



that meeting (“the First Agenda”). The Chairman indicated that although he was providing an agenda, he was not required to do so by law or the Institute’s governing documents.

6. The First Agenda proposed that the Board “consider” creating a special litigation committee; that it “consider” modifying two provisions of the Institute’s by-laws; and that it “consider alternatives to involve important donors and supporters . . . including . . . having them become members of the board of directors.”
7. On the evening of March 20, 2012, I was copied on an email from Cato shareholder and director Charles Koch to the Chairman, in which Charles Koch acknowledged receipt of the First Agenda from the Chairman, and in which, *inter alia*, he (1) sought clarification as to whether votes would be taken on any items set out in the First Agenda and (2) expressed the need for each director to have sufficient time and information to give due deliberation to any changes affecting the Institute’s governance.
8. On March 21, while I was traveling, and approximately 24 hours before the scheduled Special Board Meeting, I received an email from the Chairman attaching a revised agenda for the meeting (the “Revised Agenda”). The Revised Agenda was substantially identical to the First Agenda, with the exception of its having added an additional discussion topic (relating to consideration of modifying a third by-laws provision). Because I was traveling from New York to the Midwest most of the day on March 21, I did not read any material sent to me that day until the morning of March 22.
9. Later the night of March 21, I received from the Chairman, but did not read until the next day, an email attaching two resolutions for consideration at the next day’s Special Board Meeting.
10. The first of these two resolutions was a two-plus page, single-space document addressed to the subject of creating a special litigation committee (“SLC Resolution”) to manage Cato’s legal position in the Declaratory Judgment Action. The SLC Resolution was in omnibus form and consisted of two recitals and thirteen distinct resolutions relating to the creation of a special litigation committee, and its size, scope, powers, recusal standards, confidentiality, indemnification, and other provisions.
11. The SLC Resolution also included a fourteenth resolution for the appointment of persons to the special litigating committee. The space for names of the persons to be appointed was left blank.
12. The second resolution proposed four changes to Cato’s by-laws: (1) a modification to a Cato by-laws provision governing the period to be served by directors chosen to fill vacancies and newly created directorships; (2) a modification permitting a majority of directors to fill vacancies and newly created directorships on the Board; (3) a modification of the Cato by-laws removal-for-cause provision; and (4) a modification to the existing by-laws provision setting the notice period for calling a special meeting of the Institute’s Board (the “By-Laws Resolution”).
13. There were no additional proposed resolutions attached to the email and, in particular, there were no resolutions relating to the subject of expanding the Board by adding new directorship positions or the identities of persons proposed to fill those positions.

14. I have participated as a member or director on other boards of directors or boards of trustees. My normal practice with respect to my duties in those capacities is to consider in advance any proposed resolutions as carefully as possible and, where appropriate, ascertain as much background and explanation as necessary, in my judgment, to execute my fiduciary responsibilities.
15. In the few hours between my receipt of these resolutions and the commencement of the March 22 Board meeting, I had very little time to consider the proposed resolutions or to understand fully their potential implications. I was disappointed that there were not more materials to support or explain them. Indeed, Cato's Chairman had said in circulating the initial agenda for the meeting that he was not required by any law or Cato governing instrument to provide an advance agenda, and I had been surprised and disappointed by that attitude toward the responsibilities of members of the Board of Directors. I stated in an email to the Chairman after receiving the First Agenda that "I wouldn't be too defensive about an agenda for a Board of Directors meeting. I don't think I've ever been on a board that didn't produce agendas prior to meetings." (Ex. 1.)
16. The Board meeting was held at 2:30 p.m. EDT on March 22, 2012. The meeting itself was chaired by the Chairman. I was in the Midwest and therefore participated by telephone.
17. At the Board meeting, both the SLC Resolution and the By-Laws Resolution were presented for discussion.
18. With respect to the SLC Resolution, because I had had very little time to read or consider it before the discussion, I was unsure as to the necessity or breadth of many of its provisions. Indeed, as I understood the underlying dispute, it was a disagreement between shareholders as to the legal implications of the Shareholders' Agreement. It seemed that the Institute was a nominal defendant in that dispute, and it was thus unclear why the proposed kind of elaborate procedures or substantial budget would be necessary for Cato to fulfill its role in that litigation. That subject was never explained during the meeting to my satisfaction. Indeed, while I did not have any strong position in favor of or against the resolution, it did not seem to me that the resolution or its necessity under Kansas law was adequately explained. I would have preferred a postponement of this measure until we all had had an opportunity to consider it in the required detail, but the Chairman opposed any delay and stated that those who had questions about the necessity for the resolution should simply vote against it.
19. Other directors, including Andrew Napolitano, Kevin Gentry, and Nancy Pfotenhauer made similar observations. A motion to table the SLC Resolution was brought before the Board, and it was rejected by a 9:7 vote. A motion was then brought to vote to approve the SLC Resolution, and it was passed by the same 9:7 vote.
20. The Chairman then brought before the Board a recommendation that he and two other directors—Howard Rich and Fred Young—be elected by the Board as members of the special litigating committee.
21. Kevin Gentry asked the Chairman how he (the Chairman) could consider himself independent given that he had taken a public position against the Kochs in the shareholders dispute and had acted as a proxy in voting (over the objection of

shareholders Charles Koch and David Koch) the late Mr. Niskanen's contested shares at the March 1, 2012 shareholders' meeting.

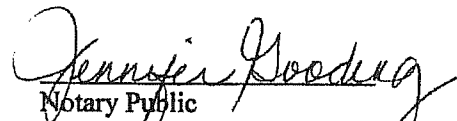
22. The Chairman responded that he was independent. He then called the vote and, along with Messrs. Rich and Young, he was elected to the special litigating committee by the same 9:7 margin.
23. With respect to the By-Laws Resolution, during the Board meeting, these were raised as three different motions, covering each of the changes referenced in paragraph 12 above. In response to this Resolution, I stated that I had received the resolutions only the night before the meeting; that it raised substantial questions relating to Kansas law; and that I did not believe I had had sufficient opportunity to review it in the proper exercise of my fiduciary duties.
24. The Chairman responded that the proposed by-laws modifications were compelled by Kansas law and needed to bring the Institute into compliance with it.
25. I asked the Chairman whether the Institute had obtained a legal opinion in support of the proposed changes.
26. The Chairman responded that he had a legal opinion supporting the need for the changes dated February 9, 2012.
27. I asked the Chairman why he had not shared the legal opinion with all directors being asked to vote on it before a vote was had on it. He responded that he could not send everything he received as Chairman and some of the paperwork he receives is not important. The Chairman also said that he had elected not to share the opinion with all directors, and noted that he had been busy, including busy "with litigation."
28. For these reasons, I stated that while I could not conclude that the resolutions were improper or unnecessary, I did not feel that I could properly discharge my fiduciary duty to Cato by voting one way or another without more information—and urged a delay in their consideration.
29. The Chairman responded that it was not possible to wait because responses in the litigation were due soon.
30. I understood his reference to "the litigation" as a reference to the Declaratory Judgment Action. I asked the Chairman the date on which such responses were due and he responded that he did not know. I then reiterated my request that we as directors be provided more time to review these resolutions before voting on them. The Chairman responded that if anyone did not feel comfortable that they had sufficient time to review any resolution, they were free to vote against it.
31. A vote was taken on each of the three paragraphs of the By-Laws Resolution. The first proposed change was approved by a margin of 9:6, with a single abstention, and with the same nine directors who had voted for the SLC Resolution and for the membership of the special litigating committee voting for the change. In fact, these nine directors voted as a bloc on every vote brought before the Board during the meeting. The second change, pertaining removal of directors for cause, was approved 9:7. The third change, relating to the period for noticing a board meeting—was approved by an 11:5 vote, with the same nine voting as a bloc.

32. The Chairman then introduced a new resolution to the effect that four new directorships should be created for the Cato Board.
33. I had not received any notice that a vote on newly created directorships would be taken at this meeting.
34. The Chairman then proposed four new members for the Board: William A. Dunn, John C. Malone, Lewis Randall, and Donald G. Smith.
35. I had not received any notice that a vote on the identities of persons to fill newly created directorships would be taken at this meeting. Nor had I received notice of the identities of those persons.
36. The Chairman put the resolution creating four new directorships to a vote, naming Messrs. Dunn, Malone, Randall, and Smith to serve as directors. The vote passed by the same 9:7 margin.
37. I was astonished that we would be asked to vote to increase the size of the Board by four members without advance notice, and to vote for certain persons without a full discussion of their respective qualifications to be members of the Board. I do not have any basis for challenging their credentials, but I have never served on a board where a vote was called with respect to new members without a thorough ventilation of the qualifications of those proposed to be added to the board.
38. On March 23, 2012, I received an email from the Chairman discussing his actions at the previous day's Board meeting.
39. With respect to each of the votes brought before the directors, I understand that each vote raised questions relating to the exercise of my fiduciary duties as a director as well as factual and legal issues relating to the shareholder differences that were before the court in the Declaratory Judgment Action.
40. I understand that as a director of a non-profit corporation, I have certain fiduciary duties of loyalty and care that must be exercised after due consideration in the best interests of the entity and its shareholders.
41. As to the resolutions voted on at the March 22, 2012 Board meeting, I do not believe that I received the notice or opportunity to review them necessary to enable me to exercise my fiduciary duties fully, fairly, and properly.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

  
Theodore B. Olson

Subscribed and sworn to (or affirmed) before me on this 5<sup>th</sup> day of April, 2012 by Theodore B. Olson, personally known to me or proved to me on the basis of satisfactory evidence to be the person who appeared before me.

  
Notary Public

My Commission Expires: 1/31/16



# EXHIBIT 1

----- Original Message -----

From: Olson, Theodore B. [<mailto:TOlson@gibsondunn.com>]  
Sent: Monday, March 19, 2012 03:07 PM  
To: Robert Levy <[rlevy@cato.org](mailto:rlevy@cato.org)>  
Subject: RE: Agenda for Cato's Special Board Meeting

Thanks, Bob. I appreciate it. I wouldn't be too defensive about an agenda for a Board of Directors meeting. I don't think I've ever been on a board that didn't produce agendas prior to meetings.

Ted

Theodore B. Olson

GIBSON DUNN

Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue, N.W., Washington, DC 20036-5306 Tel +1 202.955.8668 \* Fax +1 202.530.9575  
[TOlson@gibsondunn.com](mailto:TOlson@gibsondunn.com) \* [www.gibsondunn.com](http://www.gibsondunn.com)

-----Original Message-----

From: Robert Levy [<mailto:rlevy@cato.org>]  
Sent: Monday, March 19, 2012 3:59 PM  
To: Crane Ed; Marshall Preston; Pfothenhauer Nancy; Yass Jeff; Rich Howie; Koch Charles G.; Koch David H.; Washburn Kathy; Dennis Richard; Humphreys Ethelmae; Olson, Theodore B.; Young Fred; Gentry Kevin; Andersen Tucker; Napolitano Andrew  
Cc: Andersen Tucker; Koch David H.; Bond Frank  
Subject: Agenda for Cato's Special Board Meeting

To the Cato Institute Board of Directors:

I've been asked for an agenda for Thursday's special board meeting. Although not required by law or the Institute's governing documents, I've attached (below) an agenda for your review. Please understand that the Institute is not acknowledging that an agenda must be provided, or that matters other than those delineated in the agenda will not be considered at the meeting.

In addition to board members, the following persons have been invited to attend the special meeting: Wes Edwards, an attorney with Koch Industries; Edward Frizell, an attorney with Polsinelli Shughart, which is representing the Cato Institute; David Boaz, Cato's executive vice president, who customarily attends the Institute's board meetings; and Lesley Albanese, Cato's vice president for development, who will serve as recording secretary. Each of those persons is invited to observe, but not participate, unless his or her views are requested on a specific issue.

SCAN DATE 2012/03/19 13:53



Best regards  
Bob

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Robert A. Levy  
Chairman  
Cato Institute  
c/o 8787 Bay Colony Dr.  
Naples, FL 34108  
Phone: 239-566-7139

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This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

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