QUESTION 1

AppCo Incorporated ("AppCo") is a Delaware corporation. AppCo's bylaws ("ByLaws") contain the following provisions concerning AppCo's board of directors ("Board"):

> Section 1. The business and affairs of the corporation shall be managed by or under the direction of the board of directors. The number of directors that shall constitute the whole board of directors shall be six.
>
> Section 2. At all meetings of the board of directors, a majority of the whole board of directors shall be necessary and sufficient to constitute a quorum for the transaction of business. The act of a majority of the directors present at any meeting of the board of directors at which a quorum is present shall be the act of the board of directors, unless by express provision of applicable law or the certificate of incorporation a different vote is required, in which case such express provision shall govern and control.

Neither AppCo's certificate of incorporation ("Certificate") nor the Bylaws contain any other provisions regarding the size of the Board, the number of directors necessary to constitute a quorum, or the number of votes necessary for the Board to take action. The Certificate and the Bylaws do not contain any provisions regarding board committees. The Certificate contains a provision eliminating the personal liability of directors for breaches of fiduciary duty to the fullest extent permitted by Section 102(b)(7) of the General Corporation Law of the State of Delaware (the "DGCL").

AppCo currently has only five sitting directors: Betty, Carl, Diane, Ed, and Fran. One board seat is vacant. Betty is AppCo's President. Carl is AppCo's Treasurer and Secretary. Diane, Ed and Fran are not officers or employees of AppCo, are not involved in its day-to-day

operations, and do not derive a material part of their income from any fees they receive for their services as directors or from transacting any business with AppCo.

The Certificate authorizes one class of capital stock: common stock, with a par value of $0.01 per share. The common stock is not redeemable. All of the shares of AppCo's common stock are held by eight stockholders: the five directors, and three former employees who now work for an AppCo competitor (the "Other Stockholders"). Betty owns 250 shares, Carl, Diane, Ed, and Fran each own 150 shares, and the Other Stockholders each own 50 shares.

AppCo needs additional capital to finance its operations. AppCo has been negotiating with X Investors, LLC ("X Investors") regarding a potential transaction in which X Investors would receive a new class of AppCo preferred stock in exchange for providing the additional capital AppCo needs (the "XI Transaction"). As part of the XI Transaction, AppCo will need to amend its Certificate to authorize the new class of preferred stock. Diane, Ed, and Fran own all of the economic interests in X Investors.

You are outside counsel to AppCo. The Board has asked you if it might be possible to structure the director vote on the XI Transaction so that only Betty and Carl would be voting to approve it, given the conflicts of interest faced by the other directors. The Board describes two scenarios. In the first scenario, only Betty, Carl and Diane would attend the Board meeting at which the directors would vote on the XI Transaction; Diane would abstain from voting at such meeting; and Betty and Carl would vote to approve the XI Transaction. The Board's second proposed scenario would involve the full Board appointing a committee of the Board with Betty and Carl as the committee's only members. The Board would delegate to the committee the full power and authority of the Board to evaluate and approve the XI Transaction, including the creation and issuance of the preferred stock.

In responding to the following two questions, address only matters under the DGCL and AppCo's Certificate and Bylaws; do not address fiduciary duty principles or standards of judicial review.

1. With respect to the first proposed scenario, assuming that notice of the Board meeting is properly given to all directors and that only Betty, Carl, and Diane attend the meeting, would action taken at the meeting be valid Board action? Explain why or why not.

2. With respect to the second proposed scenario, could the Board delegate to a committee the full power and authority of the Board to approve the XI Transaction? Explain why or why not.

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Instead of utilizing either of the scenarios proposed by the Board, the Board considers the XI Transaction at a properly noticed meeting attended by all directors. After due deliberation, all five directors vote in favor of the XI Transaction.

3. Can Diane, Ed, and Fran be counted for purposes of determining the existence of a quorum for the Board meeting? Explain why or why not. Address only matters under the DGCL; do not address fiduciary duty principles or standards of judicial review.

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Following the Board meeting, AppCo and X Investors decide to abandon the XI Transaction. AppCo continues to struggle financially.

After considering numerous alternatives for raising more capital and consulting with legal and financial advisors, the Board approves a transaction by which AppCo will offer all of its stockholders the opportunity to purchase shares of a new class of preferred stock (the "Preferred Stock Offer"). Specifically, all eight AppCo stockholders will be offered the opportunity to purchase two shares of preferred stock for each share of common stock they own, at a purchase price of $250 per share of preferred stock. Betty would be entitled to purchase up to 500 shares of preferred stock, Carl, Diane, Ed, and Fran would each be entitled to purchase up to 300 shares of preferred stock, and the Other Stockholders would each be entitled to purchase up to 100 shares of preferred stock.

Following Board and stockholder approval, AppCo files an amendment to its Certificate setting forth the rights, powers, and preferences of the new preferred stock. In the letter to stockholders informing them of their right to purchase shares of preferred stock (the "Offering Letter"), AppCo describes the terms of the preferred stock, the terms of the Preferred Stock Offer, and the procedures to exercise the right to purchase shares of preferred stock. The Offering Letter also states that Betty, Carl, Diane, Ed, and Fran all plan to purchase their full allotment of preferred stock.

The Offering Letter discloses basic financial information about AppCo, and states that AppCo will provide more detailed financial information to any of the Other Stockholders who executes a confidentiality agreement. The confidentiality agreement would prohibit the Other Stockholders who sign it from disclosing the more detailed financial information to third parties or using such information for competitive purposes or any other purpose unrelated to

the Other Stockholders' interests as stockholders of AppCo. The Board has determined that a confidentiality agreement is necessary because the Other Stockholders work for an AppCo competitor.

The Other Stockholders file a complaint in the Court of Chancery against AppCo and all five directors, contending that the directors breached their fiduciary duties of care and loyalty by (i) approving the Preferred Stock Offer, including by giving themselves the right to purchase more shares than they offered to the Other Stockholders, (ii) failing to disclose to the Other Stockholders the financial information necessary to evaluate the Preferred Stock Offer, and (iii) conditioning the Other Stockholders' receipt of the detailed AppCo financial information on their execution of a confidentiality agreement. The directors file an answer denying each of these contentions and asserting the Section 102(b)(7) exculpatory provision in AppCo's Certificate as an affirmative defense against the breach of fiduciary duty claims.

4. Did the directors suffer from a conflict of interest when they considered and approved the Preferred Stock Offer because the terms of the Preferred Stock Offer will allow each of them to purchase more shares of stock than the Other Stockholders are allowed to purchase? Explain why or why not.

5. What legal standard will the Court of Chancery apply in assessing whether the directors disclosed sufficient information to enable the Other Stockholders to make an informed decision whether to participate in the Preferred Stock Offer? Explain your answer.

6. What arguments should the directors make to support their contention that they did not breach their fiduciary duties by conditioning the disclosure

of detailed financial information to the Other Stockholders on the execution of a confidentiality agreement? Explain your answer.

7. **Discuss whether and the extent to which the Section 102(b)(7) exculpatory provision in AppCo's Certificate provides the directors with a defense against the Other Stockholders' breach of fiduciary duty claim.**

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The Other Stockholders enter into a settlement agreement with AppCo and the directors to resolve the lawsuit challenging the Preferred Stock Offer. Pursuant to the settlement agreement, AppCo will purchase all shares of common stock held by the Other Stockholders for an agreed-upon price.

8. **Describe any limitations under Section 160 of the DGCL on AppCo's financial ability to purchase the shares of its common stock from the Other Stockholders and explain in detail how AppCo's financial ability to purchase shares of the common stock would be determined under Sections 160 and 154 of the DGCL.**

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QUESTION 2

On March 1, 2012, Adam and Barbara are married. Shortly thereafter, they purchase a farm named Blackacre. Adam is concerned that the property costs are more than they can afford, but the owner, Seller, agrees to provide a portion of the required financing and the couple is able to arrange the remaining financing through First Local Bank. Seller's financing to Adam and Barbara complies in all respects with Delaware law relating to seller financing, including 25 Del. C. Section 314.

On May 1, 2012, Seller signs and seals a general warranty deed, granting and conveying Blackacre to Adam and Barbara, and the deed is appropriately acknowledged, delivered, and recorded on the same day. Adam and Barbara sign, seal, acknowledge, and deliver two different mortgages describing the property, first to First Local Bank and then to Seller. First Local Bank properly records its mortgage on May 2, 2012. On May 5, 2012, Seller properly records his mortgage.

Adam and Barbara later decide to rent part of Blackacre and hire Contractor to convert a barn on Blackacre into an apartment. Contractor begins work on January 15, 2013. In order to pay Contractor, Adam and Barbara again borrow against the farm, signing, sealing, acknowledging, and delivering a third mortgage on Blackacre to Second Local Bank. Second Local Bank properly records the mortgage on February 1, 2013.

One month later, unbeknownst to Adam, Barbara, or their other creditors, First Local Bank assigns its mortgage on Blackacre to Third Local Bank. The assignment is attested by a credible witness, but it is not sealed.

Contractor finishes the work on the barn apartment on March 15, 2013, and submits a bill to Adam and Barbara on the same day. Almost two months later, Adam and Barbara still have

not paid Contractor, so Contractor files a statement of claim against the property. Thereafter, Contractor files a mechanic's lien action and obtains a judgment on the claim on May 1, 2013.

Meanwhile, Adam and Barbara successfully rent the unfurnished barn apartment to Tenant, a law school student. Rather than incur the expense of a lawyer, Adam and Barbara print a lease from the internet. The lease reads as follows:

LEASE

> FOR GOOD AND VALUABLE CONSIDERATION, the sufficiency of which is hereby acknowledged, the parties hereto agree to the following terms and conditions on this first day of April 2013.
>
> Tenant shall have possession and quiet enjoyment of the barn apartment at 101-A Blackacre Lane for one year in exchange for payment of $12,000 rent, to be paid in 12 installments of $1000 each on the first day of each month. Tenant shall also pay a security deposit of $1000 in connection with his tenancy of said apartment, which deposit shall be repaid at the end of this lease (less damages).
>
> Adam and Barbara ("Landlords") shall be responsible for the provision of utilities for said apartment.
>
> If Tenant shall not pay the rent due on the first of each month, or if he otherwise breaches this lease, Landlords are authorized to confess judgment against Tenant, and Landlords may recover attorney's fees against Tenant.
>
> Landlords shall in no way be liable for any damages in connection with said apartment or lease.

Adam, Barbara and Tenant sign the lease. Tenant pays the security deposit and the first month's rent, and he moves into his new apartment on April 1, 2013.

On April 27, 2013, a minor earthquake occurs, causing one of the water pipes in the barn apartment to leak. Tenant promptly informs Adam and Barbara of the leak, and, in order to prevent further damage, they turn off the water main, leaving the apartment without water.

Adam and Barbara assure Tenant that they will fix the problem, but three days later, on April 30th, there is still no water. Tenant packs up his possessions and drives off, but, first he tapes the following note to Adam and Barbara's door:

> Dear Adam and Barbara,
>
> As you know, there is still no water in the apartment. I can't live like this. Good luck finding a new tenant. You can send my security deposit to me care of my law school: 123 Law School Drive, College Town, State 12345.
>
> Tenant

Over the next month, Adam and Barbara become so busy with other matters that they forget about Tenant. Deprived of their rental income, Adam and Barbara fall behind on their mortgage payments, and Second Local Bank institutes a foreclosure action with respect to Blackacre on June 1, 2013.

Adam engages you for legal advice.

When responding to each of the following questions, please explain your answers in detail.

1. Adam does not want to incur any more debt but fears Barbara may attempt to remortgage Blackacre in an attempt to extricate the couple from their unfortunate situation. Assuming another lender would accept a mortgage on the property, can Adam prevent Barbara from mortgaging Blackacre? Why or why not?

2. Adam asks you to explain the relative positions of the lienholders on Blackacre so that he may attempt to negotiate solutions with them. What are the relative lien priorities of Seller, the three banks, and Contractor relating to Blackacre?

3. Adam asks you about the unresolved situation with Tenant. He believes that Tenant owes the remaining $11,000 under the lease, which he did not pay, and Adam would like to file suit, confess judgment against Tenant, and collect attorney's fees. Adam also wonders if he must return Tenant's security deposit, since Tenant left so suddenly in violation of the lease. Advise Adam as to these questions.

4. As a final matter, Adam explains that, whenever it snows, people come to sled at Blackacre on the big hill behind the barn. Adam and Barbara welcome the activity, which is free to all, and they would like to continue to allow it, but Adam is concerned that they may incur liability if someone is injured. He is thinking of posting a "no trespassing" sign. Barbara thinks that they can charge visitors to sled on the hill. Advise Adam as to the liability risk of allowing the sledders to sled at Blackacre. Is that risk changed if Adam and Barbara (a) charge the sledders for admission, and/or (b) post the "no trespassing" sign? Explain.

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QUESTION 3

Owner owns a nightclub (the "Club") in Wilmington, Delaware. Singer enters into an agreement with Owner to perform at the Club once a week, beginning in January, 2012. Owner prepares a written contract (the "Written Agreement") stating that Singer will be paid 20% of the Club's revenue on the nights that Singer performs. Owner and Singer each sign the Written Agreement. Following Singer's first performance, Owner pays Singer in accordance with the Written Agreement. Singer, however, claims that the payment is insufficient. Singer asserts that Singer and Owner actually agreed that Singer would be paid 30% of the Club's revenue on nights that Singer performs and that the 20% figure set forth in the Written Agreement is incorrect. Owner denies owing Singer any more money, but proposes that they resolve their dispute by entering into an amended contract that splits the difference between their respective positions – that is, Owner suggests that they agree to change the payment term in the Written Agreement to 25% of the Club's revenue on the nights that Singer performs. Singer refuses the offer and sues Owner in the Delaware Court of Chancery for reformation of the Written Agreement to reflect the alleged 30% payment term.

1. Singer retains Expert, a professor of contract law at Wilmington Law School, to testify as an expert witness on Singer's behalf. Expert's report discloses that Expert will offer the opinion that, as a matter of Delaware law, the Written Agreement may be reformed even though it is unambiguous. Owner objects, and moves *in limine* to exclude the introduction of this opinion at trial on the grounds that it is not an appropriate subject for expert testimony. **Should the opinion be excluded? Why or why not?**

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2. Singer's counsel takes the deposition of Buddy, one of Owner's friends. Buddy testifies that he regularly plays cards with Owner and Pastor, a mutual friend of theirs who serves as a pastor at the church they both attend. During a card game taking place shortly after Singer filed the reformation suit, Buddy went into the kitchen for snacks. Upon returning, he overheard Owner whisper to Pastor, "I feel so guilty. I typed in 20% instead of 30% on the contract with Singer. What should I do about it?" Buddy testifies that no one else was in the room. He does not think that either Owner or Pastor knew that Buddy was in the room at the time because they both had their backs to the door, and as soon as they noticed Buddy had come into the room, they stopped talking. Owner objects and moves *in limine* to exclude from trial any testimony from Buddy about what Owner said to Pastor, on the grounds of privilege. **What arguments should Owner make to exclude the testimony?**

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3. Owner provides Singer with written notice pursuant to Delaware Rule of Evidence 609 ("Rule 609") that Owner intends to impeach Singer's credibility with the fact that, in 2000, Singer was convicted of felony assault. Singer served three months in jail for that offense, and was released later in 2000. Singer moves *in limine* to exclude the evidence of this prior conviction. **What arguments should Singer make under Rule 609 in that motion?**

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4. At trial, Singer requests that Owner be excluded from the courtroom during Singer's testimony, arguing that Owner would obtain an unfair advantage from hearing Singer's testimony before Owner is called to the stand. **Will Owner be excluded from the courtroom? Why or why not?**

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5. Singer seeks to testify about Owner's offer to amend the payment term of the Written Agreement for the purpose of proving Owner knows the Written Agreement does not accurately reflect the terms to which they actually agreed. Owner objects. **Is this testimony admissible? Why or why not?**

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Owner and Singer eventually settle their dispute. During one of Singer's later performances at the Club, a walkway in the Club collapses, injuring Fan and Visitor, who are both patrons of the Club. Fan and Visitor are taken to the hospital in separate ambulances. Visitor's injuries are particularly severe. On the way to the hospital, Medic informs Visitor that Medic believes that Visitor's injuries are so grave that Visitor probably will not survive the trip to the hospital. Visitor tells Medic that shortly before the walkway collapsed, Owner told Visitor that Owner knew the walkway was not strong enough to hold all of the people standing on it. Fortunately, Visitor recovers from his injuries. Visitor then moves to China, vowing never to return to Delaware.

Fan's injuries are also severe. Owner arranges to pay Fan's medical bills incurred while Fan is in the hospital, using the proceeds of a claim that Owner made against the insurance policy on the Club. Fan, however, has other, ongoing medical bills as a result of injuries sustained in the walkway collapse. In an attempt to recoup those expenses, Fan sues Owner in Delaware Superior Court for negligence, claiming Owner knew or should have known that the walkway was not sturdy enough. Meanwhile Owner has the walkway in the Club rebuilt with new reinforced support structures.

6. Despite reasonable efforts, Fan is unable to procure Visitor's appearance at trial by subpoena or otherwise. In lieu of Visitor's testimony, Fan calls Medic to testify about what Visitor said in the ambulance concerning what Owner said about the walkway collapse. Owner objects to Medic's testimony as hearsay within hearsay. **What arguments should Fan make that the testimony is admissible?**

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7. Fan attempts to offer the fact that Owner paid Fan's hospital bills as evidence of Owner's liability for Fan's injuries. Owner objects. **Is that fact admissible? Why or why not?**

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8. Fan also seeks to offer the fact that Owner had the walkway repaired with reinforced support structures after it collapsed as evidence of Owner's negligence. Owner objects. **Is that fact admissible? Why or why not?**

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9. Fan also seeks to offer the fact that Owner was covered by insurance in connection with the walkway collapse as evidence that Owner acted negligently in maintaining the walkway. Owner objects. **Is that fact admissible? Why or why not?**

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QUESTION 4

Former jailhouse buddies Allen and Butch decide to hitch a ride from Baltimore, Maryland to Dewey Beach, Delaware. They do not have any money but agree to figure out a way to pay for a hotel, food and drink. They arrive in Dewey Beach on a Friday in June while vacationers are still on the beach. They go to the Dewey Suites Hotel. While Butch keeps a lookout outside the rooms, Allen breaks into two rooms and fills his backpack with the occupants' belongings and cash. From the first room, rented by Mr. and Mrs. Tourist, Allen takes four credit cards, two cameras worth $700 each, $1,500 cash, a cell phone worth less than $200, and a diamond ring worth $4,000. In the second room, rented by 70 year old Mr. Vacationer, Allen takes a cell phone worth $300 and a camera worth $1,200. It costs $200 to repair the damage done to each hotel room door.

After leaving the hotel, Allen and Butch steal an unlocked car and drive to Rehoboth Beach, where they rent a room at the Ocean Front Hotel. They abandon the car undamaged downtown. Later that day, the police recover the car and return it to its owner.

Allen and Butch then go to the Rehoboth Liquor Store and use a credit card belonging to Mr. Tourist. Butch uses the credit card and signs Mr. Tourist's name to buy a six pack of beer. Thirty minutes later Allen goes back to the store and buys a case of champagne and a bottle of expensive liquor. Allen also signs Mr. Tourist's name on the $1,200 credit card receipt. The store clerk, while making small talk, asks where the party is, and Allen tells him that the party is at the Ocean Front Hotel.

After partying all night and recovering on the beach the next day, Allen and Butch decide that they need some more money. They put the stolen property in a backpack and head to the other side of town to sell the cameras and jewelry. They sell the cameras and jewelry for $550.

They head back to their hotel to discover that a police officer is at the front desk. They see a car parked in the drop-off area of the hotel with the engine running and trunk open. Allen jumps in the passenger seat and Butch jumps in the driver seat and they start driving back to Baltimore.

As they pull out of Rehoboth Beach, a police car begins to chase them with its lights and sirens activated. Butch is driving at speeds over 90 miles per hour. With police officers chasing him and the Delaware State Police helicopter overhead, Allen rolls down the passenger window and fires his 9 mm handgun. He hits the windows of two separate police cars on the driver's side. On the third shot, while aiming for the police officer's head, Allen mistakenly shoots and kills a woman on a bicycle.

They continue to flee the police and cross the state line into Maryland. Maryland police join the chase. Eventually, Butch runs off of the road allowing the Maryland police to take both Allen and Butch into custody. They both waive extradition to Delaware and now face prosecution in Delaware.

Identify and discuss by reference to the elements, each Delaware crime with which Allen and Butch could be charged. If a crime is divided into degrees, specify the appropriate degree.

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QUESTION 5

Paul, a high school senior, is an avid and accomplished artist. He sold his first painting at the age of ten, and since then he has become known in the local art community for his Andrew Wyeth-like landscapes. His paintings regularly sell for thousands of dollars.

Paul recently finished his latest masterpiece, which he calls "The Mill," depicting an old mill located in the rolling hills of New Castle County. Based on his past sale prices and the current local art market, Paul believes that he could sell his painting for at least $4,000.

Over breakfast one morning, Paul tells his mom that he plans to enter his painting in an upcoming art show that is held annually to give local artists a chance to show, and hopefully sell, their work to art enthusiasts from all over the region. Paul's mom remembers that her college roommate, Anne, recently moved to Wilmington from New York, where she worked as an art broker. Paul's mom suggests that Paul ask Anne to "show him the ropes," since Paul has limited art-show experience. Taking his mom's advice, Paul calls Anne the next day. After Paul introduces himself and explains the situation, Anne agrees to assist Paul in his efforts to sell his painting at the art show, which is scheduled to begin that Friday. Anne says that she wouldn't think of charging Paul for her time and assistance, but that she will otherwise treat Paul like all the rest of her clients. Paul accepts Anne's offer, and they agree to meet Thursday evening at the museum to discuss their sales strategy.

On Thursday, which is Paul's eighteenth birthday, Paul meets Anne at the museum. Anne is quite impressed by Paul's work, which reminds her of a Wyeth landscape. Regarding their sales strategy, Paul tells Anne, "I don't care how you do it, but I won't accept anything less than four big ones for this beauty." Thinking to herself that $400 would be a reasonable asking price, Anne nods in agreement and tells Paul that she will do everything she can to sell the

painting. "Great," Paul says, "you handle the wheeling and dealing, but I want the final say on any sale." "Understood," Anne says.

On Friday morning, Paul's painting attracts some interest, but no serious offers. By lunchtime, the crowd has thinned out, and Anne offers to drive to a nearby deli to pick up some sandwiches. Paul gives Anne his order and begins wandering around the museum to view the other works on display. In the parking lot, Anne's car will not start, so she returns to ask Paul if she can borrow his car. Paul agrees, and Anne leaves. As Anne is driving to the deli, a pedestrian steps off the sidewalk into Anne's lane. Anne hits the pedestrian, who is taken by ambulance to the hospital with a leg injury.

With nearly an hour lost to the accident, Anne heads back to the museum. Without consulting Paul, Anne arranges for Paul's painting to be moved closer to the entrance of the museum, where it can be more prominently displayed, in exchange for a payment of $100 to the museum. "Great deal," Paul later tells Anne. After Paul's painting is moved and the after-work crowd begins to fill the museum, Paul and Anne are busy answering questions about Paul's painting. Theresa, a nearby restaurant owner, thinks The Mill would add some local flavor to her dining room. She asks Paul what inspired the work. Paul tells Theresa that he was lost one winter day while driving around the Brandywine Valley when he came across the dilapidated mill, with geese flying in the background, and that he just had to capture the scene. Impressed by Paul and his painting, Theresa asks Paul about the price of the painting. Paul quickly points to Anne, who is across the room and says, "You'll have to talk to her about that."

After twenty minutes of negotiations outside Paul's presence, Anne agrees to sell The Mill to Theresa for $475. Theresa pays cash on the spot and takes possession of the painting.

Anne informs Paul of the sale and hands him the cash. Irate, Paul throws the cash, yelling, "I told you I wouldn't sell if for anything less than four thousand dollars." Paul immediately tells Theresa there is no deal, but Theresa insists that the sale is final and refuses to return the painting. Litigation ensues in Delaware state court.

1. **Is Paul bound by Anne's agreement to sell The Mill to Theresa for $475? Explain your answer.**

2. **If Paul is bound by the sale, what, if any, recourse does Paul have against Anne, assuming that The Mill is appraised at $4,000? Explain your answer.**

3. **Assume that the sale is final, but that Theresa later discovers that The Mill is an exact copy of a Wyeth painting (a fact known to Anne). Setting aside any claims Theresa has against Paul, does Theresa have a claim against Anne? Explain your answer.**

4. **Is Paul bound by Anne's agreement to pay the museum $100 in exchange for moving Paul's painting closer to the entrance of the museum? Explain your answer.**

5. **Does the injured pedestrian have any recourse against Paul for his injuries, assuming that Anne was at fault in the accident? Explain your answer.**

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QUESTION 6

Sam and Tyler work for Employer, dividing their work time between office duties at Employer's Delaware headquarters, and on-site sales and service visits to client locations. Sam's seniority with Employer has earned him a company sedan. Employer permits Sam to use the sedan for personal reasons in addition to his business duties for Employer.

One day, Sam and Tyler are making site visits to clients, starting at 8:30 a.m. and working until 5:30 p.m. They go to The Pub for a late lunch at 1:45 p.m. and find a table with two chairs near the back wall. Sam encourages Tyler to drink some beers with him. Tyler agrees, and over the next two hours they consume several beers while singing songs and discussing business. Sam becomes clearly intoxicated. Tyler, while feeling some effects from the alcohol, is not clearly intoxicated. Tyler leans back in his chair as he raises his hands and yawns. Suddenly, one of the legs of the chair splinters and breaks, causing Tyler to fall out of the chair. Tyler strikes his head and left shoulder on a radiator before landing on the floor. When Tyler gets back to his feet, he feels severe pain in his left shoulder. The Pub's owner apologizes for the broken chair, telling Tyler that The Pub purchased these chairs brand new from Ace Chair Company only two months ago, and that this is the third Ace chair to break in that time frame. The owner asks Tyler if he feels okay. Tyler shakes his head "no" and says that his shoulder is throbbing. Sam and Tyler pay their tab and leave The Pub.

As they are leaving, Tyler asks Sam if he is okay to drive, and Sam assures Tyler that he feels fine. Tyler tells Sam he wants to get medical attention for his injuries. They both get into the sedan, and Sam starts driving to a nearby walk-in medical aid unit. While traveling northbound on Main Street, Sam receives a call on his cell phone from his boss at Employer. The boss starts talking to Sam about some year-end revenue figures. Not wanting to tell his

boss about what transpired at The Pub, Sam answers the boss's questions while he hurries down Main Street, exceeding the speed limit, to get Tyler to the medical aid unit as quickly as he can. At the same time, Jack is driving his pickup truck in a southbound direction on Main Street. The two vehicles reach the intersection of Main Street and Elm Street, which is controlled by traffic signals, at approximately the same time. Jack makes a left turn directly into the path of Sam's sedan. Sam slams on his brakes, but is unable to stop in time. The front of Sam's sedan strikes the passenger side of Jack's pickup truck. Sam injures his neck as a result of the collision. As soon as the vehicles come to a rest, the drivers exit their vehicles and begin to argue. Sam yells that he had a solid green light to go through the intersection, while Jack shouts, "You're drunk! I had the green arrow to turn left!" Jack shoves Sam and Sam falls to the ground, suffering injuries to his right knee and right elbow in the process. Jack does not think that he was injured in the collision, but two days later begins suffering from headaches and numbness and tingling in his neck and shoulders. Meanwhile, Tyler is still sitting in Sam's sedan. His seatbelt held him in place, but he is now experiencing some back pain.

Just seconds after the collision occurs, Chris is driving northbound on Main Street approaching the intersection where the accident occurred. Chris is looking at a catalogue lying open on the front passenger's seat of her station wagon when she notices the accident in front of her as she rounds a bend in the road. She tries to swerve, but strikes the driver's side rear corner of Sam's sedan. The sedan is pushed into Jack's pickup truck, causing additional damage to the pickup truck but no further injuries to Jack. Tyler, who has unbuckled his seatbelt in Sam's sedan when the impact occurs, strikes his face on the passenger side window of the sedan bloodying his nose.

For each of the following questions, assume that all events occurred in Delaware and that Delaware law applies.

1. Based on the above facts, identify the tort claims that Tyler could assert to recover for his multiple injuries. For each claim, identify the elements of the claim, the person or persons against whom the claim could be asserted, and any arguments that could be raised by that person or persons to avoid some or all liability to Tyler. Explain your answer. Do not discuss the amount or type of damages for any claims, or any potential third-party claims or cross-claims. Do not discuss any worker's compensation issues.

2. In a lawsuit between Sam and Jack where each is suing the other for personal injuries, explain in detail how Delaware's comparative negligence law, 10 Del. C. Section 8132, applies and under what circumstances recovery could be limited or barred as to each of them.

3. Does Jack have a claim for the personal injuries he suffered in the accident against anyone other than Sam? Explain your answer.

4. Could Sam's intoxication or his speeding affect the damages that someone could recover from Sam? Explain your answer.

5. If Tyler sues both Jack and Chris for his injuries, then settles his claim against Chris, and executes a release in favor of Chris as part of the settlement, is there any significance to the type of release executed between Tyler and Chris? Explain your answer.

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QUESTION 7

Phil is a lifelong Delaware resident and the youngest member of a family full of avid pasta chefs. In early 2012, Phil decides to act on his life-long dream and open a pasta restaurant. He forms Phil's Pasta Palace Inc., a Delaware corporation ("Phil's Pasta"), and begins making plans to open his first location in New Castle County, Delaware.

In preparation for the Grand Opening, Phil places a large order with Delaware Signs, Inc., a Delaware corporation ("Delaware Signs"), for signs and posters advertising the Grand Opening weekend and the Grand Opening specials. Because of a problem with Delaware Signs' computers, Phil places the order in person at Delaware Signs' headquarters in Wilmington, Delaware and tenders a business check for the required $7,500 deposit. Phil informs the sales person that his restaurant opening will be on August 3. A few days later, Phil completes and signs a purchase order on behalf of Phil's Pasta to memorialize the purchase.

Delaware Signs delivers the signs and posters on August 1. When Phil opens them, he sees that they advertise a Grand Opening date of August 30, not August 3. Delaware Signs claims the error is Phil's fault and points to the purchase order, on which Phil had mistakenly written August "30" instead of August "3." Phil refuses to pay the balance due and Delaware Signs refuses to refund the deposit.

1. **Phil's Pasta wants to sue Delaware Signs for the refund of its $7,500 deposit. Which of the following state and federal courts have subject matter jurisdiction over Phil Pasta's claim: (a) Justice of the Peace Court; (b) Court of Common Pleas; (c) Court of Chancery; (d) U.S. District Court for the District of Delaware? Explain your answers.**

2. Phil is not a lawyer, but wants to represent Phil's Pasta in this case. For the court or courts identified in response to Question 1, can Phil represent Phil's Pasta? Explain why or why not.

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Phil ultimately decides to make his own signs, and Phil's Pasta has a successful opening weekend. The highlight of the menu is his mom's secret red sauce. Due to the popularity of his mom's secret sauce, Phil's business becomes very successful very quickly.

Phil hires his childhood friend, Dave, a Pennsylvania resident, to run the kitchen. Before sharing the secret sauce recipe with Dave, Phil has Dave sign a confidentiality agreement, which also contains a non-compete provision. Phil and Dave are the only people (other than Phil's mom) who know the recipe for the secret sauce.

After working at Phil's Pasta for several months, Dave becomes jealous of the money he believes Phil is making based on the restaurant's success. Dave demands that his salary be doubled and that he receive a company car to commute to and from work. Phil explains that, due to debts from opening expenses, he cannot afford to increase Dave's salary. Dave quits and walks out.

A few months later, Phil learns that Dave is working for a competitor, Wilmington Pizza & Pasta Corp. ("Wilmington Pizza & Pasta"), a Delaware corporation with its primary location in Wilmington, Delaware. Phil notices that Wilmington Pizza & Pasta is very busy. After doing some research, Phil determines that Phil's Pasta has lost $25,000 in business to Wilmington Pizza and Pasta since Dave joined them. Phil has one of his employees purchase a spaghetti

dish from Wilmington Pizza & Pasta. Upon tasting it, Phil believes that Dave is using his mom's secret sauce recipe.

3. Phil's Pasta files a Complaint in the United States District Court for the District of Delaware (the "District Court"). The Complaint alleges breach of contract against Dave and tortious interference with contract against Wilmington Pizza & Pasta. Does the District Court have subject matter jurisdiction over the case? Why or why not?

4. Assume, for purposes of this question only, that the District Court has personal jurisdiction over Dave and Dave is neither a minor nor incompetent. Can Phil's Pasta properly affect service of the Complaint on Dave? If so, identify each method of service he can use to properly serve Dave.

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Phil's Pasta voluntarily dismisses the District Court Complaint and re-files the Complaint in the Superior Court of the State of Delaware. Dave and Wilmington Pizza & Pasta are properly served.

5. Phil's Pasta wants to aggressively litigate the case and serves the Defendants with document requests and interrogatories the day after the Complaint is filed. How many days do Dave and Wilmington Pizza & Pasta have to respond to the discovery served? Explain.

6. Dave asks his attorney to file a motion that will relieve him from having to respond to the numerous interrogatories that were served upon him by Phil's Pasta. Under what rule should his attorney file the motion, and what standard will govern the motion?

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In addition to his motion directed to the interrogatories, Dave asks his lawyer to file a motion to dismiss. Dave tells his lawyer the following:

> On his last day at Phil's Pasta, Dave told Phil that he didn't want hard feelings between them. Dave also told Phil that he was worried about his contract. Phil wished Dave good luck and told him there were no hard feelings. Later that day, Phil sent Dave a text message that said "Good luck. I'll miss you. Don't worry about the contract. We'll always be friends."

Dave wants his lawyer to attach the text message to the motion to dismiss.

7. Dave's lawyer files a Motion to Dismiss the breach of contract claim on the grounds that Phil's text message relieves Dave of any contractual obligations. Dave attaches a screen shot of the text message to the Motion to Dismiss. What standard(s) governs Dave's Motion to Dismiss? Can the Court consider the text message? Explain your answers.

* * * * * *

The Court denies Dave's Motion to Dismiss. Approximately three months after Dave and Wilmington Pizza & Pasta have filed answers to the Complaint, and one month before the close of fact discovery, Phil gets Dave's cell phone records. Phil discovers that both before and after Dave quit his job at Phil's Pasta, Dave had a number of telephone calls with the owner of Wilmington Pizza & Pasta.

8. Phil wants to file an Amended Complaint to assert a claim for civil conspiracy against both Dave and Wilmington Pizza & Pasta. What kind of motion should Phil's Pasta file? What standard(s) governs the motion?

9. Assume for purposes of this question that the motion is filed after the statute of limitations has run on a claim for civil conspiracy. Will the filing of the Amended Complaint against Dave and Wilmington Pizza & Pasta relate back to the filing date of the original Complaint? Why or why not?

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The Court denies the motion. Phil believes that the Court ruled incorrectly and wants the Court to reconsider its ruling.

10. Under what rule should the attorney for Phil's Pasta file a motion? What standard(s) governs the motion?

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The Court denies the motion and the case proceeds to trial. Phil's Pasta prevails and receives an award of damages in the amount of $25,000 against Dave. Final Judgment is entered on March 1, 2013. Dave intends to appeal. On the last day to file an appeal under the applicable rules, Dave is in a car accident. Dave calls Phil from the hospital and asks for a one-week extension to file his Notice of Appeal. Phil agrees and their attorneys file a stipulation with the Court.

11. Dave files his Notice of Appeal within the one week extension period. Is Dave's notice timely filed? Why or why not?

12. Assume for purposes of this question that the appeal is accepted. What standard(s) governs the Supreme Court's review of the Superior Court's factual findings?

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QUESTION 8

Curt owns and operates CC Cleaning Inc. ("CC"), a cleaning company based in Wilmington, Delaware that specializes in emergency and general cleaning of hotels and large buildings in Delaware. Sara owns and operates a cruise ship company out of the Port of Wilmington, in Wilmington, Delaware called Scenic Cruises, LLC ("Scenic").

"The Pride of Delaware," one of Scenic's ships, is towed into the Port of Wilmington after being adrift in the Gulf of Mexico for several days and is in desperate need of cleaning. Curt, having watched the drama unfold on television, approaches Sara and offers CC's services to clean the ship. Curt and Sara negotiate an agreement on behalf of their respective companies that requires CC to clean all of The Pride of Delaware's cabins for a price of $30,000 payable in advance. In addition, the agreement requires CC to use "EnviroClean" as its all-purpose cleaner because it is environmentally friendly and smells lemony, facts that are mentioned in one of Scenic's advertising brochures. Sara wires the agreed $30,000 to CC.

When CC's crew arrives at the Port of Wilmington to clean The Pride of Delaware, they find Sara there to greet them. As they unload the cleaning supplies, Sara notices that CC's all-purpose cleaner is SuperScour instead of EnviroClean. Sara knows that SuperScour smells like oranges and that it is not environmentally friendly, but says nothing. CC's crew proceeds to clean the cabins but somehow misses, and therefore fails to clean, ten (10) of the 200 cabins on the ship. Sara discovers the dirty cabins during a routine inspection just one (1) hour prior to arrival of passengers for the next cruise. When Scenic calls CC to clean the missed cabins, no one answers the phone. As a result, Scenic hires Joe's Janitorial cleaning crew at a cost of $2,500 to clean the ten (10) missed cabins. Scenic sues CC to recover the $30,000 payment.

1. **Identify and discuss any claims that Scenic can assert against CC, any defenses potentially available to CC, and any damages or other remedies potentially available to Scenic. For purposes of your response, assume that the statute of frauds does not apply.**

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Despite their previous issues, CC and Scenic decide to work things out and negotiate a long-term contract. They enter into a written agreement whereby CC agrees to supply cleaning services to Scenic's cruise ships in the Port of Wilmington at the price of $10,000 per ship for two (2) years. The agreement also states that CC will only have to clean the cabins and that the cabins must be cleaned within 24 hours of arrival of each ship in the Port of Wilmington. In addition, the agreement contains a provision that requires any modification to be in writing signed by both parties.

Upon executing the agreement, CC's crew begins cleaning the cabins of Scenic's cruise ships in accordance with the agreement. After a month, Sara calls Curt to explain that Scenic will extend the contract by six (6) months if CC will clean each cruise ship from top to bottom, not just the cabins, in 24 hours for $15,000 per ship. Curt, who happens to be at his daughter's soccer game, yells "Yeah!" into the phone. Sara says, "Great, I love your enthusiasm. We have a ship coming in tomorrow. See you then."

When Curt gets to work in the morning, he finds that only half of CC's workers have shown up, a number insufficient to clean the entire ship. The rest have the flu - the worst

outbreak in 20 years. Nonetheless, CC sends its remaining workforce to the ship and the workforce proceeds to clean the cabins over the next 24 hours.

When Scenic's passengers begin to arrive for their cruise in the morning, the cabins are fine, but the common areas of the ship are filthy. Because of the deplorable condition of the ship, the passengers refuse to board, causing the cancellation of the entire cruise and losses to Scenic of $300,000.

2. Identify and discuss any claims that Scenic can assert again CC, any defenses potentially available to CC, and any damages or other remedies potentially available to Scenic. For purposes of your response, assume that the statute of frauds does not apply.

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Finally fed up with CC, Scenic determines that it can be more efficient if it fully integrates its cruise ship business with a cleaning service. Scenic visits CC's place of business, which consists of a small office and warehouse, and a paved parking lot where CC stores its service trucks. CC also owns a separate vacant lot next to the warehouse, but has never used that vacant lot for any business purpose. Curt always thought if he ever sold his cleaning business, he would use the vacant lot to open a delicatessen. Sara notices the vacant lot next to the warehouse property and thinks that the vacant lot, with some improvement, could be a great place from which to run a shuttle service for Scenic's cruise ship passengers to and from the Philadelphia and Baltimore airports. Sara tells Curt that she likes what she sees, and proposes

to have Scenic "buy all assets of CC, including all of CC's real estate used for the cleaning business, for $500,000."

CC's attorney drafts an extensive agreement which states that Scenic will "buy all assets of CC, including all of Scenic's real estate used for the cleaning business, for $500,000." The agreement attaches as an exhibit a legal description of real property. However, unbeknownst to CC, its attorney includes in the legal description not only the warehouse property, but also the vacant lot. Finally, the agreement contains the following language: "This Agreement and the exhibits attached hereto contain the entire agreement of the parties with respect to the subject matter of this Agreement, and supersede all prior negotiations, agreements and understandings with respect thereto."

Scenic and CC sign the agreement. Scenic and CC also properly execute a deed prepared by CC's attorney. The deed includes the vacant lot in its legal description of the real property. The deed is properly recorded.

Several months after selling the cleaning business to Scenic, CC, now ready to start building a delicatessen on the vacant lot, applies to the bank for a construction loan. Following a routine search of the property records, the bank tells CC that Scenic, not CC, is the record owner of the vacant lot.

3. CC files suit in the Delaware Court of Chancery seeking a judgment that will leave Scenic with no legal right to hold title to the vacant lot. Assuming that the Court of Chancery has jurisdiction to consider the action, discuss the merits of the arguments CC might assert to challenge the conveyance of the vacant lot to Scenic. For purposes of your response, assume that the statute of frauds does not apply.

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