
BOXALL BATTLES

PHASE 6- STRATEGIC INTERLUDE I

Questions for Dianne Nelson's Lawyer

[This interlude may be limited to Dianne's side. If the instructor chooses to have participants receive it, the discussion could take place in two groups, one for each side. Either way, it should take place before you read the role information for the BoxAll Pre-Later Meeting.]

In preparation for negotiating a settlement of your client's disputes with her brother, you learned of more financial shenanigans by Keith. Dianne's accountant had the sound instinct to dig behind the "executive compensation" line in the financials and found that Keith had been awarding himself outlandish bonuses over the five years since your father's death. Keith's regular salary had long been \$500,000 per year. Dianne knew that, when their father was alive and BoxAll had a very good year, he and Keith took personal bonuses as high as their salaries. But never in a bad year, and never more than their base salaries. Even after he retired as BoxAll's owner, their father reviewed and approved all executive compensation, including bonuses. Sure enough, as soon as the father passed away, when BoxAll shares went into the Trust, Keith began taking annual bonuses much larger than \$500,000 – on top of that salary. Because Keith had become the Successor Trustee, he just approved them for himself.

Even that first year, when Keith claims BoxAll was in a tough financial situation, he took a \$600,000 bonus. Without the bonus, BoxAll could have borrowed less! During the next four years, he took bonuses of \$600,000, \$650,000, \$700,000, and \$750,000. That is a total of \$800,000 (\$100,000 + \$100,000 + \$150,000 + \$200,000 + \$250,000) more than the father had permitted. Especially in the first year or so, it's arguable that \$0 bonuses would have been financially prudent, as BoxAll hadn't yet reaped profits from new patents and contracts. That \$800,000 came off the top of the shared profits. So, your client is entitled to 48% of that \$800,000 – at minimum. An accountant or business expert could say she was owed more. The experts might say Keith's bonuses were unreasonably high and some portion of that money should be added back into Dianne's profits claim. Even in great years, Keith never paid his executive team bonuses of more than \$50,000. Consider:

- should you flag the issue of Keith Nelson's bonus excesses to his lawyer before any negotiation or mediation? The information strengthens Dianne's liability case and increases her quantifiable damages. Moreover, it doesn't rely on documents not yet exchanged in discovery. These bonus excesses are reflected in the BoxAll's records.

In a rational world, the bonus issue should inspire Keith to pay more in settlement or at least prompt his lawyer to recommend it. However, if you use it forcefully in these negotiations, and the case fails to settle, it will have less force later. (Even if you don't lean on the bonus issue, Keith's lawyer would likely be aware of it by then.) Consider:

- What strategy would you adopt?
- Does this new information impact whether you would prefer to first try to negotiate settlement directly, or whether to suggest mediating as a next step?
- Do you have any obligation to share this information with counsel for the mother?