

Goodwin Procter's Annual

DIRECTORS FORUM

A Tale of Two Bidders: Responding to an Interloper

Stuart M. Cable

Goodwin Procter LLP

Lisa R. Haddad

Goodwin Procter LLP

Goodwin Procter's Annual

DIRECTORS FORUM

Decision Point #1

For several years, Frank Slootman, President and Chief Executive Officer of Data Domain, and the Chairman and Chief Executive Officer of NetApp have had informal discussions regarding their respective businesses and the data storage industry in general. Mr. Slootman and Thomas Georgens, President and Chief Operating Officer of NetApp, meet to discuss potential strategic opportunities involving NetApp and Data Domain. At the meeting, Mr. Georgens inquires as to whether Data Domain would be interested in a potential business combination with NetApp.

DIRECTORS FORUM

Decision Point #2

After several discussions, NetApp presents a written summary of proposed terms for a potential business combination transaction with consideration consisting of a mix of \$7.00 to \$8.00 per share in cash and 0.805 shares of NetApp common stock.

- Represents an implied value of \$22.00 to \$23.00 per share
- Represents a 30-35% premium on the Data Domain shares
- Consideration mix consisting of approximately 35% cash and 65% NetApp stock

The proposed terms also provide for a limited period of exclusivity for discussions with NetApp, and the potential for a role on the NetApp board of directors for Aneel Bhusri, Chairman of the Data Domain board of directors, and a role in the management of NetApp for Mr. Slotman.

DIRECTORS FORUM

Decision Point #3

While negotiations with NetApp proceed, a member of the board of directors of EMC, a competitor of Data Domain, contacts Mr. Slootman. The EMC board member seeks to arrange a meeting between Mr. Slootman and the CEO of EMC to share with them EMC's vision for the future. At the same time, NetApp provides a draft merger agreement that does not allow Data Domain to terminate the merger agreement to accept a superior proposal if Data Domain receives an unsolicited offer prior to closing and includes a termination fee equal to 5.00% of the transaction value.

DIRECTORS FORUM

Decision Point #4

Data Domain signs a merger agreement with NetApp at a per share price of \$25.00 (\$11.45 in cash and \$13.55 in stock) and publicly announces the transaction. After announcement, Mr. Sloatman contacts EMC's CEO to cancel their meeting scheduled for later in the month. On various occasions thereafter, representatives of EMC contact representatives of Data Domain and members of the Data Domain board of directors regarding an alternative acquisition proposal from EMC.

DIRECTORS FORUM

Decision Point #5

EMC publicly announces an unsolicited \$30.00 per share all cash tender offer to the stockholders of Data Domain. EMC sends a letter to Mr. Slootman that same day regarding the cash tender offer and enclosing a proposed form of merger agreement. On the following day, EMC makes a filing with the SEC to formally commence the tender offer.

DIRECTORS FORUM

Excerpts from EMC Letter to Data Domain

- We are disappointed that we were not given an opportunity to explore a business combination prior to the announcement of your proposed transaction with NetApp, particularly since I believe you should have been aware of our interest.
- EMC's proposal is not subject to any financing or due diligence contingency, and we will use existing cash balances to finance the transaction.

Excerpts from EMC Letter to Data Domain, cont.

- In comparison to your proposed transaction with NetApp, EMC's proposal represents a far superior alternative for your stockholders.
 - EMC's proposal provides higher absolute value for each Data Domain share
 - As an all cash offer, EMC's proposal offers greater certainty of value
 - With a tender offer structure, EMC's transaction offers a faster time to close
- A transaction with EMC also represents a far more compelling alternative to your customers, employees and partners.
- We will maintain the senior management team under your leadership and operate Data Domain as a product division within EMC.

Goodwin Procter's Annual

DIRECTORS FORUM

Decision Point #6

Following the commencement of the tender offer by EMC, NetApp agrees to raise its per share price to \$30.00 by increasing the cash portion of the consideration by \$5.00 (\$16.45 in cash and \$13.55 in stock).

Goodwin Procter's Annual

DIRECTORS FORUM

What Happened?

Date	Event
June 2	The EMC tender offer is formally commenced. The offer is set to expire on June 29 th .
	NetApp calls the chairman of the Data Domain Board indicating NetApp's willingness to increase the aggregate offer price to \$30.00 per share.
	The Data Domain Board meets with its financial advisor and legal counsel to discuss the revised NetApp proposal and to consider additional terms it might seek from NetApp.
"late evening" June 2	NetApp delivers a letter with the financial terms of its revised \$30.00 per share proposal. NetApp also highlights the increased regulatory risk of the EMC offer due to substantial product overlap.
"morning of" June 3	The Data Domain Board meets with its financial advisor and legal counsel, determines that the revised NetApp terms are in the stockholders' best interests, and votes to approve an amendment to the NetApp merger agreement. The Data Domain Board reaffirms its determination that the EMC offer is reasonably likely to lead to a Superior Proposal.
June 3	Data Domain's counsel delivers a mutual confidentiality and standstill agreement to EMC's counsel. As of June 14 th , EMC had not executed this agreement.

Goodwin Procter's Annual

DIRECTORS FORUM

Date	Event
June 9	EMC publishes an open letter to Data Domain employees in the San Jose Mercury News.
June 15	Data Domain files a Schedule 14D-9 recommending that the holders of its common stock reject the EMC offer and approve the revised NetApp merger agreement.
	EMC issues a press release reaffirming its offer and its belief that the EMC offer is superior to the NetApp merger agreement.
	The Police & Fire Retirement System of the City of Detroit files suit in DE Chancery Court against Data Domain and NetApp alleging that the Data Domain Board breached its fiduciary duties and that NetApp aided and abetted the breach.
June 26	EMC issues a press release announcing the extension of its offer to July 10 th .
July 2	The HSR waiting periods for the NetApp merger and the EMC offer both terminate. Both EMC and NetApp announce the end of the waiting periods.

Goodwin Procter's Annual

DIRECTORS FORUM

Date	Event
July 6	<p>EMC announces a revised all cash offer for Data Domain at \$33.50 per share.</p> <p>EMC's revised offer eliminates all deal protection provisions, including the no shop provision and break-up fee obligation, from its proposed merger agreement.</p> <p>EMC states that the deal could be closed within 2 weeks—a faster close time of almost a month.</p>
	<p>EMC files a preliminary proxy statement with respect to soliciting votes against approval of the NetApp merger agreement.</p>
	<p>NetApp issues a press release announcing it has received all regulatory approvals to proceed with the merger.</p>
	<p>The Data Domain Board meets with its financial advisor and legal counsel and determines that the EMC offer constitutes a Superior Proposal.</p> <p>NetApp is orally informed of the Board's determination and declines to increase the consideration offered in the merger agreement.</p>

Goodwin Procter's Annual

DIRECTORS FORUM

Date	Event
July 8	<p>The Board votes unanimously to approve the EMC offer and to enter into the EMC merger agreement. The Board further resolves to recommend that stockholders tender their shares in the EMC offer.</p>
	<p>The Board also approves termination of the NetApp merger agreement and payment of the break-up fee of \$57MM to NetApp.</p>
	<p>Data Domain executes the EMC merger agreement, notifies NetApp of the termination, and pays the \$57MM break-up fee.</p>
	<p>Data Domain issues a press release announcing it has entered into a definitive merger agreement with EMC.</p>
July 9	<p>The Police & Fire Retirement System of the City of Detroit advises the DE Chancery Court it will not seek a preliminary injunction. A tentative hearing date in August is vacated.</p>
July 23	<p>EMC successfully completes the tender offer with approximately 90% of the outstanding Data Domain shares being tendered, and subsequently effects the second-step merger.</p>