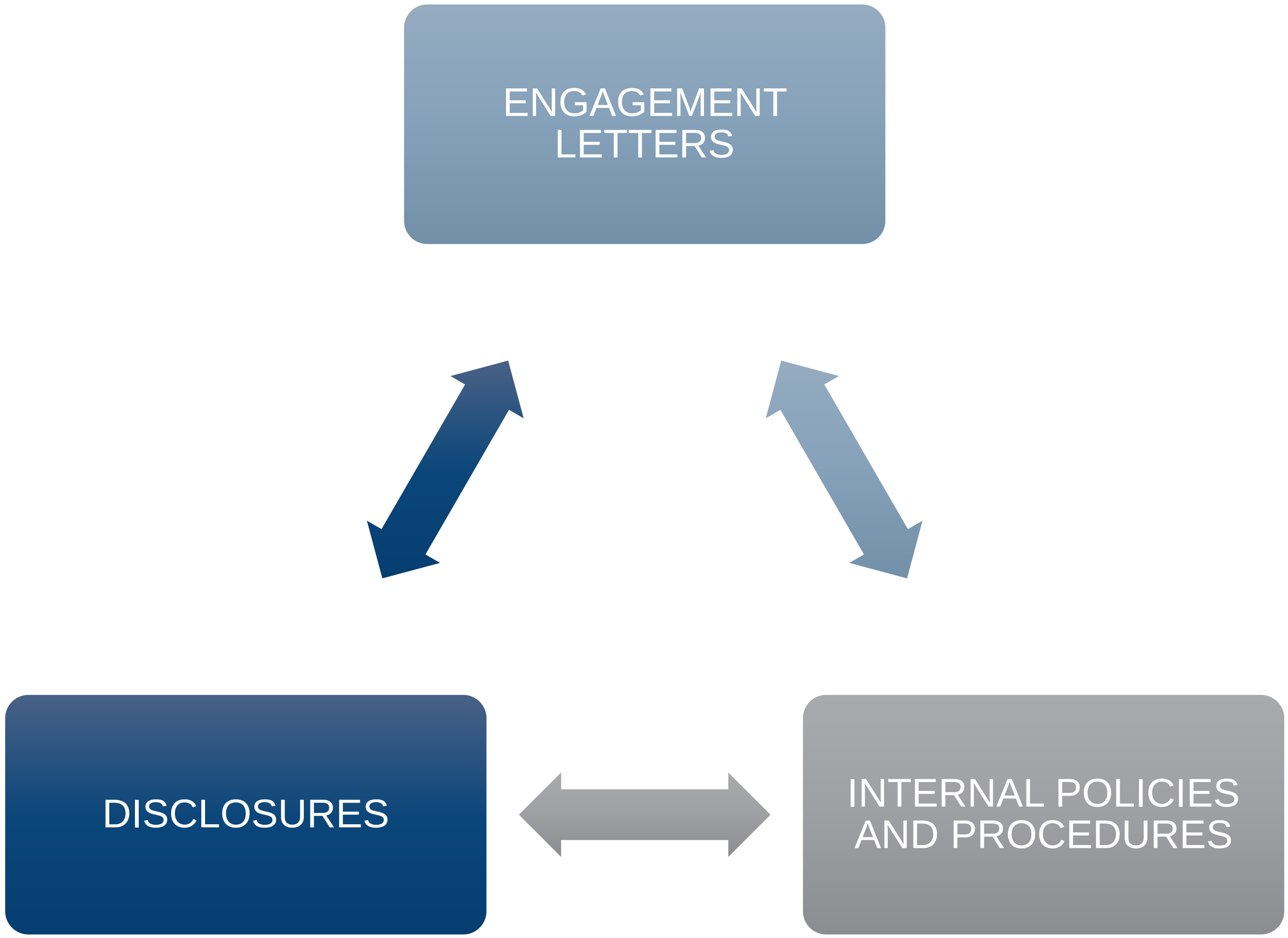
FEE ARRANGEMENTS

- How is the fee structured: Contingent? Fixed or combination?
- Are there expectations of future business resulting from the success of the transaction?

POTENTIAL WAYS TO ADDRESS POTENTIAL CONFLICTS

- Disclosures both via engagement letters, correspondence with your client and to stockholders
- Obtaining consent from the client
- Use of separate teams, *i.e Chinese Walls*
- Use of fee arrangements that are not viewed to be singularly aligned to a single outcome unless dictated in the engagement letter
- Use of co-advisors/second opinions

KEY LEVEL OF SOLUTIONS



CASES

Rural Metro Corp.

Tibco Software Inc

El Paso Pipeline Partners

Del Monte Foods Company

Southern Peru Copper Corp.

In Re **Rural Metro Corp**. Shareholders Litig., 2014 Del. Ch. LEXIS 36 (Mar. 7, 2014) and 102 A.3d 205 (Del. Ch.2014)

CASE

RURAL METRO CORP

RURAL METRO CORP - INTRODUCTION / SITUATION

- March 28, 2010 Rural announced it was being acquired by Warburg Pincus LLC ("Warburg"). RBC Capital Markets, LLC ("RBC") was the lead financial advisor during the process. Moelis & Company LLC ("Moelis") served as Rural's secondary financial advisor in a role junior to RBC.

- The complaint, brought on by the shareholders, contends RBC, and Moelis, aided and abetted the defendants in breaching their fiduciary duties during the sale process and misconduct leading to disclosure violations.

- RBC was engaged by the Special Committee, not by the board, but by what was considered to be to sale the company. At the time the Special Committee had not been authorized to hire a "sell-side" advisor or to start a sale process, only to analyze the range of strategic alternatives and make a recommendation to the board.

In Re **Rural Metro Corp**. Shareholders Litig.,
2014 Del. Ch. LEXIS 36   Mar. 7, 2014) and 102 A.3d 205 (Del. Ch.2014)

RURAL METRO CORP … CONTINUED

- RBC's M&A advisory fee was anticipated to be $5.1M with the potential for staple financing fees of $14-$20M
- Moelis was engaged as the secondary advisor, on a contingent fee arrangement, by which they would only be paid if Rural was sold, and to provide a second fairness opinion; they did not seek to use their position as advisor to obtain a role in financing.
- In August 2010, it was determined that Rural, a leading provider of ambulance and fire services nationwide in the US should consider acquiring a competitor, AMR, or in the alternative be acquired by a private equity group.

RURAL METRO CORP … CONTINUED

- In December of that year RBC began discussing with Rural's board potential M&A activity, while internally recognizing the opportunity for them to position themselves as a sell-side advisor for Rural and to secure buy-side financing roles with private equity firms
- RBC contacted a number of private equity firms but ran into some issues due to the fact that many were also bidding on a competitor of Rural and had issues due to their confidentiality agreements. RBC finally receives a number of bids. When RBC presents first to the special committee they do not include any valuation metrics. The bids ranged from $14.75/share to $19/share.
- RBC presents to the Special Committee a second time, again without any valuation metrics, and informs them who won the bidding for another firm.

RURAL METRO CORP … CONTINUED

- The Board now meets for the first time. RBC presents, and again no valuation materials had yet to be presented since the banker pitch books, RBC notes that the sale process focused on financial buyers and advised against strategic buyers; Board grants the Special Committee the authority for a potential transaction. And to hire additional advisors.
- Rural receives a single bid from Warburg although the firm purchasing Rural's competitor submitted a letter of interest if the transaction could be delayed.
- At the Special Committee's meeting to review the bid the only valuation material was a one page transaction summary that compared the metrics implied by the per share offer ($17/share) vs the price the prior day (+37%); RBC didn't disclose that it had and was continuing to seek a buy-side role providing financing to Warburg.

RURAL METRO CORP … CONTINUED

- Shackelton, the lead Committee member accesses the valuation model and makes changes to the assumptions and generates a base case valuation of $18.86/share while at the same time RBC had delayed working on its fairness opinion for they hoped to still secure the buy-side financing role
- RBC on the day before the board approved the merger pushes hard for the buy-side financing. At the same time RBC works to lower the analysis in its fairness presentation so Warburg's bid looked more attractive

RURAL METRO CORP … CONTINUED

- RBC’s fairness committee wasn’t a standing committee like most but an ad hoc committee, consisting of at least two, any willing and available, managing directors to respond. In this case one of the members had never been on a fairness committee before. The two members and the bankers made a series of valuation decisions. The first was not to rely on the single comparable company for valuation the next was to change the precedent transaction analysis shifting from little credit to full credit on a 2004 transaction, thereby lowering the bottom end of the range.
- RBC's two independent fairness committee members approved the revised fairness presentations. One without reading it and the other with only one question.
- The board approves the merger with it having only for the first time seeing any valuation information ever as part of the sale process.
- RBC doesn't provide any financing on the transaction.

RURAL METRO CORP - FINDINGS

- RBC didn't provide adequate disclosures of its interests in expectations for future business from the success of the transaction; They didn't disclose that proceeding in a sale process in parallel with the EMS sale process served RBC interest in gaining a role in financing the sale for EMS. RBC didn't disclose its efforts to solicit a buy-side role from Warburg
- RBS knew that the board and Special Committee were uninformed about Rural's value when making critical decisions and that it provided manipulated valuation analyses
- The proxy materials contained misleading disclosures in the form of false information that RBC presented to the Board in it financial presentation. RBS mismanaged the sale process that generated only one final bid by a bidder that knew it had the upper hand
- Board didn't have adequate time to review to consider the merger consideration versus Rural's going concern

RURAL METRO CORP - RESULTS TO DATE

- Moelis settles without admission of wrong doing or liability; pays $6.6 M
- RBC found liable for aiding and abetting the board's breach of fiduciary duty in connection with Rural's 2011 sale to Warburg. Damages were $76M or approximately 83% of the damages;
  - did not disclose its efforts to secure a buy-side financing role from Warburg;
  - manipulated its financial analysis to justify the transaction and offered false reasons for certain changes in the analysis;
  - provided false information to the board regarding its financial analysis that led to misleading disclosure in the proxy statement.

Does this serve as a warning to financial advisors that they may be subject to aiding and abetting liability risks by stockholders alleging unreasonable decisions by a board in a sales process?

CASE

In Re **El Paso Corp**. Shareholders Litig., 41 A.3d 432 (Feb. 29, 2012)

EL PASO PIPELINE PARTNERS

El Paso Pipeline Partners
a Kinder Morgan company

EL PASO PIPELINE PARTNERS – INTRODUCTION / SITUATION

- On October 16, 2011 Kinder Morgan announced that it had agreed to acquire all the outstanding shares of El Paso Corporation at $26.87 a share.
- Following the announcement there was a shareholder complaint filed asserting breach of fiduciary duty claims against El Paso's board of directors as well as aiding and abetting against Kinder Morgan and the boards financial advisor Goldman Sachs & Co.
- Plaintiffs next moved to preliminarily enjoin the Merger due to the conflicts that corrupted the Board's sales process, and the defects that skewed the valuation analyses performed by Goldman and the Board's other financial advisor, Morgan Stanley.
- Denied on February 29, 2012; Merger approved March 9, 2102;
- Case Settles for $110M; Goldman waives its $20M.
- Goldman Sachs was the initial financial advisor to El Paso. Continued as the advisor to the board for a spin alternative

In Re **El Paso Corp**. Shareholders Litig., 41 A.3d 432 (Feb. 29, 2012)

EL PASO PIPELINE PARTNERS - ISSUES

- Goldman owned 19.1% of Kinder Morgan, and held two board seats, had advised El Paso in the past and had provided advice on a current strategic alternative for El Paso - a spin. (All disclosed). Claims to have stepped out of the sale process in favor of Morgan.
- The lead banker for the El Paso Goldman team owned 340,000 share of stock in Kinder Morgan and that was not disclosed.
- Morgan Stanley was brought in as a second investment bank to address the conflict issues around Goldman. And Morgan's fee was fully contingent if El Paso adopted the strategic option of selling to Kinder Morgan.

EL PASO PIPELINE PARTNERS - FINDINGS

- El Paso's CEO was the sole negotiator and never surfaced his own self interests. He wasn't an aggressive negotiator and backed down quickly on price renegotiations.
- Structure of the deal protection package made it expensive and tough for EL Paso to terminate and thus seek other higher bidders.
- Court did find that the board met its duty of care. And denied the preliminary injunction.

EL PASO PIPELINE PARTNERS - TAKEAWAYS

- Goldman: were they conflicted in reality due to the advice they gave the board of El Paso, after being "walled off" about the value of pursuing the spin off instead of the Kinder deal?
  - What about their advice to recommend Kinder to enter into due diligence?
  - What about their continuing to provide strategic advice around the spin off alternative?

- Judge felt that the plaintiffs had a probability of showing that more faithful, un-conflicted, parties could have secured a better price from Kinder...but what to do about it? Judge also felt that it would be difficult to prove an aiding and abetting claim being that the largest conflict was surfaced and fully addressed against Goldman.

CONFLICTS ADDRESSED & DISCLOSED

In Re **Del Monte Foods Co**. Shareholders Litig., 2011 Del. Ch. LEXIS 30 (Feb. 14, 2011).

CASE

DEL MONTE FOODS COMPANY

DEL MONTE FOODS COMPANY – INTRODUCTION / SITUATION

- On November 24, 2010 Del Monte Foods Company entered into an agreement and plan of merger with a group consisting of KKR, Vestar Capital and Centerview Partners in a take private transaction for $19 per share. This was approximately a 40% premium over the prior closing price. Plaintiffs sought an injunction postponing the vote.
- They originally asserted the board breached their fiduciary duties in two separate ways:
  - first by failing to act reasonable to pursue the best transaction reasonable available and,
  - second by disseminating false and misleading information and omitting material facts in connection with the stockholder vote.

In Re **Del Monte Foods Co**. Shareholders Litig., 2011 Del. Ch. LEXIS 30 (Feb. 14, 2011).

DEL MONTE FOODS COMPANY … CONTINUED

- Barclays Capital was the financial advisor to the board. They expected to earn $23.5 M as sell-side advisor ($2.5M of which was for the fairness opinion).
- KKR had paid Barclays over $66M in fees over the prior two years and had engaged them as both sell-side advisor and as provider of buy-side financing.
- Initially, Del Monte performs a targeted non-public process of exploring strategic options with various groups as suggested by Barclays. At the time Barclays had only discussed a role as a sell-side advisor to Del Monte, while in private had begun “setting” the table to also provide buy-side financing
- Each interested group signed confidentiality agreements; not discussing confidential information, or their bids with anyone, including each other.

DEL MONTE FOODS COMPANY … CONTINUED

- The board was displeased with the initial results and the sale process was put on hold. Barclay's then teamed KKR up with Vestar. When the process was reopened, a single bidder strategy was adopted for numerous reasons. But the board didn't know about the violation of the CA. Finally after the news was leaked about the potential, Del Monte LBO, KKR formally approached Barclays requesting to include Vestar in the deal.
- Next, Barclay requests if it could provide buy-side financing? They were planning to do so 11 months prior. Del Monte agreed.
- Barclay's insisted in a letter agreement that if they provide buy-side financing, Del Monte receive independent financial advice, including an additional fairness opinion, from an independent third party firm not involved in the acquisition financing.
- Del Monte hired Perella Weinberg Partners and paid them $3M fixed non-contingent fee for a fairness opinion.

DEL MONTE FOODS COMPANY – KEY ISSUES

- Barclays never disclosed, or mentioned, its intention to provide buy-side financing on the current transaction from the onset.
- Barclay's appears to have crossed the line by the unauthorized pairing of Vestar and KKR along with its late stage request for permission to provide buy-side financing. Their conflict tainted the go shop process
- Court felt that at a minimum, Barclay's withheld information about its buy-side intentions, its involvement with KKR, and its pairing with KKR and Vestar.

DEL MONTE FOODS COMPANY – FINDINGS

- Company settles for $89.4M of which Barclay's pays $23.7M; and received no fee
- The judge in the case makes it clear that Barclays is a bad actor in his mind here for;
  - not requesting and disclosing to Del Monte the unauthorized KKR/Vestar teaming;
  - asking permission to be one of KKR’s financing banks, with no deal related reason to do so other than fees and forcing Del Monte to spend an additional $3M on a second fairness opinion;

In re **Southern Peru Copper Corp**. Shareholder Deriv.Litig., 52 A.3d 761 (Del. Ch. 2011); aff'd 51 A.3d 1213 (Del. 2012)

CASE

SOUTHERN PERU COPPER CORP

SOUTHERN PERU COPPER CORP – INTRODUCTION / SITUATION

- In February 2004, Grupo Mexico proposed that Southern Peru buy 99.15% interest in Minera. At that time Grupo Mexico owned 54.17% of Southern Peru's outstanding capital stock and had 63.08% voting power, making it Southern Peru's majority stockholder.
- The initial offer was for Southern Peru to issue 72.3 million new shares worth $3.05 billion, at that time. Minera was not publicly traded. Southern Peru formed a Special Committee of disinterested directors to evaluate the proposed transaction.
- The Special Committee's mandate was to evaluate the merger as it deemed desirable and in the best interests of the stockholders and was authorized to retain legal and financial advisors on such terms as they deems appropriate. It did not give them the express power to negotiate or authorize them to explore other strategic alternatives.

In re **Southern Peru Copper Corp.** Shareholder Deriv.Litig., 52 A.3d 761 (Del. Ch. 2011); aff'd 51 A.3d 1213 (Del. 2012)

SOUTHERN PERU COPPER CORP – INTRODUCTION / SITUATION

- Goldman Sachs was retained as the financial advisor along with a consultant Goldman suggested to aid in the process.
- May 7th term sheet Group's ask is $3.147 billion of Southern's stock calculated as of average of the prior 20 days trading for their majority controlling share in Minera
- Goldman presented a number of different valuations from May until its final presentation and opinion on October 21st. During this time the ranges of value and assumptions changed materially as did methodologies to a degree. But the overriding similarities were using DCF, and multiples to value Minera versus the prorata value of the to be issued shares in Southern Peru at the then market price.
- Goldman's DCF analysis of Minera had values less than approximately $1.4 billion than Grupo's demand for the value it wanted for Minera.

SOUTHERN PERU COPPER CORP – INTRODUCTION / SITUATION

- Throughout the summer the Special Committee and Goldman utilized various mechanisms to simultaneously devalue Southern and bridge the gap between Goldman's valuation of the deal and Grupo's demands.
- Special Committee feels Grupo's demands are too high, over $1B. Well Grupos counters and Goldman presents yet another valuation using multiples this time. Grupo rejects the majority of the Committee's proposals but the parties work out a deal.
- Goldman issues its fairness opinion on October 21, 2004 and makes its final presentation on their findings.

SOUTHERN PERU COPPER CORP – INTRODUCTION / SITUATION

- It is critical to note that Goldman wasn't asked by the Special Committee to update its fairness opinion from October 2004 to the time of the shareholder vote March 28, 2005, and to closing, nearly five months, with the stock of Southern Peru increasing approximately 21.7%.
- Also the committee had agreed to a collarless fixed exchange ratio without a walk away right.
- In addition, before the merger vote, Southern Peru had smashed through the projections that the Special Committee had used for it, while Minera's had slightly underperformed.

SOUTHERN PERU COPPER CORP – RESULTS

- Merger was approved; litigation was filled against defendants and the Special Committee, alleging that the merger was entirely unfair to the corporation and its minority stockholders.
- Court felt the proxy left out a material step in the disclosure process about Southern's first counter

SOUTHERN PERU COPPER CORP – RESULTS

- This transaction would had nearly doubled the size of the company and increased the equity stake of the controlling stockholder. Thus this should have been disclosed.
- Also the method by which Goldman concluded the Merger was fair wasn't clear in the disclosure.
- Also there were additional obscurities with the Southern Peru multiples Goldman used to support its fairness opinion.
- Later it was discovered that Grupo went on a road show illustrating information about the transaction inconsistent with Goldman's fairness presentation

SOUTHERN PERU COPPER CORP – RESULTS

- Court found that the Special Committee was well qualified and competent. And, they had hired top tier advisors.
- The defendants conceded that before settling on relative valuation, Goldman performed a number of valuations and other financial analysis and that all of these analyses were substantially lower that Grupo Mexico's asking price of $3.1 billion.
- While the court felt Goldman dropped its focus on the value of what Southern Peru was giving for they felt Southern's market price was higher than its intrinsic value, and shifted its focus on non real world set of analyses that obscured the value of what Southern was getting.
- They couldn't attribute Goldman's behavior to a fee incentive because Goldman didn't have a contingent fee.

SOUTHERN PERU COPPER CORP - FINDINGS

- Findings were for the Plaintiffs for more than $2.031 billion and attorney fees.

- Court found it curious that the Special Committee didn’t request Goldman to update their fairness opinion in light of the increase in the stock price, the fact they had a collarless fixed exchange ratio, and the fact regarding the excellent financial performance of Southern vs Minera.

- One can also assume that Goldman's engagement letter didn't require them to update their opinion.

CASE

TIBCO SOFTWARE INC

In Re **Tibco Software Inc**. Shareholders Litig., 2014 Del. Ch. LEXIS 242 (Nov. 25, 2014) and 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015)

TIBCO SOFTWARE INC – INTRODUCTION / SITUATION

- Vista, a private equity firm agreed to pay $24/share to acquire TIBCO Software in a merger that closed on December 5, 2014. Both parties operated under a mistaken belief that the aggregate equity value implied by the transaction was approximately $4.244 billion, approximately $100M less or $.57/share more than what was reflected in the merger agreement.
- This mistake arose from a capitalization spreadsheet that double counted certain shares. This spreadsheet was used by Vista during the bidding process and by TIBCO's financial advisors, Goldman Sachs & Co., in its fairness analysis.
- During the sale process Goldman and TIBCO prepared spreadsheets showing the number of fully diluted shares that would be acquired in a merger. The first spreadsheet did not list the number of shares but it was up for the bidders to do the calculation, though it did provide certain listing of outstanding shares, options and other stock based equity awards outstanding.

In Re **Tibco Software Inc**. Shareholders Litig., 2014 Del. Ch. LEXIS 242 (Nov. 25, 2014) and 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015)

TIBCO SOFTWARE INC …. CONTINUED

- TIBCO subsequently discovers an error in a subsequent cap table spreadsheet and it is revised (but still contains an error). Goldman informs the bidders and later sends Vista the revised spreadsheet with the correction but still with an error. Vista submits it bid based on this new spreadsheet for $24/share.
- Goldman submits it fairness opinion based on the inaccurate share count from the spreadsheet when opining that the $24 per share was fair.
- After the merger agreement was signed and in the process of reviewing the draft proxy a Goldman employee discovered the error.
- The board meets again with Goldman. Goldman presents a revised analysis with the correct share count and same share price but now revised enterprise values. Goldman does not change its opinion.
- The preliminary proxy was revised to include a disclosure addressing the share count error and the board reaffirms the merger.

TIBCO SOFTWARE INC - FINDINGS

- The court found Goldman knowingly participated in the directors breach of their fiduciary duties.
- The court found that Goldman was motivated to (via its contingent fees) and intentionally created an informational vacuum by failing to disclose material information to the Board at a critical when it was evaluating and reconsidering its options concerning whether it could act to secure some or all of the additional $100M in additional equity.
- Thus the motion to dismiss by the defendants is denied. Still open.

TIBCO SOFTWARE INC - FINDINGS CONTINUED

- Court felt that the facts had one thing in common that it can be reasonable inferred that Vista and TIBCO had specifically agreed before the Merger Agreement that Vista would not pay anything other than $24/share to acquire the equity

- Goldman for its advisory services and its fairness opinion received $47.4M from TIBCO. All of Goldman's fee was contingent except for $500,000.

- Court concluded that what was offered and accepted was expressed in terms of dollars per share and not aggregate equity value. Court concluded, on an amended complaint, that the claim against Goldman for aiding and abetting can continue.

KNOWLEDGE OF THE FACTS → CONTINGENT FEES → DISCLOSURES

THANK YOU

QUESTIONS ?

JAMES G. WOLF, CFA

New York City,
New York USA

1-914-325-9929

jim@jwolf.us

JAMES G. WOLF

Prior to retiring from Ernst & Young LLP's Transaction Advisory Services, Jim was the leader of the Fairness Opinion Practice for over 20 years. He has significant experience in the valuation of tangible and intangible assets in both public and closely held companies. Jim participated in, and supervised, a variety of valuation and strategic finance projects.

Jim also has extensive experience in Strategic Finance engagements assisting clients in decision analysis for capital allocation, M&A activity and value driver analyses.

Jim holds a BA in finance from the U of Notre Dame and a MBA from the U of Texas. He is CFA, a member of New York Society of Security Analysts (NYSSA), member of The Institute of Chartered Financial Analysts (ICFA) and is a senior member of the American Society of Appraisers, Business Valuation (ASA).

Jim has provided deposition and expert witness testimony in cases litigated in New York, Texas, California, Colorado, and New Jersey, including both Federal Bankruptcy Court and U.S. Federal District Court.